AJAY KUMAR GHOSHAL ETC. A

v.

STATE OF BIHAR & ANR.

(Criminal Appeal Nos. 119-122 of 2017)

JANUARY 31, 2017 B

[DIPAK MISRA AND R. BANUMATHI, JJ.]

Code of Criminal Procedure, 1973 – s. 386 – Powers of the appellate court – High Court ordering re-trial of the dowry death case – Appeal thereagainst by accused persons – Held: Powers conferred by s. 386 is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice – Circumstances warranting retrial must be such where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings or irregularity resulted in miscarriage of justice – As also where the original trial was not satisfactory for wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard – On facts, High Court did not state as to how the alleged lapses resulted in miscarriage of justice necessitating retrial – High Court erred in remitting the matter back to the trial court for fresh trial – Thus, order passed by the High Court set aside – Matter remitted back to the High Court for consideration of the matter afresh. C D E F

Allowing the appeals, the Court

HELD: 1.1 The High Court pointed out certain lapses; but did not state as to how such alleged lapses resulted in miscarriage of justice necessitating retrial. Certain lapses either in the investigation or in the 'conduct of trial' are not sufficient to direct retrial. The High Court being the First Appellate Court is duty bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice. [Para 8] [473-G] G H

A **1.2 Section 386 Cr.P.C. deals with the powers of the appellate court. As per Section 386 (b) Cr.P.C, in an appeal from a conviction, the appellate court may:- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings or that irregularity has resulted in miscarriage of justice. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard. [Paras 10, 11] [474-F-H; 475-A-B]**

1.3 '*De novo*' trial means a "*new trial*" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold '*de novo*' trial. But the question is when such power should be exercised. [Para 12] [475-C]

1.4 When the accused prefers an appeal against their conviction and sentence, the appellate court is duty bound to consider the evidence on record and independently arrive at a conclusion. The High Court erred in remitting the matter back to the trial court for fresh trial and the impugned order cannot be sustained. The impugned judgment of the High Court is set aside. The matter is remitted back to the High Court for consideration of the matter afresh. [Paras 18, 19] [480-C-D, E-F]

Mina Lalita Baruwa v. State of Orissa and Ors. **(2013) 16 SCC 173 : [2013] 16 SCR 788**; *Nar Singh v. State of Haryana* **(2015) 1 SCC 496 : [2014] 12 SCR 218**; *Pandit Ukha Kolhe v. State of Maharashtra* **[1964] SCR 926**; *State of M.P. v. Bhooraji and Ors.* **(2001) 7 SCC 679: [2001] 2 Suppl. SCR 128**; *Gopi Chand v. Delhi Administration* **AIR 1959 SC 609 : [1959] Suppl. SCR 87**; *Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors.* **(2004) 4 SCC 158 : [2004] 3 SCR 1050**; *Mohd. Hussain @ Julfikar Ali v. State (Govt. of NCT of Delhi)* **(2012) 9 SCC 408 : [2012] 10 SCR 480** – **referred to.**

Case Law Reference

[2013] 16 SCR 788	**referred to**	**Para 4**
[2014] 12 SCR 218	**referred to**	**Para 4, 9**
[1964] SCR 926	**referred to**	**Para 12**
[2001] 2 Suppl. SCR 128	**referred to**	**Para 13**
[1959] Suppl. SCR 87	**referred to**	**Para 15**
[2004] 3 SCR 1050	**referred to**	**Para 16**
[2012] 10 SCR 480	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 119-122 of 2017.

From the Judgment and Order dated 28.08.2015 of the High Court of Judicature at Patna in Criminal Appeal (SJ) No-230/2015, 275/2015, 232/2015 and 243/2015.

Nagendra Rai, Sr. Adv., Smarhar Singh, Advs. for the Appellants.

Gopal Singh, Manish Kumar, Advitya Awasthi, Mithilesh Kumar Singh, Manju Singh, J. Bangarvi, T. Verma, Advs. for the Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. These appeals are directed against the common final order dated 28.08.2015 passed by the High Court of Judicature at Patna in Criminal Appeal (SJ) No.230 of 2015, Criminal

A Appeal (SJ) No.275 of 2015, Criminal Appeal (SJ) No.232 of 2015 and Criminal Appeal (SJ) No.243 of 2015 setting aside the judgment of the trial court and directing the retrial of Session Trial No.14 of 2008/637 of 2008 against the appellants.

