

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.406 of 2021**

Arising Out of PS. Case No.-31 Year-2019 Thana- BETTIAH CITY District- West
Champaran

=====

Saddam Hussain @ Daddam Hussain Son of Late Wadood Alam Resident of
Village - Chhavni, P.S.- Manuwapul, District - West Champaran

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

with
CRIMINAL APPEAL (DB) No. 515 of 2021

Arising Out of PS. Case No.-31 Year-2019 Thana- MUFFASIL District- West Champaran

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Farman Khan S/O Mansaf Khan R/O Village-Chhauni, Ward No.5, P.S-
Bettiah Mufassil (MANUAPUL), District-West Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

(In CRIMINAL APPEAL (DB) No. 406 of 2021)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Imteyaz Ahmad, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Purushottam Kumar, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 515 of 2021)

For the Appellant/s : Mr. Sanjeev Kumar, Advocate
Mr. Raushan Raj, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

**HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

C.A.V. JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**



Date : 08-11-2023

These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, putting to challenge the judgment of conviction dated 17.03.2021 and the order of sentence dated 23.03.2021, passed by learned Additional District and Sessions Judge-VI-cum-Special Judge POCSO, Bettiah, West Champaran, in CIS No. 09 of 2019, arising out of Bettiah (Mufassil) P.S. Case No. 31 of 2019, whereby the appellants have been convicted and sentenced as under:

Cr. Appeal (DB) No. 406 of 2021				
Appellant Name	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Saddam Hussain @ Daddam Hussain	Under Section 363 of the IPC	R.I. for Seven years	20,000/-	--
	Under Section 377 of the IPC	R.I. for life	50,000/-	--
	Under Section 376DB of the IPC	R.I. for life	50,000/-	--
	Under Section 8 of the POCSO Act	R.I. for Five years	20,000/-	--
Cr. Appeal (DB) No. 515 of 2021				
Appellant Name	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Farman Khan	Under Section 363 of the IPC	R.I. for Seven years	20,000/-	--
	Under Section 377 of the IPC	R.I. for life	50,000/-	--
	Under Section 376DB of the IPC	R.I. for life	50,000/-	--
	Under Section 8 of the POCSO Act	R.I. for Five years	20,000/-	--

2. All the sentences have been ordered to run concurrently.

3 From the lower court's records and the impugned judgment of conviction also, it appears that the appellants were



charged for commission of offence punishable under Sections 363, 365, 377, 376D read with Section 34 of the IPC and Sections 6 and 8 of the Protection of Children from Sexual Offences Act (POCSO Act). The said charges were read over to the appellants and evidently the appellants faced the trial for commission of the offences punishable under various provisions of the IPC and the POCSO Act in respect of the aforesaid charges.

4. By the impugned judgment of conviction, the trial court has held the appellants guilty of the offences punishable under Section 376DB of the IPC instead of Section 376D of the IPC in respect of which the appellants were charged in addition to other offences, after appreciation of evidence adduced at the trial. After having convicted the appellants of the offences punishable under Section 376DB of the IPC, the trial court has sentenced them to undergo imprisonment for life which shall mean imprisonment for remainder of the appellants' natural life with fine.

5. Section 376D of the IPC reads thus: -

[376-D. Gang rape.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:



Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]

6. Section 376DB of the IPC reads as under: -

"[376-DB. Punishment for gang rape on woman under twelve years of age.—Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]"

7. There is no gainsaying that the offence punishable under Section 376DB of the IPC is graver than Section 376D of the IPC from the perspective of the gravity of the sentence. We also notice that the trial court, at no point of time, had altered the charge.

8. Section 216 of the CrPC confers upon a trial court to make alteration in the charge and provides procedure therefor. We consider it apt to reproduce Section 216 of the CrPC, which reads as under: -



"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."

9. Section 217 of the CrPC mandates that when a charge is altered or added by the court after commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, examine with reference to such alteration or addition, any witness who may have been examined, unless the court, for the reason to be recorded in writing, considers that the prosecution or the accused, as the case may be, desires to recall or re-examine



such witness for the purpose of vexation or delay or defeating the ends of justice.

10. On conjoint reading of Section 216 and 217 of the CrPC, it can be easily culled out that the court's power to alter or add any charge any time before judgment is pronounced is subject to the conditions prescribed thereunder. One of such conditions under sub-section (2) of Section 216 of the CrPC is that such alteration or addition shall be read and explained to the accused. Sub-Section (3), however, prescribes that if 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 alteration or addition has been made, proceed with the trial as if the altered or added charges had been the original charge.

11. We reiterate, at this juncture, that two distinct punishments have been proscribed for the offence punishable under Section 376D and Section 376DB of the IPC, which can be easily noticed on a comparative reading of the said two provisions. The appellants have, thus, been convicted of a charge for graver offence than what they were charged with by the trial court and have been sentenced to imprisonment accordingly. In our opinion, the case of the appellants stood prejudiced in their defence, they



having been convicted of graver charge than for the offence which they were charged with and, therefore, such alteration was required to be read and explained to the appellants in conformity with the requirement under sub-section (2) of Section 216 of the CrPC. As has been noticed above, Section 217 of the CrPC safeguards the interest of the accused and the prosecutor as well in case a charge is altered or added by the court after commencement of the trial, if, in the opinion of the trial court, it is required by giving them an opportunity to recall or resummon and reexamine with reference to such alteration or addition.

12. Section 216 of the CrPC, which gives wide power to the court to alter or add any charge at any time before the judgment is pronounced, also takes care of the interest not only of the prosecutor, but of defence also to a fair trial. The power under Section 216 of the CrPC is subject to the condition that an accused has not to face a charge for a new offence or is not prejudiced either by keeping him in dark about the charge or giving him a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. [See: ***Kantilal Chandulal Mehta v. State of Maharashtra*** (AIR 1970 SC 359)].

13. In such view of the matter, the conviction of the appellants for the offence punishable under Section 376DB of the Indian Penal Code is unsustainable, the trial court having failed to



comply with the requirements under Section 216 of the CrPC and, if required, Section 217 of the CrPC.

14. After having held so, we deem it proper, in the interest of justice, to set aside the impugned judgment of conviction dated 17.03.2021 and the order of sentence dated 23.03.2021 passed by Additional District and Sessions Judge-VI-cum-Special Judge POCSO, Bettiah, West Champaran, in CIS No. 09 of 2019, arising out of Bettiah (Mufassil) P.S. Case No. 31 of 2019, and remit the matter back to the trial court for the limited purpose for the trial court to comply with the requirements of Section 216 of the CrPC and, if required, Section 217 of the CrPC and proceed accordingly.

15. These appeals are disposed of with the aforesaid observations and directions.

(Chakradhari Sharan Singh, J)

Nawneet Kumar Pandey, J: - I agree.

(Nawneet Kumar Pandey, J)

Pawan/-

AFR/NAFR	NAFR
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