JOHAR AND OTHERS

v.

MANGAL PRASAD & ANR.

(Criminal Appeal No. 215 of 2008)

JANUARY 30, 2008

(S.B. SINHA AND V.S. SIRPURKAR, JJ.)

Code of Criminal Procedure, 1973:

ss.397 and 401(3) – High Court's power of revision – In a trial for offences u/s 302 r/w 34 IPC trial court convicting accused u/s 323 – No appeal by State – On revision petition by complainant, High Court reappreciating whole evidence, commenting upon credentiality of Autopsy Surgeon and remanding the case to trial court observing that intention of all the accused was to cause death of the victim and it was a case u/s 302 IPC – Held: In effect and substance finding of trial court has been reversed – One possible view was sought to be substituted by another possible view – High Court did not point out any error of law on the part of trial court – Since the view of trial court could not be termed to be a perverse one, High Court exceeded its jurisdiction – Judgment of High Court set aside – Penal Code, 1860 – ss.323/34.

The appellants along with another accused were prosecuted for causing death of a person. But the trial court convicted all of them u/s 323 r/w s.34 IPC. The State did not file any appeal. One of the accused filed an appeal and his conviction u/s 323 IPC was confirmed by the High Court. The complainant also did not challenge the order of the trial court in his case. However, the complainant filed a revision petition against order of the trial court as regards the appellants. The High Court opined that it was a case u/s 302 IPC and intention of all the accused was to cause the death of the victim, and that having regard to the nature of deposition of the Autopsy Surgeon, the trial

A court committed a grave error in ignoring the other relevant materials brought on record to pronounce a judgment of acquittal. It further held that the doctor willfully suppressed the head injury of the deceased and was thus guilty of dereliction of duty. With these findings the High B Court remanded the case to the trial court.

In the instant appeal filed by the accused, it was contended for the appellants that the High Court committed a manifest illegality in passing the impugned judgment against the mandate of sub-section (3) of s.401 C Cr.P.C.

Allowing the appeal, the Court

HELD: 1.1 Revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 of the Code D of Criminal Procedure, 1973 is limited. The jurisdiction of the High Court to entertain a revision application, although is not barred, but severely restricted, particularly, when it arises from a judgment of acquittal. [Para 9 and 17] [191-E; 195-A]

E *D. Stephens vs. Nosibolla* (1951) 1 SCR 284; *Logendra Nath Jha and others vs. Polailal Biswas* (1951) SCR 676; *K. Chinnaswamy Reddy vs. State of Andhra Pradesh* (1963) 3 SCR 412; *Mahendra Pratap Singh vs. Sarju Singh and Anr.* (1968) 2 SCR 287; *Janata Dal vs. HS Chowdhary* (1992) 4 F SCC 305; *State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand* (2004) 7 SCC 659 and *Satyajit Banerjee vs. State of W.B.* (2005) 1 SCC 115 – relied on.

Ram Briksh Singh vs. Ambika Yadav (2004) 7 SCC 665 G – distinguished.

1.2 In the instant case, the approach of the High Court to the entire case cannot be appreciated. Technically, it may be said that the High Court has not converted the judgment of acquittal passed by the trial court to a H judgment of conviction, but for arriving at a finding as to

whether the High Court has exceeded its jurisdiction or not, the approach of the High Court must be borne in mind. The High Court not only entered into the merits of the matter but also sought to re-appreciate the whole evidence. It, in particular, went to the extent of commenting upon the credentiality of the Autopsy Surgeon. It relied upon the evidence of the so-called eye-witnesses to hold that although appellants had inflicted injuries on the head of the deceased, PW-9, the doctor, deliberately suppressed the same. Evidently the High Court raised a presumption that Autopsy Surgeon deliberately did not disclose the ante mortem head injury purported to have been suffered by the deceased. The Autopsy Surgeon was not cross-examined by the State nor was he declared hostile. He was, for all intent and purport, found guilty of the offence under Sections 193 and 196 of the Indian Penal Code. [Para 10,13,16-17] [192-A, B; 193-B, C, D; 194-G, H; 195-A]

