

HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

CRIMINAL APPEAL NO.2419/2020

Rakesh Kushwaha

Vs.

The State of Madhya Pradesh

Counsel for the appellant : Shri B.J. Chourasia, Advocate
Counsel for the Respondent/State: Shri Manhar Dixit, Panel
Lawyer.

Corum : **Hon'ble Mr. Justice Atul Sreedharan**
Hon'ble Mrs. Justice Sunita Yadav

J U D G M E N T
(12-11-2021)

Per : Sunita Yadav, J.

Heard on IA No.4903/2020 an application under Section 389(1) of the Code of Criminal Procedure, 1973 for suspension of sentence filed on behalf of the appellant-Rakesh Kushwaha.

2. The appellant stands convicted for the offences punishable under Section 363 of IPC and has been sentenced to undergo RI for 3 years with a fine of Rs.500/-, Section 376(3) of IPC and has been sentenced to undergo RI for 22 years with a fine of Rs.5,000/-, Section 354 of IPC and has been sentenced to undergo R.I. for 3 years with a fine of Rs.500/-, Section 5(n) r/w Section 6 of the Protection of Children from Sexual

Offences Act, 2012, and has been sentenced to undergo R.I. for 20 years and fine of Rs.5,000/-, and Section 9/10 of the Protection of Children from Sexual Offences Act, 2012, and has been sentenced to undergo R.I. for 5 years with a fine of Rs.1,000/-, with default stipulations.

3. While hearing the aforesaid IA, it reveals that initially the charge-sheet under Section 354 of IPC and Section 7/8 of the Protection of Children from Sexual Offences Act, 2012 was filed against the appellant/accused. The learned trial Court framed the charges under Sections 363, 354 of IPC and Section 10 of the Protection of Children from Sexual Offences Act, 2012 on 10/08/2017. After recording the statement of accused under Section 313 of Cr.P.C., at the stage of examination of defence witnesses, an application under Section 216 of Cr.P.C. was filed by the Special Public Prosecutor on 16/01/2020 which was allowed by the trial court on 28/01/2020 and additional charges under Section 376(3) of IPC and section 5 /6 of POCSO Act were framed. After that the case was fixed on 31/01/2020 for recording plea of the accused. On 31.01.2020 plea of accused was recorded and the case was again fixed for examination of defence witnesses without giving an opportunity to the appellant/accused to further cross-examine the prosecution witnesses with reference to the additional charges under Section 376(3) of IPC and section 5 /6 of POCSO Act. At this juncture the provisions of Section 217 of the Cr.P.C. need to be seen which provides “whenever a charge is altered or added to by the Court after the commencement of the trial, the

prosecutor or 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”.

4. On perusal of the record it is clear that the learned trial Court has ignored the mandatory provisions of 217 of Cr.P.C. by not giving the accused an opportunity to further cross-examine the prosecution witnesses with reference to the additional charges. The trial Court has also not recorded any reason in writing for not recalling the prosecution witnesses with reference to additional charges.

5. Section 216 of the Cr.P.C. clearly mandates that it is compulsory on the part of the Court to check that no prejudice is caused to the accused and he is allowed to have a fair trial and that is inbuilt safeguard in this Section. It is compulsory for the learned trial Court to facilitate the trial in such a manner that no prejudice in favour of any party arises and a fair trial is affected. The accused must always be made aware of the charges which is framed against him so that he can properly lead his evidence. In this case, the above aspect of the trial as has been ignored by the learned trial Court.

6. In the light of the above, the impugned judgment and order dated 28/02/2020 is set aside and this case is hereby remanded to the concerned

trial Court with a direction to give an opportunity to the appellant/accused for further cross-examination of the witnesses with reference to additional charges. It is also directed that the trial Court shall conclude the trial within a period of three months from the date of receipt of certified copy of this order.

7. Consequently, this appeal stands **disposed of** giving the liberty to the appellant to appeal afresh against the order of the trial Court which shall be passed by it in compliance of this order, if so aggrieved.

8. As a result, IA No.4903/2020 is dismissed as having rendered infructuous.

9. Office is directed to ensure that the copy of this order be served on the appellant/accused who is in jail. The record of the trial Court be sent to the concerned Court along with the copy of this order for necessary compliance. After receipt of certified copy of this order, the trial Court shall proceed with the matter in accordance with law.

Certified copy as per rules.

(Atul Sreedharan)
Judge

(Sunita Yadav)
Judge