THE HIGH COURT OF SIKKIM : GANGTOK

Criminal Revision Petition No. 13 OF 2005

Chandra Bahadur Katwal,
S/o. Late Dilli Ram Katwal,
R/o. Middle Gyalshing,
West – District, Sikkim ..... ***Petitioner***

Versus

1. The State of Sikkim,
(Service through the
Learned Public Prosecutor,
High Court)

2. Bishnu Kumar Rai
S/o. late Uttersing Rai.

3. Raj Kumar Katwal
S/o. Damber Singh Katwal.

4. Chandra Lall Karki
S/o. Til Bdr. Karki.

5. Bhanu Bhakta Katwal
S/o. Late Dilli Ram Katwal.

6. Kubirnath Kafley
S/o. late Kharananda Kafley.

7. Dhurba Kr. Katwal
S/o. Damber Singh Katwal.

8. Indra Bdr. Katwal
S/o. Damber Singh Katwal.

9. Damber Singh Katwal
S/o. late Hasta Bdr. Katwal.

10. Dal Bdr. Karki
S/o. late Indra Bdr. Karki. ..... ***Respondents***

(Respondent Nos. 2 to 10 are all residents of Middle Gyalshing, West-district, Sikkim)

For the Petitioner : Mr. S.S. Hamal, learned Counsel assisted by Mr. N.T. Bhutia, learned counsel.

For the Respondent No.1 : Mr. J.B. Pradhan, learned Public Prosecutor.

For the Respondent Nos.2 to 10 : Mr. N.K.P. Saraff, learned counsel assisted by Miss Sapna Rai, learned counsel.

PRESENT: THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

DATE OF JUDGMENT : 15th May 2006.

JUDGMENT

A. P. Subba, J.

This Criminal Revision Petition, is directed against the judgment and order dated **27.09.2003** passed by the learned Judicial Magistrate, West at Gyalshing, in **Criminal Case No. 3 of 2003**, as well as the Judgment and Order dated **26.12.2003** passed by the learned Sessions Judge (South & West) at Namchi, in **Criminal Appeal No. 2 of 2003**.

2. The case of the petitioner is that, on a written complaint dated 19.03.2002 lodged by him, the respondents Nos. 2 to 10 herein, were prosecuted for offences under Sections 147/149/325/342 of the Indian Penal Code, in the court of learned Judicial Magistrate, West at Gyalshing. On conclusion of the trial, the learned Judicial Magistrate convicted three of the nine accused persons namely, Bishnu Kumar Rai (Respondent No. 2), Raj Kumar Katwal (Respondent No.3) and

Chandralall Karki (Respondent No. 4) under Section 325 I.P.C., sentenced each of them to undergo simple imprisonment for 18 months and to pay a fine of Rs. 500/- each, and acquitted the rest of the accused respondents. Aggrieved by the order of conviction and sentence, the three convicted accused respondents preferred an appeal before the Ld. Court of Sessions Judge (South & West) at Namchi who, after hearing the parties, set aside the impugned order of conviction and acquitted all the three accused respondents.

3. It is the further case of the complainant petitioner that, on pronouncement of the impugned order dated 27.09.2003 by the Ld. Court of Judicial Magistrate, West, acquitting the respondent Nos. 5 to 10, he approached the State Government for filing an appeal against the acquittal order and duly obtained approval of the Government for filing such appeal. It is stated that no appeal was however filed. In the meantime, the three convicted accused persons who had gone in Appeal were also acquitted by the appellate Court. When the appellate Court so acquitted the three accused persons, the complainant petitioner again approached the State Government for filing an appeal against the impugned order of acquittal dated 26.12.2003 passed by the Ld. Court of Sessions Judge (South & West). This time the request was rejected by the Government on the ground that there were no sufficient grounds for filing appeal against the impugned judgment/order. However, the petitioner applied for legal aid and on being provided legal aid by the State Legal Services Authority, filed the present revision petition against the judgments and orders of both the courts below.

