

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.19 of 2019

Arising Out of PS. Case No.-134 Year-2013 Thana- SABAUR District- Bhagalpur

1. Yashoda Devi, wife of Rambilash Mandal
2. Santosh Mandal, son of Rambilash Mandal
Both are resident of village- Fakirachak, P.S- Sabour (Goradih) , Dist- Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Dharendra Nath Jha, Adv.

Mr. Ajay Kumar Jha, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 16-10-2019

A day before yesterday while matter was being heard over the prayer for bail and for that purpose, when the L.C.Record was gone through, some sort of inherent lacuna were perceived present on the L.C.Record whereupon, this appeal has been listed for hearing in stead of allowing its pendency.

It is further evident from the judgment impugned that on 13.4.2018 when the case was fixed for judgment, appellant Yashoda Devi was physically present while appellant Santosh Mandal remained physically absent but was represented under section 317 Cr.P.C. and so, after having been found guilty, representation petition was rejected, bail bond was cancelled and warrant of arrest (non-bailable) was issued as provided under section 353(6) Cr.P.C. fixing 18.4.2018 the date for hearing over the sentence. On 18.4.2018 only Yashoda Devi, who was under



custody, remained physically present and so, on her behalf hearing over the sentence was made and she was sentenced to undergo R.I. for five years for an offence punishable under section 328 I.P.C., R.I. for ten years as well as to pay fine appertaining to Rs.3,000/- and in default thereof, to undergo S.I. for three months, additionally for an offence punishable under section 304B I.P.C. were inflicted with a further direction to run the sentences concurrently. Subsequently thereof, as is evident appearance of the appellant/ convict Santosh Mandal was procured and so, hearing over the sentence concerning him was materialized on 28.4.2018 on which date, he was also directed to undergo R.I. for five years under section 328 I.P.C., R.I. for ten years as well as to pay fine appertaining to Rs. 3,000/- and in default thereof, to undergo S.I. for three months, additionally for an offence punishable under section 304B I.P.C. was also inflicted with a further direction to run the sentences concurrently by the 3rd Addl. Sessions Judge, Bhagalpur in S.Tr.No. 105/2014 arising out of Sabour (Goradih) P.S.Case No. 134/2013.

Informant Sadanand Mandal (P.W.5) gave his Fard Beyan on 2.6.2013 at the Sasural of his sister Tanuja (since deceased) lying at village Fakirachak that the marriage of his sister Tanuja was solemnized with Santosh Mandal, son of Ram Bilash



Mandal about a year ago. Today i.e. on 2.6.2013 at about 8.30 A.M. brother-in-law of Santosh Mandal, namely, Bablu Mandal came to his place and disclosed that his sister has consumed poison. After hearing the same, he alongwith his brother Niranjana Mandal and father Shital Mandal came at the Sasural of Tanuja where they found Tanuja over a cot kept over inside varandah. All the family members were absconding. His sister was unconscious. When they were about to hospital, Tanuja succumbed. So, the informant claimed that his brother-in-law alongwith his family members sharing common intention caused murder of his sister by administering poison.

After registration of Sabour (Goradih) P.S. Case No. 134/2013 investigation commenced and concluded by way of submission of charge sheet only against these two appellants, namely, Yashoda Devi and Santosh Mandal as they were under custody keeping the investigation pending against co-accused Ram Bilash Mandal and Deepak Mandal, facilitating the trial, meeting with ultimate result, subject matter of the instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. Further more, six D.Ws. have



been examined on behalf of the appellants/ accused on that very score.

In order to substantiate its case altogether seven P.Ws. have been examined on behalf of the prosecution, who are P.W.1 Niranjana Mandal, P.W.2 Ajay Mandal, P.W.3 Chandan Kumar, P.W.4 Dhananjay Mandal, P.W.5 Sadanand Mandal, P.W.6 Dr. Yogendra Prasad Sah and P.W.7 Rajesh Kumar as well as also exhibited Ext.1 signature of the informant over Fard Beyan, Ext.2 Postmortem report, Ext.3 endorsement over the Fard Beyan, Ext.3/A forwarding to Sabour P.S., Ext.3/B subsequent endorsement over the Fard Beyan in the pen of Rajesh Kumar, Ext.4 formal F.I.R. Side by side six D.Ws. have also been examined at the end of the defence, who are D.W.1 Badudeo Mandal, D.W.2 Sri Kant Mandal, D.W.3 Harish Chandra Singh, D.W.4 Jayram Singh, D.W.5 Adhiklal Singh and D.W.6 Lalan Mandal. No documentary evidence has been adduced on behalf of the defence.