2. Briefly stated, case of the prosecution is that on 15.05.2007, B Asim Kumar Chatarjee (PW-5) filed a complaint before the Officer-in-Charge, Tilakmanjhi, stating that his sister Bandhavi @ Bani Ghoshal was married to Raj Kumar son of Ajay Kumar Ghoshal on 03.02.2007 and at the time of her marriage, the complainant gave cash and ornaments as per his capacity and all the usual gifts given in a marriage to the accused-appellants. PW-5 asserted that the husband, father-in-law and C mother-in-law (Munmun Ghoshal) kept demanding dowry from his deceased sister and upon his inability to fulfill their demands, they in turn tortured Bandhavi Ghoshal mentally and physically. The complainant stated that on 15.05.2007, he received information from Bhagalpur about the death of his sister deceased Bandhavi @ Bani Ghoshal in her D matrimonial home, in suspicious circumstances and he went to Bhagalpur. The complainant stated that he saw the dead body of his sister and noticed that her wrist veins were cut and her body had the marks of hanging, assault and electrocution. On the basis of aforesaid, FIR was registered under Section 304 (B), Section 34 IPC at Kotwali (Tilkamanjhi) P.S. Case No.281 of 2007. After completion of investigation, the charge-E sheet was filed against the appellants under Sections 302, 304B, 201, 498A, 120B IPC and Sections 3 and 4 of Dowry Prohibition Act.

3. In order to prove guilt of the accused, the prosecution has examined twelve witnesses and exhibited documents and material objects. Upon consideration of evidence, the trial court vide judgment dated F 06.04.2015, held that the prosecution has proved the guilt of the accused beyond reasonable doubt and convicted all the appellants/accused persons, by judgment dated 09.04.2015. For conviction under Section 304B read with Section 120B IPC, the trial court imposed sentence of imprisonment for ten years on each of the appellants. The appellants G were convicted under Section 201 IPC and were sentenced to undergo rigorous imprisonment for five years as well as fine of Rs.10,000/- each with default sentence and rigorous imprisonment for two years for the conviction under Section 4 of Dowry Prohibition Act.

4. Being aggrieved by the verdict of conviction and the sentence H imposed upon them, the appellants/accused preferred separate appeals

before the High Court. Upon consideration of the contentions of the parties, the High Court in paras (29) and (30) of its judgment pointed out certain lapses on the part of Investigating Officer/trial court and held that the trial court failed to take appropriate action on the lapses. After quoting relevant extracts from the judgments in ***Mina Lalita Baruwa vs. State of Orissa and Ors.*** (2013) 16 SCC 173 and ***Nar Singh vs. State of Haryana*** (2015) 1 SCC 496, the High Court set aside the judgment of the conviction and sentence recorded by the trial court and the matter was remitted back to the trial court to proceed afresh in accordance with law. Being aggrieved, the accused-appellants have preferred these appeals.

5. Learned counsel for the appellants submitted that the High Court being the First Appellate Court should have appreciated the evidence on its own merits; instead it erred in remitting the matter back to the trial court to proceed afresh and the order for *de novo* trial would cause serious prejudice to the accused-appellants.

6. We have heard the learned counsel for the State as well as counsel for the complainant i.e. brother of the deceased Asim Kumar Chatarjee. Both of them submitted that the evidence available on record is sufficient to sustain the conviction of the accused-appellants.

7. We have carefully considered the rival contentions and perused the impugned order and other materials on record. The question falling for consideration is whether there was serious irregularities in the prosecution case thereby necessitating retrial and whether the irregularities pointed out by the High Court are such as resulting in miscarriage of justice thereby constraining the High Court to set aside the judgment of the Sessions Court and direct for retrial.

8. In para (29) of its judgment, the High Court pointed out certain lapses; but has not stated as to how such alleged lapses has resulted in miscarriage of justice necessitating retrial. Certain lapses either in the investigation or in the 'conduct of trial' are not sufficient to direct retrial. The High Court being the First Appellate Court is duty bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice. The circumstances that should exist for warranting retrial must be such that whether the trial was undertaken by the court having no jurisdiction

A or trial was vitiated by serious illegality or irregularity on account of misconception of nature of proceedings or that irregularity has resulted in miscarriage of justice.