1.3 The trial court might be wrong as regards analyzing the prosecution evidence but then it had not relied upon the evidence of the eye witnesses only having regard to the opinion of medical expert. It considered the plea of alibi on the part of some of the accused and accepted the same. The High Court did not bestow any consideration in this behalf. It also failed to take into consideration that even by-standers have been implicated in the matter. Unfortunately, the High Court did not meet the reasonings of the trial judge which was its bounden duty. Even the effect of the order passed by the High Court in the appeal preferred by another accused was not taken into consideration. The said order attained finality. If the said accused was guilty of commission of an offence under Section 323 IPC, others could not be held guilty for commission of the offence under Section 302. In any event, the judgment passed in favour of the said accused could not have been set aside indirectly which could not be done directly. [Para 23-25] [198-F, G; 199-A, B]

1.4 It is evident that the State did not even prefer any appeal against the judgment. The High Court did not point out any error of law on the part of the trial judge. It was not opined that any relevant evidence has been left out of its consideration by the court below or irrelevant material has been taken into consideration. One possible view was sought to be substituted by another possible view. There is no reason to hold the findings of the trial judge to be perverse. It may be that sub-section (4) of Section 378 of the Code was not available to the first informant but the same by itself would not mean that in absence of any appeal preferred by the State, the limited jurisdiction of the court should be expanded. [Para 8, 9,13,14 and 18] [191-D, E, F; 193-D; 195-B]

1.5 Prohibition contained in sub-section (3) of Section 421 refers to a finding and not the conclusion. A bare perusal of the judgment of the High Court clearly demonstrates that in effect and substance the finding of the trial judge has been reversed. While hearing the matter afresh in terms of the direction of the High Court, the trial judge would be bound by the observations made therein and thus, would have no option but to convict the appellants. The High Court has, therefore, exceeded its jurisdiction in view of the fact that the judgment of the trial judge could not be termed to be a perverse one. The impugned judgment, therefore, cannot be sustained, and is set aside. [Para 20, 22 and 26] [198-B, C, D, E; 199-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 215 of 2008.

From the final Judgment and Order dated 9.3.2007 of the High Court of Madhya Pradesh at Jabalpur in C.R. No. 955/1999.

Fakhruddin, Abdul Karim Ansari, Abdul Qadri and Aftab Ali Khan for the Appellants.

Vibha Datta Makhija for the Respondents.

The Judgment of the Court was delivered by A

S.B. SINHA, J. 1. Leave granted.

2. Appellants were charged for commission of offences under Sections 148 and 302 of the Indian Penal Code and in the alternative under Section 302/149 and Section 120-B of B the Indian Penal Code. They were, however, convicted for commission of an offence under Section 323 read with Section 34 of the Indian Penal Code only, recording that as accused Nos. 1 to 4 had only caused simple injuries to the deceased Umashankar, the provisions of Section 148 and 149 of the Indian C Penal Code were not attracted.

3. The State did not prefer any appeal thereagainst. The complainant/respondent, however, filed a revision application before the High Court. The High Court went into the evidence adduced on behalf of the prosecution. In regard to the deposition D of the official witnesses including Autopsy Surgeon it was commented :-

> "10. If a public servant is corruptly (sic) makes a report in a judicial proceeding it will be offences under section 193 IPC and section 196 IPC and preparation of document E with an intention to save person from punishment, it will be an offence falling under section 196 IPC. Thus, willful act of the Doctor in not referring to other injuries in the post mortem report discloses his intention to protect the respondents who are guilty of commission of murder. F Witnesses were firm on the point of beating of deceased by lathi and number of injuries received by the deceased. It is held that post mortem report is incomplete report prepared by the doctor to give undue advantage to the accused. Appropriate steps for prosecution of PW9 Dr.Y.K. Malaiya G be initiated for intentionally preparing false evidence."