After perusal of the L.C.Record it is evident that at an initial stage vide order dated 31.3.2014 charges under section 328/34 I.P.C., 302/34 I.P.C. were framed against both the appellants followed with conduction of trial and during course thereof, all the witnesses so named hereinabove have already been



examined. Then thereafter, the case was closed on 16.5.2016, the statement under section 313 Cr.P.C. was recorded on 2.6.2016. It is further evident that D.W.1 was examined on 28.6.2016, D.W.2 was examined on 1.7.2016, D.W.3 was examined on 4.7.2016 and D.W.4 was examined on 12.7.2016. Thereafter, defence case was closed and argument advanced. Then thereafter on 22.7.2016, a prayer was made on behalf of the prosecution for addition of charge under section 304B I.P.C., whereupon, objection was filed on 27.7.2016 and then, vide order dated 8.9.2016 prayer of the prosecution was allowed and in pursuance thereof, charge under section 304B I.P.C. was added on 28.11.2016. Subsequent order sheet as is evident did not speak with regard to any direction or finding at the end of the learned lower court either in accordance with Section 216 Cr.P.C. or under Section 217 Cr.P.C. whether trial has to re-commence or any witness was to be recalled for examination or re-examination/ cross-examination at the end of prosecution or defence. On continuing with the said sequence, ultimately, on 15.2.2017 last chance was given and even then, the matter prolonged in similar way. Then it is apparent from the margin of the order sheet that summon to the witnesses was issued on 11.8.2017. However, no such order was ever made at the end of the court. On 6.10.2017, as is evident direction was given for



issuance of bailable warrant upon the witness and the same was complied on 15.1.2018 and lastly, vide order dated 26.2.2018 the case was closed without having production of even a single witness nor any kind of execution report came up. Then thereafter, the statement was recorded under section 313 Cr.P.C. Then, two D.Ws. Adhiklal Singh and Lalan Mandal were examined on 12.3.2018 as well as 21.3.2018 respectively, followed with acquittal of judgment impugned.

In order to properly appreciate the conduct of the learned lower court, the relevant sections, 216 Cr.P.C. as well as 217 Cr.P.C. need to be minutely gone through and for that, both the sections are quoted below:

“216. Court may alter charge.- (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of



the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall for witnesses when charge altered.-

Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.”

After going through Section 216 Cr.P.C. it is evident that two sub-sections, sub-section (3) as well as sub-section (4) appear to be pertinent attracting extra attention as, after addition of the charge court has to form an opinion whether such addition is going to cause prejudice or not. If it has got no prejudice to the interest of the accused, then in that circumstance, there happens to be no



occasion to recall the witness but, when there happens to be finding of the court that such addition has adverse impact upon the defence of the accused, then in that circumstance, court will have to record finding and those findings are to be guided in terms of section 217 Cr.P.C. which should be at the instance of the prosecution or defence and further, whether all the charge sheet witnesses are to be recalled or some of them, including new one having prospect of examination/ cross-examination. From the order sheet, as discussed hereinabove, it is abundantly clear that after addition of the charge on 28.11.2016, there happens to be no effort at the end of the learned lower court to say anything in accordance with sub-section (3) or (4) of section 216 Cr.P.C. nor there happens to be prayer at the end of the prosecution as well as at the end of the accused/ appellants in accordance with section 217 Cr.P.C. Although, summon has been issued, bailable warrant has been issued but, there happens to be complete silence whether those efforts were on account of recalling of P.Ws. who have already been examined or, it was for the new one.

