

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.62 of 2016**

Arising Out of PS. Case No.-377 Year-2013 Thana- KRITYANAND NAGAR District-  
Purnia

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Kirtan Sharma, Son of Baldeo Sharma, Resident of Village – Singhia, Police  
Station - K. Nagar, District - Purnia.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Vikram Singh, Adv.

Mr. Amit Ranjan, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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

**Date : 15-11-2019**

The appellant Kirtan Sharma has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo S.I. for one year additionally, vide judgment of conviction and order of sentence dated 13.01.2016 passed by the learned 4<sup>th</sup> Additional Sessions Judge, Purnea in Sessions Trial No.737 of 2014 arising out of K. Nagar P.S. Case No.377 of 2013.

2. Bindeshwari Sharma (PW-7) filed Complaint Petition No.2250 of 2013 on 26.07.2013 against appellant Kirtan Sharma, Baldeo Sharma and Amrika Devi showing the date of occurrence as 26.01.2013 at about 11.00 AM and subsequently thereto showing the place of occurrence to be the house of the accused



with an allegation that on 26.01.2013 at about 10.00 AM accused Kirtan Sharma came to his house and asked for assistance of his daughter (victim, name withheld PW-6) for preparation of list of persons falling under the BPL category for which they have allowed. On the same day at about 11.00 AM, the victim had gone to the house of the accused where, the accused Kirtan Sharma took her inside his room where papers were placed before her. The victim as per instruction, began to prepare the list and during course thereof, Kirtan Sharma began to tease her. When she protested, Kirtan Sharma took out *Chhura*. Then on the pretext of do away with her life, forcibly committed rape on her. Then thereafter he had also threatened not to divulge the same otherwise she will have to face dire consequences. Victim at that very moment was minor aged about 13-14 years and considering her tender age, the aforesaid Kirtan Sharma continued with committing rape on her on the pretext that he will marry. On account of frequent physical indulgence, the victim became pregnant. Seeing some abnormality her mother enquired. On query, she (victim) disclosed the whole events. The mother of the victim disclosed to the complainant. Whereupon he had gone to the place of the accused on 16.07.2013 and complained and further, asked for proper solution. However, instead of showing



any sort of remedial activity, all the accused became enraged, abused and became adamant to assault. When the villagers assembled he disclosed the whole events to them. The villages have tried to resolve by way of convening a Panchayati wherein the accused persons failed to turn up. As such, on an instruction of the complaint case has been filed as the police had refused to entertain the allegation.

3. After registration of K. Nagar P.S. Case No.377 of 2013, investigation commenced and concluded by way of submission of charge-sheet against accused Kirtan Sharma only as, the other co-accused Baldeo Sharma and Amrika Devi were not sent up for trial, facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

4. Defence as is evident from the mode of cross-examination as well as the statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that on account of village politics this case has purposely, intentionally and malafidely been drawn up against the accused. However, nothing has been adduced on behalf of defence.

5. At the end of the prosecution, in order to substantiate its case, altogether 8 PWs have been examined, who are PW-1, Ranjit Sharma, PW-2, Sunil Kumar Sharma, PW-3, Satyanarayan



Mandal, PW-4, Gopal Sharma, PW-5, Dr. Sunita Prasad, PW-6, (name withheld) (victim), PW-7, Bindeshwari Shama (complainant) and PW-8, Rama Shankar (I.O.). Side by side prosecution has also exhibited Ext. 1, medical report, Ext.-2, endorsement over the written report, Ext.-3, formal FIR. Obstetrical ultrasound report of victim (photo copy) has been marked 'X'. As stated above, nothing has been adduced in defence.

6. Learned counsel for the appellant has submitted that the judgment impugned suffers from inherent defects on account thereof, is unsustainable. In order to justify the same, it has been submitted that the age of the victim has been estimated in between 15-16 years by the doctor whereupon giving the benefit of variance of plus-minus two years, the age of the victim happens to be 17-18 years and, the maximum age is to be considered so, the victim happens to be more than 18 years on the alleged date of occurrence. Whereupon, happens to be major and in the aforesaid background, considering her conduct coupled with introduction of promise of marriage is the circumstance which suggests that only to put curtain over the conduct of the victim to be a consenting party, the same has been introduced which, in the facts and circumstances of the case, could not be accepted. Even in worse



case accepted, it happens to be mere a breach of promise punishable under Section 417 of the IPC and for that, the period of sentence could be found properly adjustable against the sentence so desirable under the present scenario.