It was opined that having regard to the nature of deposition of the Autopsy Surgeon, the trial Court committed a grave error in ignoring the other relevant materials brought on records to pronounce a judgment of acquittal in favour of the respondents H

A (appellants herein). It was furthermore held that the doctor had willfully suppressed the head injury and was thus guilty of dereliction of duty. Re-appreciating the evidence of the prosecution witnesses, it was held :-

> B "It is natural that when a person is surrounded by number of accused it is difficult for eyewitness to describe the author of each and every injury. In para 16 of cross-examination, this witness has clarified that he has seen the body of injured and he found that Umashankar was having lathi injuries on his entire body and no place on his C body was left where he had not received injuries by lathi.'

4. On the premise that the learned trial judge has mis-appreciated the evidence, the revision application was allowed, directing :-

> D "22. In the result, judgment of acquittal passed by the trial court is set aside and the case is remanded to the trial court to pass the judgment on the basis of evidence on record for each offence keeping in mind evidence of eyewitnesses wherein it is stated that deceased had E suffered injuries on the whole body. The fact is also referred in Dehati Naleshi and Panchnama of dead body Ex.P/3. Evidence of doctor will not prevail over the eyewitness account in this case. This is a case under section 302 IPC and the intention of all the respondents was to cause death F of deceased. Trial court shall also examine and pass necessary orders against the concerned doctor for preparing document in order to give undue benefit to the accused."

5. We may, however, before embarking upon the G contentions raised before us by the learned counsel for the parties place on record that one of the accused persons, namely Roshan, had preferred an appeal before the High Court of Madhya Pradesh at Jabalpur and by a judgment and order dated 18th November, 2003, it while upholding his conviction under H Section 323 read with Section 34 of the Indian Penal Code set

him free on probation on his furnishing a personal bond for Rs.3,000/- (Rupees there thousand only) with one surety of the like amount. The said judgment and order has attained finality. A

6. Mr. Fakhruddin, the learned Senior counsel appearing for the appellant, submitted that the High Court committed a manifest illegality in passing the impugned judgment which is in the teeth of Sub-section (3) of Section 401 of the Code of Criminal Procedure, 1973. B

7. Ms Vibha Datta Makhija, the learned counsel appearing on behalf of the respondent-State, on the other hand, urged that it is not a case where the High Court converted a judgment of acquittal to a judgment of conviction in exercise of its revisional jurisdiction but merely remitted the matter to the trial court for consideration afresh, this Court should not interfere therewith. C

8. The State did not prefer any appeal from the judgment of the learned Trial Judge. From the proceedings of the High Court, it appears that the State was not even made a party in the criminal revision application. Public Prosecutor, however, represented the State before the High Court. Nobody interestingly appeared on behalf of the complaint-revisionist. D E

9. Revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 of the Code of Criminal Procedure is limited. The High Court did not point out any error of law on the part of the learned Trial Judge. It was not opined that any relevant evidence has been left out of its consideration by the court below or irrelevant material has been taken into consideration. The High Court entered into the merit of the matter. It commented upon the credentiality of the Autopsy Surgeon. It sought to re-appreciate the whole evidence. One possible view was sought to be substituted by another possible view. F G

10. Sub-section (3) of Section 401 reads as under :-

"401(3). Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into H

A one of conviction."

Technically, although Ms. Makhija may be correct that the High Court has not converted the judgment of acquittal passed by the learned Trial Court to a judgment of conviction, but for arriving at a finding as to whether the High Court has exceeded its jurisdiction or not, the approach of the High Court must be borne in mind. For the said purpose, we may notice a few precedents.

11. In *D. Stephens vs. Nosibolla :* [1951] 1 SCR 284 this C Court opined :-

"10. The revisional jurisdiction conferred on the High Court under section 439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which D the Government has a right of appeal under section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not E ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record."

12. The same principle was reiterated in *Logendra Nath Jha and others vs. Polailal Biswas* [1951 SCR 676] stating:

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"...Though sub-section (1) of section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by section 423, sub-section (4) specifically excludes the power to "convert a finding of G acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the H

accused guilty and passing sentence on him. By merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial Court's appreciation of the evidence in the case. That is what the learned Judge in the court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal..." A B