4. Mr. S.S. Hamal, learned legal aid counsel assisted by Mr. Norden Tshering, learned counsel for the petitioner, Mr. J.B. Pradhan, learned Public Prosecutor for the State Respondent No. 1 and Mr. N.K.P. Saraff, learned counsel assisted by Miss Sapna Rai, learned counsel for the respondent Nos. 2 to 10 were heard.

5. It is the submission of Mr. S.S. Hamal that the courts below had overlooked material evidence resulting in flagrant miscarriage of justice. As such, interference of this court was called for, in order to correct the manifest illegality committed by the courts below, and to prevent gross miscarriage of justice in exercise of the power of revision. Shri J.B. Pradhan, learned Public Prosecutor, on the other hand, submitted that, since revisional powers must be exercised only in exceptional cases, the scope of interference by this court in the present case, was extremely limited. Mr. N.K.P. Saraff, in similar vein, submitted that the revisional jurisdiction conferred on the High Court, is to be sparingly exercised and when it is invoked by private complainant against an order of acquittal, the scope for interference would be very narrow. This jurisdiction, the learned counsel accordingly submitted, is not to be ordinarily invoked merely because the lower court has taken a wrong view of law or mis-appreciated the evidence on record.

6. As can be noted from the foregoing narrative of the relevant facts, the present petitioner who is the victim complainant, has come up before this court in revision, as the State Government failed to exercise the right of appeal in the matter. This is, therefore, a revision at the instance of a private complainant. That a private complainant can come up in revision where the State has failed to exercise its right

of appeal is not disputed. The only submission made by both Shri N. K. P. Saraf and Shri J. B. Pradhan is that, the revisional jurisdiction conferred on the High Court is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal.

The decision relied on by Shri Saraf in support of his submissions are the following :-

1. **AIR 1979 S.C. 1567**
2. **AIR 1981 S.C. 733**
3. **2105 (3) Crimes 218 (SC)**

A perusal of the above three decisions would go to show that they deal with power of the High Court in appeal rather than in revision and lay down, inter alia, that High Court ought not to reverse an order of acquittal by taking different view of evidence if the view taken by the lower Court is a reasonable view borne out by evidence and not perverse, that if the judgment of the trial Court is based on consideration of all evidence no interference would be justified and that it is obligatory on the High Court to discuss each of the reasons given by the trial Court while reversing an order of acquittal. These decisions, therefore, do not apply directly to the facts of the present case.

The other decisions relied on by Mr. Pradhan which are relevant are the following :-

1. **Chinnaswami –vs- State of Andhra Pradesh - AIR 1962 SC 1788.**
2. **Jaganath Choudhary –vs- Ramayan Singh - (2002) 5 SCC 659.**
3. **Thankeppan Nadar & Ors –vs- Gopala Krishnan - (2002) 9 SCC 393.**

4. State of Maharashtra -vs- Jagmohan Singh Kuldip Singh Anand - (2004) 7 SCC 659.

5. Hydru –vs- State of Kerala - (2004) 13 SCC 374.

7. The law laid down by the above decisions on the point at hand, in sum and substance, is that, the High Court in exercise of its revisional jurisdictional power does not have the power to re-appreciate the evidence and go into indepth re-examination of oral or medical evidence as an Appellate Court. That, the powers of revisional Court are very limited and interference by High Court in revision would be justified only in exceptional cases of gross miscarriage of justice, manifest illegality or perversity, etc.

8. Indeed, the law with regard to the right of a private complainant to invoke revisional jurisdiction of a higher court against an acquittal order is well settled. In this regard, a reference to the decision rendered by a Division Bench of this Court in Rinzing Choda Vs State and others SLJ Vol-II 1978 page 7 would be apposite. The Division Bench in this case, relying on the above referred decision of the Hon'ble Supreme Court in K. Chinnaswamy Reddy –Vs- State of Andhra Pradesh AIR 1962 SC 1788 has laid down that, a private complainant can invoke revisional jurisdiction of this court against an order of acquittal, the only condition being that, such revisional jurisdiction can be exercised only in exceptional cases where the interest of public justice requires interference for the correction of manifest illegality or the prevention of gross mis-carriage of justice.