7. Apart from this, it has also been submitted that when the evidence in its entirety more particularly, the victim is being gone through, it is evident that she happens to be inconsistent. That being so, the evidence became untrustworthy and fit to be rejected. Others are not the eye witnesses of the occurrence. Consequent thereupon it happens to be a case of no evidence.

8. The learned Additional Public Prosecutor repelled the submission and submitted that there happens to be gross illegality during course of conduction of trial as, there happens to be consistent prosecution case right from inception that the victim, at the time of commission of rape, was aged about 13-14 years and, taking into the fragile mental state on account of tenderness of the victim, the appellant succeeded in continuing with raping the victim and for that, she was allured on the pretext of marriage. Furthermore, it has also been submitted that the age of the victim as estimated by the Doctor could not be accepted and taken into consideration as has been observed by the Apex Court in the case of **Jarnail Singh vs. State of Haryana**, reported in **2013 CRI**.



**L.J. 3976** and in the case of **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773**. Therefore, it is a fit case wherein after setting aside the judgment impugned, the matter be remitted back to the learned lower court to proceed afresh under the theme of de novo trial, as the learned lower court was incompetent to try the case falling under POCSO Act whereunder the instant controversy is to sail.

9. From paragraph 4 of the complaint petition there happens to be specific disclosure that the victim at the time of commission of rape was aged about 13-14 years. During course of investigation, the I.O. has failed to locate the school where she was studying nor took recourse to ascertain the same through other sources and so, the actual date of birth could not surface irrespective of disclosure having in the complaint petition. Moreover, the victim presence at the room of the accused was on the pretext of preparation of list of BPL beneficiary as per allegation. That means to say, she was literate.

10. It is needless to say that with regard to ascertainment of age of the victim, the Hon'ble Apex Court has deprecated the medical evidence at a first glance rather, the methodology so prescribed under the Juvenile Justice (Care and Protection of Children) Act has been allowed to be followed for the purpose of



ascertainment of age of the victim, consistently as has been observed in the aforesaid two decisions.

11. Be that as it may, on the date of examination of the victim that was subsequent to commission of rape she was found in between 15-16 years and even then, she was less than 18 years on the date of occurrence.

12. True it is, that majority of penal offences punishable under the Indian Penal Code is to be cared by the Criminal Procedure Code, but the Special Act introduced for applicability of particular nature of offence is to be cared by the procedure, if any, so prescribed therefor as per Section 4 of the Cr.P.C., otherwise the procedure so prescribed under Cr.P.C. Will guide the same. The preamble of the said Act which is to be taken note of whereupon is quoted below will speak a lot with regard to aim, object of the Act:-

*“An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.*

WHEREAS clause (3) of article 15 of the Constitution, *inter alia*, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by



all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent--

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.”

13. The aforesaid preamble reflects the agony of the legislature while discussing its need to introduce and during course thereof, it has been found that according to the **NCRD**, the cases of rape with children have doubled in 2016 compared to 2015 and so the introduction of all kind of offences so enumerated therein including that of preparation of attempt/ use of electronic device in order to blackmail, outrage the modesty, porn, video clipping, been made punishable and in likewise manner certain special procedure has also been laid down to be taken during course of trial, by way of prosecution even contrary to the basic criminal jurisprudence. Section 2 of the POCSO Act deals with conduction of trial by special court and further, identified the particular mode of crime against child as indicated under Section 2(a), (b), (f), (i) (j) and



further child has been identified under Section 2(d) any person below the age of 18 years. Furthermore, as per sub-section (2) of Section 2 the applicability of Indian Penal Code, Criminal Procedure Code, Juvenile Justice (Care and Protection of Children) Act, 2000 and Information Technology Act have properly been acknowledged in consonance with Section 42 of the Act whereunder joint/common prosecution trial is found permissible and further, sentence has also been acknowledged subject to condition maximum period either of the two is to be properly cared of. The most important aspect which the POCSO Act carries is Section 29, the presumption of commission of occurrence relating to certain category in consonance with obligation on the part of the accused to rebut, however with certain relaxation thereto when the matter is to be considered in accordance with Section 30 of the Act over presumption of culpable mental condition. Apart from safeguarding the interest of the child/victim so prescribed thereunder, that means to say, the victim would not have an opportunity to see the accused directly, the victim should be examined in presence of her guardian or in whom he/she got trust, should not be allowed to be directly confronted either with the Additional Public Prosecutor or by the defence counsel rather, the questionnaire is to put before the



Presiding Officer who will evaluate the same and then, the Presiding Officer is to place the questionnaire before the victim in such manner which could be understandable to him/her. That means to say, there happens to be different kind of perception than that of ordinary trial.

