

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.521 of 2021

Arising Out of PS. Case No.-109 Year-2018 Thana- MAHILA P.S. District- Nalanda

Sonelal Kewat @ Sonu, S/O Ramdhin Kewat, R/O Village-Bind, P.S-Bind,
District-Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Kanhaiya Kumar Singh, Advocate
Mr. Upendra Kumar Singh, Advocate
For the Respondent/s : Mr. Bipin Kumar, APP

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

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

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

Date : 10-11-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 05.03.2021 and an order of sentence dated 15.03.2021, passed by learned Additional Sessions Judge-VI-cum- Special Judge (POCSO), Nalanda, Bihar Sharif, in Mahila P.S. Case No. 109 of 2018, G.R. No. 4472 of 2018, whereby the appellant has been convicted and sentenced as under:-



Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Sonelal Kewat @ Sonu	376AB of the IPC	Imprisonment for life	10,000/-	SI for six months
	4 of the POCSO Act	X	X	X
	6 of the POCSO Act	X	X	X

2. The appellant was charged of commission of the offence punishable under Section 376 of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act ('POCSO Act' in short).

3. By the impugned judgment of conviction dated 05.03.2021, the trial court has convicted the appellant of the offence punishable under Section 376AB of the IPC in place of Section 376 thereof. Learned trial court has held the age of the victim to be below 12 years and, therefore, the offence of rape committed by the appellant on the victim was punishable under Section 376AB of the IPC. It has been mentioned in the impugned judgment of conviction that the charge has been altered to an offence punishable under Section 376AB of the IPC. While imposing the sentence the trial court has noted that the punishment under Section 376 AB of the IPC is greater than that of Sections 4 and 6 of the POCSO Act. Taking recourse to Section 42 of the POCSO Act, which provides that where an act



or omission constitutes an offence under this Act (POCSO Act) and also under any other law for the time being in force, the offender found guilty of such offence, shall be liable to be punished under such law or the POCSO Act which provides for punishment which is greater in degree. Accordingly, the trial court has sentenced the appellant for the offence punishable under Section 376AB of the IPC and has not passed any separate sentence for the proved offences punishable under Sections 4 and 6 of the POCSO Act.

4. We have carefully perused the records of the trial court. There is no separate order passed by the trial court altering the charge from Section 376 of the IPC to Section 376AB thereof. There is no gainsaying that the offences punishable under Section 376AB of the IPC is graver than Section 376 of the IPC from the perspective of sentencing.

5. It is true that the trial court may alter or add to any charge at any time before the judgment is pronounced as stipulated under Section 216(1) of the CrPC. However, in the Court's opinion, in view of the clear language of Section 216(1) of the CrPC, the power to alter or add to any charge, can be exercised only before the judgment is pronounced. We deem it proper 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."

6. 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.

7. On conjoint reading of Sections 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.

8. We reiterate, at this juncture, that two distinct



punishments have been proscribed for the offence punishable under Section 376 and Section 376AB of the IPC, which can be easily noticed on a comparative reading of the said two provisions. The appellant has, thus, been convicted of a charge for graver offence than what he was charged with by the trial court and has been sentenced to imprisonment accordingly. In our opinion, the case of the appellant stood prejudiced in his defence, he having been convicted of graver charge than for the offence which he was charged with and, therefore, such alteration was required to be read and explained to the appellant 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.

9. 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)].

10. In such view of the matter, the conviction of the appellant for the offence punishable under Section 376AB of the IPC is unsustainable, the trial court having failed to comply with the requirements under Section 216 of the CrPC and Section 217 of the CrPC, if required.

11. After having held so, we deem it proper, in the interest of justice, to set aside the impugned judgment of conviction dated 05.03.2021 and the order of sentence dated 15.03.2021 passed by learned Additional Sessions Judge-VI-cum- Special Judge (POCSO), Nalanda, Bihar Sharif, in Mahila P.S. Case No. 109 of 2018, G.R. No. 4472 of 2018 and remit the matter back to the trial court for the limited purpose to comply with the requirements of Section 216 of the CrPC and, if required, Section 217 thereof and proceed thereafter in accordance with law.



12. This appeal stands disposed of with the aforesaid observations and directions.

(Chakradhari Sharan Singh, J)

I agree.
Nawneet Kumar Pandey, J

(Nawneet Kumar Pandey, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
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