It is thus evident that revisional jurisdiction can be exercised only in exceptional cases for limited purposes. The question as to what amounts to exceptional cases is not free from difficulty.

Throwing some light into what matters amount to case of exceptional nature, the Apex Court in the above referred Chinnaswamy case has enumerated some cases which may be categorized as exceptional cases as follows: -

> **"It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal has wrongly held evidence which was admitted by the trial court to be inadmissible, <u>or where material evidence has been overlooked either by the trial court or by the appeal court</u>, or where the acquittal is based on a compounding of an offence which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal".**

It is clear from the above, that cases where the appeal court wrongly withholds evidence admitted by the Trial Court, as inadmissible or where material evidence have been over looked either by the trial Court or the Appellate Court, or where the acquittal is based on a compounding of an offence which is invalid under the law and other cases of similar nature, fall under the category of exceptional cases. Therefore, the question is, whether the present case falls within the category of exceptional cases as contended by the learned counsel for the petitioner.

9. It is the first and foremost submission of Mr. S. S. Hamal that in the case on hand, material evidence has been overlooked by the Courts below, and, as such, it falls within the category of exceptional cases as contemplated above. In support of his

contention, the learned counsel made specific reference to the evidence of PWs 1,15 and 16. His submission in short, is that, PW 1 being the complainant has, in his evidence, narrated the manner in which he was assaulted by the accused respondents and how he sustained the injuries in his person. The injuries found in his person have been proved by the evidence of PW 15 and PW 16. The said injuries have been found to be grievous in nature by Dr. S.D. Sharma (PW 16), the Medico Legal Consultant, S.T.N.M. Hospital. It is the further contention of the Ld. Counsel that, even though this evidence was considered by the Ld. Trial Court in proper perspective while convicting the three accused persons, the Ld. Appellate Court overlooked the material evidence and came to the conclusion that there was no cogent evidence to support the prosecution case while acquitting the accused respondents.

10. In order to appreciate the above submission made by the Ld. Counsel, it is necessary to refer to the material evidence, which according to the learned Counsel the appeal Court overlooked.

We may first take up the evidence of Shri C. B. Katwal (PW 1), the victim complainant.

In his deposition C.B. Katwal (PW 1) has stated that he was assaulted by all the accused persons at *'Bar Piple Dara'* when he was fixing water pipe lines on 10.03.2002. According to him accused Bishney Rai, C.L. Karki and Raj Kr. Katwal first assaulted him in the *'Bar Piple Dara'* and dragged him to the house of Nandamani Sangrola where the said Nandamani Sangrola and his wife Pabitra Sangrola joined them and tied him with a rope and confined him in their house. Thereafter, on being called out by Bishney Rai, the other villagers

came and also assaulted him on his arms and legs. It was only in the morning that one Gyan Bdr. Writer Constable and one Bhakta Bdr. Constable attached to Gyalshing out post rescued him from the spot at 7.30 a.m. and took him to Gyalshing Hospital from where he was referred to S.T.N.M. Hospital, Gangtok. A verbatim reproduction of the relevant part of his statement is as follows :-

> **".............I was assulted at "BAR PIPAL DARA" Middle Gyalshing and thereafter in the house of Nanda Muni Sangrola on 10.3.2002 by all the accused persons while I was fixing water pipe line. The accused persons i.e. Accused Bishney Rai, Chandralall Karki and Raj Kr. Katwal assaulted me first and dragged me to the house of Nandamani Sangrola. Thereafter they alongwith Nanda Mani Sangrola and Pavitra Sangrola bound me with a rope and confined me in the house. Bishney Rai thereafter called all the other villagers. Thereafter all the accused persons began to hit me with G.I. Pipes and hammer on my arms and legs. Thereafter while some of the accused pinned me down the others continued to assault me. On the next morning at around 7.30 a.m. W/C. Gyan Bdr. and Bhakta Bdr. Constable of Gyalshing O.P. came and rescued me and took me to Gyalshing Hospital from where I was referred to S.T.N.M. Hospital.................."**