Apart from this, learned lower court failed to appreciate that the evidence means examination, cross-examination, ordinary examination, if any, as prescribed under section 136 of the Evidence Act. That means to say, accused has got a right to cross-



examine a witness in order to test the veracity, reliability, acceptability of the evidence of the witness which, always happens to be after framing of the charge save and except, procedure so prescribed for warrant triable cases based upon complaint petition. So, when there was addition of charge under section 304B I.P.C., the accused would have an opportunity to cross-examine the witness in the background of the fact that Section 302 as well as Section 304B I.P.C. have not distinct ingredient, and on that very score, the prosecution as well as defence must have an opportunity to test the said evidence and if no witness was available for cross-examination, in that event, evidence of those witnesses with regard to addition of the charge would not be admissible in the eye of law. That means to say, section 304B I.P.C. whereunder appellants have been convicted and sentenced for, would not attract as, after addition of section 304B I.P.C. none of witness so examined turned up for cross-examination irrespective of the failure having at the part of the court to record its finding either in accordance with section 216 Cr.P.C. or at the end of the prosecution/ accused who failed to pray in accordance with section 217 Cr.P.C. That being so, there has been miscarriage of justice at the end of the learned lower court who, though allowed prayer of the prosecution for addition of the charge under section 304B I.P.C. but failed to



record its reason in accordance with section 216 (3) and (4) Cr.P.C. and in likewise manner, failure at the part of the prosecution as well as defence for making prayer in accordance with section 217 Cr.P.C.

In **Ranbir Yadav vs. State of Bihar**, reported in (1995)4 SCC 392, it has been held:

“23. ... On a combined reading of the above two sections, it is, therefore, evident that after an alteration or addition of the charge the interest of the prosecution and the accused has to be safeguarded by permitting them to further examine or cross-examine the witness already examined, as the case may be, and by affording them an opportunity to call other witnesses. It is undoubtedly true that discretion has been given to the court to direct a new trial after addition or alteration of any charge, but it does not mean that every such addition or alteration in the charge which has been read over and explained to the accused would lead to inevitable inference that the court has directed a new trial for them. It, therefore, follows that unless the court passes a specific order and directs a new trial it cannot be presumed that a new trial has commenced only because an alteration or addition to a charge which has been read over and explained to the accused has been made. Indeed the order dated 30.4.1997 shows that while directing the prosecution to examine the 4 witnesses afresh the 5th Court adjourned the case



for further trial and did not direct fresh trial. This apart, any such direction given by the court has to be judged on the touchstone of prejudice to the accused or the prosecution. In the instant case, as has already been noticed after the addition of charges the prosecution expressly stated that they did not want to further examine the four witnesses already examined but they were willing to produce them if the accused so wanted. The accused, however, did not avail of this opportunity in accordance with Section 217 of the Code and, therefore, it is too late in the day for them to raise a grievance on that score. We hasten to add that even if we had found that there was any irregularity in the continuation of the trial against the appellants after the additional charges were framed, we would not have been justified in setting aside the impugned judgment on that ground alone for there is not an iota of material on record wherefrom it can be said that a failure of justice has occasioned thereby. To put it differently, in our view in such a case Section 465 of the Code would have squarely applied.”

Normally, re-trial should not be allowed but in the facts and circumstances of the case where there happens to be failure at the respective ends did justify matter to be remitted back to the learned lower court after setting aside the judgment impugned for retrial, that has to be in accordance with law more particularly considering the mandate to section 216 as well as 217 Cr.P.C. and



for that, the prosecution as well as defence are also expected to take proper step as prescribed under section 217 Cr.P.C.

In **State of M.P. vs. Bhooraji and others**, reported in AIR 2001 SC 3372, it has been observed:

8. ... A de novo trial should be the last resort and that too only when such a course becomes to desperately indispensable. It should be limited to the extreme exigency to avert “a failure of justice”. Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. ...
...”

As stated above, on account of failure having at the end of the respective stakeholders, the judgment impugned loses its legality, authenticity, identity whereupon, is set aside. The appeal is allowed. However, the matter is remitted back to the learned lower court to proceed in accordance with law in light of aforesaid discussion. Further more, the appellants, who are under custody, are directed to be produced before the learned lower court. The learned lower court will endeavour to conclude the trial within six months.

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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(Aditya Kumar Trivedi, J)