9. The High Court copiously extracted the judgment in case of ***Nar Singh vs. State of Haryana*** (2015) 1 SCC 496 to remit the matter B to the trial court for proceeding afresh. In ***Nar Singh's case***, some of the important questions like Ballistic Report and certain other incriminating evidence were not put to the accused and the same was not raised in the trial court or in the High Court. It was felt that the accused should have been questioned on those incriminating evidence and circumstances; or otherwise prejudice would be caused to the accused. In such peculiar C facts and circumstances, ***Nar Singh's case*** was remitted to the trial court for proceeding afresh from the stage of Section 313 Cr.P.C. Be it noted that in ***Nar Singh's case***, this Court has referred to a catena of other judgments holding that omission to put certain questions to the accused under Section 313 Cr.P.C. would not cause prejudice to the D accused. It depends upon facts and circumstances of each case and the nature of prejudice caused to the accused. In our view, the High Court has not properly appreciated ***Nar Singh's case*** where this Court laid down that the appellate court can order for fresh trial from the stage of examination under Section 313 Cr.P.C., only in cases where failure to question the accused on certain incriminating evidence has resulted in E serious prejudice to the accused. The High Court, in our view, has not properly appreciated the ratio laid down in ***Nar Singh's case*** and erred in applying the same to the present case.

10. Section 386 Cr.P.C. deals with the powers of the appellate court. As per Section 386 (b) Cr.P.C, in an appeal from a conviction, F the appellate court may:- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature G and extent, of the sentence, but not so as to enhance the same.

11. Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances

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that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

12. '*De novo*' trial means a "*new trial*" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold '*de novo*' trial. But the question is when such power should be exercised. As stated in ***Pandit Ukha Kolhe vs. State of Maharashtra*** (1964) SCR 926, the Court held that:

> **"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."**

A 13. This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ ST Act, this Court stated, "a *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable; it should be limited to the extreme exigency to avert 'a failure of justice'. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial". In ***State of M.P. vs. Bhooraji and Ors.*** (2001) 7 SCC 679, the Court went on to say further as follows:

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> **"8....This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation."**

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14. In ***Bhooraji's*** **case**, the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465 (1). After noticing

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the above provisions, the Court observed in paragraphs (15) and (16) of the order as follows:

> **"15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.**
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> **16. What is meant by a failure of justice occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani vs. State of Karnataka* {2001 (2) SCC 577} thus:**
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> > **"23. We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. v. Deptt. of the Environment, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."**

15. In *Gopi Chand vs. Delhi Administration* AIR 1959 SC 609, a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required

A to be tried as a warrant case by following the procedure prescribed in the Code of Criminal Procedure, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; accordingly, set aside the orders of conviction and sentence and the Constitution Bench held as under:-

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> **"29. ....the offences with which the Appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the Appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the Appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible."**

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E 16. In ***Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.*** (2004) 4 SCC 158, [***Best Bakery case***] being an extraordinary case, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a '*de novo*' trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in ***Best Bakery case*** for retrial was in the extraordinary circumstances and cannot be applied for all cases.

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17. After considering the question a "speedy trial" and "fair trial" to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in ***Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi)*** (2012) 9 SCC 408, this Court held as under:-

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> **"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is,**

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however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the

exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

18. As discussed earlier, the High Court has not shown as to how the alleged lapses pointed out by the High Court have resulted in miscarriage of justice. When the accused prefers an appeal against their conviction and sentence, the appellate court is duty bound to consider the evidence on record and independently arrive at a conclusion. In our considered view, the High Court erred in remitting the matter back to the trial court for fresh trial and the impugned order cannot be sustained.

19. In the result, the impugned judgment of the High Court is set aside and these appeals are allowed. The matter is remitted back to the High Court for consideration of the matter afresh. The High Court shall afford sufficient opportunity to the accused-appellants and the prosecution and also to the informant Asim Kumar Chatarjee-brother of the deceased (in terms of Section 301 Cr.P.C.) and proceed with the matter afresh in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

Nidhi Jain Appeals allowed.