13. In the instant case the High Court not only entered into the merit of the matter but also analysed the depositions of all the witnesses examined on behalf of the prosecution. It, in particular, went to the extent of criticizing the testimony of Autopsy Surgeon. It relied upon the evidence of the so called eye witnesses to hold that although appellants herein had inflicted injuries on the head of the deceased, Dr. Y.K. Malaiya, PW-9, deliberately suppressed the same. He was, for all intent and purport, found guilty of the offence under Section 193 and 196 of the Indian Penal Code. The Autopsy Surgeon was not cross-examined by the State. He was not declared hostile. The State did not even prefer any appeal against the judgment. C D

14. In the absence of any such injury on the vital part of the body, the learned trial Judge, upon analyzing the evidence brought on record by the prosecution, held that only four accused had committed the offence under Section 323 read with Section 34 alone. We see no reason as to how the findings of the trial judge can be said to be perverse. The learned trial judge in arriving at his conclusion noticed:- E F

(i) Names of some of the appellants were not stated in the first information report.

(ii) Some of the accused persons were not present at the time of commission of offence, as their plea of alibi was acceptable. G

(iii) The story of recovery of lathis from some of the accused is doubtful. H

(iv) Purported recovery of lathi by the investigating officer without any disclosure statement having been made by the concerned accused, was not relevant.

(v) Some of the accused did not have any dispute whatsoever with the complainant side, as such they had no motive to commit the crime.

(vi) Only because some of the accused were present at the time of commission of the offence, having regard to the fact that the incident took place in a very small village, their presence at the time of occurrence by itself cannot lead to an inference that they participated therein, particularly when prosecution witnesses did not name them.

(vii) No independent witness had been examined by the prosecution despite the fact that a large number of persons witnessed the incident.

15. Upon analyzing the entire evidence on record, the learned trial judge held :-

"58. In view of the discussion and analyses made hereinabove prosecution has proved that accused persons No. 1 to 4 i.e. Johar, Ruplal, Roshan and Santosh inflicted simple injuries to deceased Umashankar. Against accused persons offence under Section 148, 302 r/w 149 IPC have been leveled but in the incident only accused No. 1 to 4 have committed and thus participation of the number of accused is proved to be four only and under section 148 & 149 IPC the accused persons minimum remained to be five. As such against accused No.1 to 4 offence under Section 148 & 149 are not proved."

16. Evidently the High Court raised a presumption that Autopsy Surgeon deliberately did not disclose the ante mortem head injury purported to have been suffered by the deceased.

17. The approach of the High Court to the entire case

cannot be appreciated. The High Court should have kept in mind that while exercising its revisional jurisdiction under Sections 397 and 401 of the Code of Criminal Procedure, it exercises a limited power. Its jurisdiction to entertain a revision application, although is not barred, but severally restricted, particularly when it arises from a judgment of acquittal. A B

18. Ms. Makhija is correct that sub-section (4) of Section 378 of the Code of Criminal Procedure was not available to the first informant but the same by itself would not mean that in absence of any appeal preferred by the State, the limited jurisdiction of the court should be expanded. C

19. We may notice a few of the decisions of this Court which are binding on us.

In K. Chinnaswamy Reddy vs. State of Andhra Pradesh : [1963] 3 SCR 412, this Court observed :- D

> "It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have though fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of s. 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised." E F G

In *Mahendra Pratap Singh vs. Sarju Singh and Anr.* [1968] 2 SCR 287 this Court stated the law thus :- H

"8. The practice on the subject has been stated by this Court on more than one occasion. In D. Stephens v. Nosibolla [[1951] S.C.R. 284], only two grounds were mentioned by this Court as entitling the High Court to set aside an acquittal in a revision and to order a retrial. They are that there must exist a manifest illegality in the judgment of the Court of Session ordering the acquittal or there must be a gross miscarriage of justice. In explaining these two propositions, this Court further states that the High Court is not entitled to interfere even if a wrong view of law is taken by the Court of Session or if even there is misappreciation of evidence. Again, in Logendranath Jha and others v. Shri Polailal Biswas [[1951] S.C.R. 676], this Court points out that the High Court is entitled in revision to set aside an acquittal if there is an error on a point of law or no appraisal of the evidence at all. This Court observes that it is not sufficient to say that the judgment under revision is "perverse" or "lacking in true correct perspective". It is pointed out further that by ordering a retrial, the dice is loaded against the accused, because however much the High Court may caution the Subordinate Court, it is always difficult to re-weigh the evidence ignoring the opinion of the High Court. Again in K. Chinnaswamy Reddy v. State of Andhra Pradesh, it is pointed out that an interference in revision with an order of acquittal can only take place if there is a glaring defect of procedure such as that the Court had no jurisdiction to try the case or the Court had shut out some material evidence which was admissible or attempted to take into account evidence which was not admissible or had overlooked some evidence. Although the list given by this Court is not exhaustive of all the circumstances in which the High Court may interfere with an acquittal in revision it is obvious that the defect in the judgment under revision must be analogous to those actually indicated by this Court."