11. Dr. Bikash Pradhan PW 15 who had examined the victim C.B. Katwal on 11.03.2002 at Gyalshing Hospital found the following injuries in the person of the victim: -

> **"(i) bruise 10 cm x 7.5 cm right hand dorsum**
> **(ii) bruise 15 cm x 8 cm left hand dorsum**
> **(iii) bruise 16 cm x 4 cm left forearm**
> **(iv) bruise 20 cm 8 cm left arm**
> **(v) bruise 12 cm x 6 cm right forearm**
> **(vi) bruise 15 cm x 6 cm right arm**
> **(vii) bruise 14 cm x 8 cm right knee**
> **(viii) bruise 15 cm x 5 cm left knee**
> **(ix) lacaration 4 cm x 3 cm 2 ½ left elbow**
> **(x) lacaration 3 cm x 2 cm left leg anterior aspect**
> **(xi) lacaration 2 cm x 1 cm left leg middle**
> **(xii) lacaration 3 cm x 1 cm left leg middle**
> **(xiii) lacaration 5 cm x 3 cm right leg below knee**
> **(xiv) arassion 2 cm x 3 cm lower leg**
> **(xv) abrasion 4 cm x 3 cm right cheek, general condition was fair, patient was conscious and co-operative, responded well to verbal command pupils right and left normal size and normal reaction to light".**

12. Dr. S.D. Sharma (PW 16), who examined the victim after he was admitted in S.T.N.M. Hospital, Gangtok on the same day, i.e. on 11.03.2002 found the following injuries on the basis of the x-ray examination done on the victim: -

> **"X-ray of the left elbow which showed a chip fracture of the left middle epicondyle. (2) X-ray of the left wrist and forearm which showed fracture of the lower third of the left ulna (3) X-ray of the right elbow did not show any bony injury (4) X-ray of the right wrist and forearm which showed communitted fracture of the midshaft of the right radius (5) X-ray of both knees which showed transverse fracture of the right petalla (6) X-ray of the mandible which did not show any body injury (7) X-ray of the pelvis which did not show any body injury (8) X-ray of the left leg and the ankle which did not show any body injury (9) X-ray of the right leg and ankle which showed fracture of the lower third of the right fibula".**

The above injuries sustained by the patient were, according to the medical officer, grievous in nature.

13. In his cross examination, Dr. Bikash Pradhan (PW 15), agreed with the suggestion put to him by the defence, that it is possible to sustain the kind of injuries found on the body of the victim by a fall from a certain height. His specific statement is as follows: -

> **"it is true if a person falls from a certain height on a hard surface he can sustain injuries mentioned in Exhibit P-4"**

Dr. S.D. Sharma, the Medico Legal Consultant at S.T.N.M. Hospital, Gangtok, on the other hand, denied such a suggestion, duly giving reasons as follows: -

> **"It is not a fact that such injuries and fractures as described in Exhibit P-4 can be caused from a single fall on a hard surface because the injuries and fractures were detected on different angles and different bones of the body of the victim".**

14. In the light of the above evidence on record, it is the submission of Mr. Hamal that the Ld. Sessions Judge took into account only the statement made by Dr. Bikash Pradhan (PW 15), in his cross-examination as extracted above, and considering the same along with evidence of the defence witnesses came to the conclusion that, the injuries sustained by the victim, could have been caused by a fall and, accordingly, acquitted the accused persons, totally overlooking the equally relevant statement of Dr. S.D. Sharma (PW 16).

