

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.405 of 2014**

Arising Out of PS. Case No.-59 Year-2013 Thana- MAHILA P.S. District- Siwan

Bhola Tiwary Son of Late Ram Surat Tiwary resident of village- Akopur,
Police Station- Siwan Mufassil (O.P. Mahadeva), District- Siwan.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Raghav Prasad, Adv. Mr. Neeraj Kumar @ Sanidh, Adv.
For the Respondent/s	:	Mr. S.N.Pd., APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 02-08-2019

1. Appellant, Bhola Tiwary has been found guilty for an offence punishable under Section 376(H) of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees ten thousand in default thereof, to undergo S.I. for one year, under Section 373 of the IPC and sentenced to undergo R.I. for five years, under Section 6 of POCSO Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees ten thousand in default thereof, to undergo S.I. for one year, with a further direction to run the sentences concurrently by the Special Judge, POCSO, Siwan in connection with Trial No.1/14, G.R. No.3887 of 2013 arising out of Siwan Mahila P.S. Case no.59/2013.

2. Name withheld (victim PW.1) gave her fardbeyan on 14.09.2013 at about 11:30 AM disclosing therein



that the accused had purchased her from her father on a consideration amount of rupees one thousand and then, took her to his place. Her parents have died. Few months ago, the wife of Bhola Tiwary has died. Since thereafter, Bhola Tiwary forcibly indulged in developing physical relationship with her. At every occasion when she protested was severely dealt with. After sometime, she became pregnant then, she was brought to Siwan where forced to terminate. Even thereafter, he is continuing the aforesaid lecherous activity and she has to face horrifying situation whenever she makes protest.

3. After having registration of Siwan Mahila P.S. Case No.59/2013 investigation commenced and concluded by way of submission of charge sheet, followed with trial, meeting with ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has also been pleaded that girl has been kept by him being issue-less. All kinds of facilities being provided to her but, on instigation of others insisted upon to execute sale deed relating to the land and on being denied, got this false case instituted putting false and frivolous allegation.



5. Altogether three PWs have been examined at the end of the prosecution, in order to substantiate its case who are PW.1, Victim, PW.2-Poonam Kumari, I.O. and PW.3 Dr. Usha Kumari. Side-by-side has also exhibited, Ext.1-Signature of the victim over fardbeyan, Ext.1/1-Signature of the victim over statement recorded under Section 164 Cr.P.C. Ext.2-Fardbeyan, Ext.3-Formal FIR and Ext.4-Medical Report. As stated, nothing has been adduced on behalf of defence.

6. Heard learned counsel for the appellant as well as learned APP. In order to appreciate the submission having made on behalf of learned counsel for the appellant, when the deposition of PW.1 has been gone through, it is evident that during course of examination-in-chief either the accused was not present or the prosecution failed to have identification of the accused in dock in accordance of procedure so prescribed under POCSO Act and on account thereof, there happens to be some sort of remark by the learned lower court at the end of para-9 while the victim was being cross-examined in following way:

(Note:-अभियुक्त को न्यायालय में देखकर लड़की डर कर जाकर महिला पुलिस से लिपट गई कही कि हम उन्ही के साथ जाना चाहती हूँ।)



7. In such circumstance, it could fairly be held that there happens to be utter violation of Section 273 of the Cr.P.C. as the evidence is to be recorded in presence of the accused (physical presence or presence through advocate as allowed under law through advocate (a) in accordance with Section 205 of the Cr.P.C. (b) Section 317 of the Cr.P.C. so, if the examination-in-chief of the PW.1 is taken up in isolation, then in that circumstance, there happens to be failure on the part of the prosecution in getting the accused identified in dock. In an alternative while the evidence was being recorded, accused was not present and so, there was no identification. The learned lower court should have been cautious at that very juncture. So much so that the evidence whatever been deposited before the court happens to be the substantive evidence including that of identification in dock.

8. The other circumstance happens to be presence of application of POCSO Act whereunder charge has also been framed against the accused. Whenever there happens to be application of POCSO Act then, in that circumstance, the court is expected to be more cautious because of the fact that apart from being special act, certain procedure have also been prescribed therein which, as it appears to be mandatory in nature. The first one is Section 33 sub-clause (2), sub-clause (3) and sub-clause (4)



whereunder, the court has to create a child friendly atmosphere and during course thereof would allow a coordination or a friend or a relative in the child has trust and further, there should not be direct confrontation in between the victim along with prosecutor as well as the learned defence counsel. All the questions are to be passed through the P.O. and when the P.O. would allow the same the P.O. would put the question and got an answer and during course of the same, the P.O. has to consider the nature of the questionnaire as provided under sub-section 6. Apart from this, under Section 36 there happens to be some sort of prohibition whereunder court has been entrusted to have such kind of internal arrangement whereunder the victim has no occasion for direct confrontation with the accused standing in the dock and in likewise manner accused should also not be allowed to see the victim, on the other hand, the arrangement should be like so that accused has got no occasion to see the victim while victim has an occasion to see the accused and for that, the methodology has been provided in the section itself. From the order sheet dated 14.03.2014 on which date the victim turned up as PW.1, it is evident that it did not reveal whether such kind of arrangement was prevailing in the court room. Absence thereof, is indicative of the fact that the victim had found uncongenial atmosphere hostile



to the mandate of law. By such activities adopted by the lower courts miscarriage of justice has occurred as the victim due to lapses at the end of the court, might not have mustered courage, confidence to depose.

9. In Ukha Kolhe v. The State of Maharashtra

reported in **AIR 1963 SC 1531**, the constitution Bench held:

“11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C. J., in Ramanlal



Rathi v. The State, AIR 1951 Cal 305 observed :

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case".

In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions Judge thought that in the interests of justice and for a just and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceeding, resorted to the procedure prescribed by S.428 (1) of the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellate Court should exercise its power under the said section."

10. In the aforesaid background the procedure adopted by the learned court appears to be contrary to the spirit of



law causing failure of justice by way of keeping the victim vulnerable as well as failed to discharge the obligation having so entrusted under law whereupon, the judgment impugned would not survive and is accordingly, set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh in terms of *de-novo* trial. Appellant is under custody hence is directed to be produced before the learned lower court.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
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