14. It is further evident that POCSO Act has been introduced on 19<sup>th</sup> June, 2012, that means to say, on the alleged date of occurrence, the instant trial should have been sailed in accordance with POCSO Act, which did not. So, what kind of remedy now lies.

15. In terms of Section 221(2) of the Cr.P.C., the court is competent enough to inflict sentence for the offence whereunder the accused has not been charged but, applicability of aforesaid sub-section sometimes would be hazardous to the interest of the accused as, he would be deprived of with an opportunity to rebut.

16. Now the question arose for consideration is whether it happens to be a irregular proceeding or illegal proceeding as is being cared under Sections 461 and 462 of the Cr.P.C. The trial has been conducted contrary to the spirit of law, without following the mandate of law and by such activity, allowed the victim to be vulnerable during course of trial at least during course of dock identification, recording of evidence, and was also allowed to



remain alone having proper where effect might have gone to the extent of nervousness, side by side the learned lower court could not have been in opposition to draw prescription with regard to commission of offence at the end of the accused and obligation on the part of accused to rebut as provided u/s 29 of the Act. **In Atma Ram and others vs. State of Rajasthan** reported in 2019 SCC onLine 523, it has been observed as follows:

“22. According to Section 366 when a Court of Sessions passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368 (c) of the Code and that is to “acquit the accused person”. Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with “submission of death sentences for confirmation” is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with “Appeals”. Section 391 also entitles the Appellate Court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the Appellate Court which *inter alia* includes the power to “reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for



trial”. The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering *de novo* examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

**23.** It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Pandit Ukha Kolhe v. State of Maharashtra [(1964) 1 SCR 926]*, as under:—

“15. 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*)

“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.”

17. The aforesaid view has also been relied in **Shri Ramesh Vs. State represented through Inspector of Police** (2019) SCC onLine SC page 927, and it has been observed as follows:

20. A three judge Bench decision of this Court in *Mohd Hussain v. State (Govt of NCT of Delhi)* [(2012) 9 SCC 408] while dealing with the powers of the Appellate Court to order a retrial under Section 386(b) of the CrPC, held thus:

“41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

21. A similar position was adopted by this Court in *Ajay Kumar Ghoshal v. State of Bihar* [(2017) 12 SCC 699], where it was held thus:



“11. Though the word “retrial” is used under Section 386(b)(i) CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. **An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard.**”

(emphasis supplied)

22. The power of an Appellate Court to order a retrial on the limited point of re-recording statements of witnesses was recently discussed in *Atma Ram v. State of Rajasthan* (2019 SCC OnLine SC 523: Cri. Appeal No.656-657 of 2019), where the Trial Court had convicted the accused persons of offences under Section 302, 307, 452, 447, 323, 147, 148 and 149 IPC and sentenced them to death. During the trial, the court had recorded the evidence of twelve witnesses in absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court exercised its powers under Section 386(b) of CrPC to quash and set aside the judgment of the Trial Court and remanded the matter back to Trial Court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court. The High Court held in the following terms:

“In view of the discussion made hereinabove and looking to the glaring facts of the case at hand, we feel that in order to do complete justice to the accused as well as to the victims, the entire case cannot be thrown out by holding the proceedings to be vitiated on account of the mistakes committed by the trial Judge or the prison authorities concerned. A fresh trial/de-novo has to be ordered by directing the trial court to lawfully re-record statements of the



witnesses indicated above whose evidence was recorded in the first round without ensuring presence of the accused in the court.” [\(D.B. Criminal Appeals No.33/2018\).](#)

23. The accused persons preferred a Special Leave Petition before this Court, challenging the High Court's order of a de-novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, this Court held thus:

“22. ... Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to “reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial”. The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. **If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court.** There is, thus, no infraction or jurisdictional error on the part of the High Court.”

“25. ... If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. **The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected.** On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order *de novo* examination of the concerned witnesses, it would result in great



miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.”

(emphasis supplied)

18. That being so, the judgment impugned is set aside.

The appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh in accordance with law or, would take recourse of Sections 216 and 217 of the Cr.P.C. in the facts and circumstances of the case. Appellant, who is under custody, is directed to be produced before the lower court, accordingly.

skpathak/-

**(Aditya Kumar Trivedi, J)**

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