15. Let us therefore see if the above contention is borne out by the materials on record. The learned Trial Court has dealt with the evidence of injuries found in the person of the victim and the opinion of the above Medical Officer in paragraph 10 of the impugned judgment as follows: -

> **"Regarding the injuries said to have been received by the informant Chandra Bahadur Katwal the possibility of his falling and receiving the injury cannot be completely ruled out when one goes through the depositions of defence witnesses. DW-1 Shri Indra Kumar Neopaney has stated "............on 10th March,2002 while I was returning home from my sister's house at 6th mile at around 9.15 p.m. I made Chandra Bahadur Katwal near the Bar Pipal tree. He was shouting and was fully intoxicated in the influence of alcohol.............." Similarly DW-2 Tarabir Barakoti has also deposed "..... he was shouting that he had been beaten Raj Kumar and Bishney Rai. I saw that he was fully drunk...................." Thus as stated above it could be that he received the injuries on his person when he could not control himself and fell on the ground being under the influence of alcohol. The Doctor who examined him on the following day of the incident also opined and stated in his cross-examination "...................... It is true if a person falls from a certain height on a hard surface he can sustained injuries mentioned in exhibit P-4".**

16. What is evident from the above, is that, over and above the reference made to the opinion expressed by Dr. Bikash Pradhan

(PW 15), the similar opinion expressed by Dr. S.D. Sharma (PW 16), on the basis of the X ray examination done on the person of the victim, after he was admitted in STNM Hospital at Gangtok, finds no mention at all. While the learned Court gave the deposition of defence witnesses a place of prominence for coming to the conclusion that, the complainant could have sustained the injuries by a fall, as he was unable to control himself being under influence of liquor, no such importance has been attached to the relevant medical evidence. No reason, whatsoever, has been given as to why the medical opinion given by Dr. S.D. Sharma (PW 16) which is based on X ray test done on the person of the victim is not taken into consideration, at all. It is not at all clear as to why evidence and opinion of an equally competent medical expert, which was more pertinent should be given a go by. This omission in my considered view, unmistakably supports the submission of the learned counsel that, had the Appellate Court not overlooked this material piece of evidence, the decision arrived at by him would have been materially different.

17. In the above circumstances, it is but legitimate to conclude that, the manner in which the learned Appeal Court dealt with the evidence on record and came to its conclusion by totally overlooking a material evidence, has undoubtedly resulted in miscarriage of justice, and the interest of public justice requires this Court to interfere so as to prevent gross miscarriage of justice. It goes without saying that on this ground alone, the revision petition succeeds and the prayer for quashing the impugned order and for remanding the appeal must be allowed.

18. Even though the above ground is sufficient to dispose of the present revision petition, reference to other grounds taken by the petitioner may also be made.

19. In addition to the above, it was also contended by the learned counsel for the petitioner that the impugned judgment led to gross miscarriage of justice also on account of the fact that the appeal Court failed to take a right view of the evidence on record.

20. It is stated that the learned Appeal Court has noted with emphasis that the complaint Ext. P1 was written at Gyalshing, and not at Gangtok as it was dated "Gyalshing the 19th day of March, 2002". This conclusion, according to the learned counsel was erroneous in so far as along side the signature of the victim-complainant, Shri C. D. Katwal, the words "STNM Hospital, Gangtok, Sikkim" along with date 19th March, 2002 have been written indicating the place wherefrom the letter was written,. It was, therefore, contended that the conclusion arrived at by the learned Appeal Court that the complaint was written at Gyalshing and not written and sent from Gangtok, was based on wrong view of the evidence on record.

21. Secondly, it was contended that the evidence of the medical experts PWs 15 and 16 who had examined the victim-complainant, did not mention anything about the victim-complainant being under the influence of alcohol at the time of his examination by them, and yet the learned Appeal Court came to the conclusion, that the victim-complainant was under the influence of alcohol at the time of occurrence, on the basis of the opinion expressed by the defence witnesses in their evidence. Such a conclusion was, according to the learned counsel, unfounded and unwarranted.

22. Hence, it was submitted that the failure of the learned Trial Court to take right view of the evidence on the record, as stated above, led to failure of justice, which called for interference by this Court in its revisional jurisdiction.