In *Janata Dal vs. HS Chowdhary :* (1992) 4 SCC 305, this Court stated that the object of the revisional jurisdiction was to confer power on superior criminal courts to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment.

In *State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand :* (2004) 7 SCC 659 this Court observed :-:

> "21. In embarking upon the minutest re-examination of the whole evidence at the revisional stage, the learned Judge of the High Court was totally oblivious of the self-restraint that he was required to exercise in a revision under Section 397 Cr. PC. On behalf of the accused, reliance is placed on the decision of this Court to which one of us (Justice Sabharwal) is a party i.e. Ram Briksh Singh v. Ambika Yadav. That was the case in which the High Court interfered in revision because material evidence was overlooked by the courts below."

The judgment of Ram Briksh mentioned above, has since been reported as *Ram Briksh Singh vs. Ambika Yadav* : (2004) 7 SCC 665 wherein it has been observed :-

> "12. For the aforesaid reasons, we are unable to accept the contention that the High Court has reappreciated the evidence. The High Court has only demonstrated as to how the material evidence has been overlooked leading to manifest illegality resulting in gross miscarriage of justice."

It was, therefore, relevant in the fact situation obtaining therein.

Yet again in *Satyajit Banerjee vs. State of W.B.* : (2005) 1 SCC 115 this Court has, while exercising its jurisdiction under Section 142 of the Constitution of India, expressed a note of caution stating :-

A "22. The cases cited by the learned counsel show the settled legal position that the revisional jurisdiction, at the instance of the complainant, has to be exercised by the High Court only in very exceptional cases where the High Court finds defect of procedure or manifest error of law
B resulting in flagrant miscarriage of justice.

20. We may notice that prohibition contained in sub-section (3) of Section 421 refers to a finding and not the conclusion.

C A bare perusal of the judgment of the High Court clearly demonstrates that in effect and substance the finding of the learned trial judge has been reversed. While hearing the matter afresh in terms of the direction of the High Court, the learned Trial Judge would be bound by the observations made therein
D and thus, would have no option but to convict the appellants.

21. Not only the evidence of the prosecution witnesses has been relied upon and that of the Autopsy Surgeon has been disbelieved but the Trial Judge has also been asked to initiate an appropriate proceeding against him.

E 22. We have, therefore, no hesitation to hold that the High Court exceeded its jurisdiction in view of the fact that the judgment of the learned Trial Judge could not be termed to be a perverse one.

F 23. The Trial Court might be wrong as regards analyzing the prosecution evidence but then it had not relied upon the evidence of the eye witnesses only having regard to the opinion of medical expert. The learned Trial Judge considered the plea of alibi on the part of some of the accused and accepted the
G same. The High Court did not bestow any consideration in this behalf. It also failed to take into consideration that even by-standers have been implicated in the matter.

24. Unfortunately, the High Court did not meet the reasonings of the learned trial judge which was its bounden duty.

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25. Even the effect of the order dated 18.11.2003 passed by the High Court in the appeal preferred by Roshan was not taken into consideration. A

The said order attained finality. If Roshan was guilty of commission of an offence under Section 323 of the Indian Penal Code, we fail to see any reason as to how others could be held guilty for commission of the offence under Section 302 thereof. B

In any event, the judgment passed in favour of Roshan could not have been set aside indirectly which could not be done directly. C

26. For the reasons abovementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed.

R.P. Appeal allowed. D