23. Even though the above grounds raised by the learned counsel have bearing on the issue, I do not consider it necessary to examine this aspect of the matter, at this stage, keeping in view the above conclusion that the first ground alone is sufficient for disposal of the matter and also on account of the limitation placed on the power of this Court to enter into any reappraisal of evidence in a revision petition as the present one. Over and above, the parties will also have opportunity to raise these points before the appeal Court during the rehearing of the appeal, for which the matter is being sent back.

24. The only point now left for decision is, the nature of the order that can be passed in the case, at this stage. No doubt, the learned counsel for the revision-petitioner had also assailed the order dated 27th September, 2003 passed by the learned Judicial Magistrate, West Sikkim at Gyalshing i.e., the original Court which had tried the respondents in Criminal Case No.3 of 2003. It was the contention of the learned counsel that the learned Judicial Magistrate had acquitted the rest of the respondents without any proper basis. In this regard, it may be recalled that no appeal having been filed by the State Government against the above impugned order dated 27th September, 2003, the present revision-petitioner has assailed that order also in the present proceedings. However, during the hearing, Shri Hamal, the learned counsel for the revision-petitioner, in all fairness, conceded that the evidence that had come on record with regard to the six

acquitted respondents in the proceedings before the learned Judicial Magistrate, West at Gyalshing are not very specific and as direct as in the case of the three respondents. A perusal of the relevant evidence recorded by the trial Court goes to show that, even though the respondent Nos. 1, 2 and 3 had been specifically named by the victim-complainant specifying the role played by them in the assault, his evidence with regard to the other respondents is vague, in so far as, he has only stated that the other persons who joined the respondent Nos. 1, 2 and 3 in the assault were "all the accused persons". In view of this, Shri Hamal fairly concedes that evidence in respect of the other respondents is not as specific as in the case of the respondent Nos. 1, 2 and 3. It is made clear by him that the only other evidence available on record consists of the 161 statements of the witnesses. In the circumstances, the learned counsel did not press his prayer against the rest of the witnesses as vigorously as in the case of the other respondent Nos. 1, 2 and 3 and very fairly left the matter with the Court. Admittedly, the entire evidence is on record and there is no further evidence to be adduced. In the circumstances, I am of the view that, no useful purpose would be served by sending back the matter to the Court of the learned Judicial Magistrate for retrial. In this regard, a brief reference to the following guidelines laid down by the Hon'ble Supreme Court in the above referred K. Chinnaswamy Reddy case would be of advantage. Laying down the guidelines in cases of this nature, the Apex Court observed as follows :-

> **"................It will depend upon the facts of each case whether the High Court would order the appeal court to re-hear the appeal or would order a re-trial by the trial court. Where the entire evidence is there and it was the appeal court which ruled out the evidence that had been admitted by the trial court,**

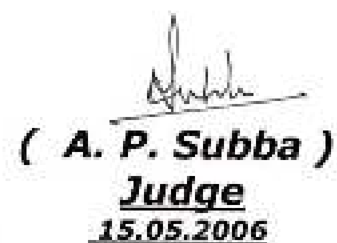
> **the proper course is to send back the appeal for re-hearing to the appeal court. In such a case the order of trial court would stand subject to the decision of the appeal court on rehearing."**

25. In the present case, the entire evidence is already on record, and as noted above, the only irregularity complained of relates to overlooking material evidence and taking wrong view of the evidence on record. It is, therefore, clear that the proper course would be to send back the matter to the Appeal Court for re-hearing.

26. Accordingly, the revision is allowed and the appeal is remanded to the Court of the learned Sessions Judge, (South and West) for re-hearing according to law. It is made clear that the learned Appeal Court while re-hearing the appeal will not be influenced by the observations made above.

27. Needless to say, the impugned Judgment and Order dated 27th September, 2003 of the trial Court would stand, subject to the decision of the appeal court on re-hearing.

Records of the lower Court may be sent forthwith.



(A. P. Subba)
Judge
15.05.2006