

(2007) 02 CAL CK 0017
In the Calcutta High Court
Case No : C.R.R. No. 1984 of 2005

Afjal Hossain and Others

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 28-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 399, 400, 401
Evidence Act, 1872 — Section 114, 165
Penal Code, 1860 (IPC) — Section 304, 323, 498A

Citation : (2007) 4 CHN 482

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Madhusudau Sur and Chittaranjan Chakraborty, for the Appellant; Sobhendu Sekhar Roy, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Roy, J.—Aggrieved by a judgment and order of the learned Additional Sessions Judge setting aside the order of acquittal of the petitioners for the alleged offences u/s 498A/323 of the Indian Penal Code and directing their re-trial, the petitioners moved this criminal revision before this Hon'ble Court.

2. The petitioners were placed on trial before the learned Judicial Magistrate, Uttar Dinajpur, Raigunge to answer a charge u/s 323/498A of the Indian Penal Code. The learned Judicial Magistrate by a judgment and order dated July 29, 2003, acquitted the petitioners of the said charges.

Against the said order of acquittal the opposite party No. 2, the de facto-complainant of the case moved a criminal revision before the Sessions Court, Uttar Dinajpur. The learned Additional District and Sessions Judge, Fast Track, 2nd Court, Raigunge, Uttar Dinajpur by his judgment and order dated January 21, 2005 set aside the said order of acquittal and remanded back the said case to the Trial Court for fresh trial directing that during such fresh trial the de facto -

complainant be permitted to examine all the FIR named unexamined witnesses.

3. Mr. Madhusudan Sur, the learned Advocate appearing on behalf of the accused petitioners, firstly submitted before this Court that Sessions Judge is not legally authorised to exercise his revisional power against an order of acquittal, Mr. Sur further submitted while setting aside the order of acquittal of the petitioners the learned Judge has deviated from the settled legal position as regards to the power of the Court, to interfere with an order of acquittal in exercise of his revisional jurisdiction. According to Mr. Sur, the order of examination of the witnesses not examined during the original trial shall cause serious prejudice to the accused petitioners leading to failure of justice. Mr. Sur thus prayed for setting aside of the impugned order.

Mr. Chittaranjan Chakraborty, the learned Advocate appearing on behalf of the de facto -complainant submitted before this Court that not only on facts but in law the contention of Mr. Sur is not tenable and prayed for dismissal of this revision. Whereas, Mr. Sobhendu Sekhar Roy, the learned Advocate appearing on behalf of the State also pressed for dismissal of this criminal revision and submitted the impugned judgment does not suffer from any illegality or infirmity so as to warrant interference of this Court.

4. Heard, the learned Advocates appearing for the parties. Perused the materials on records, viz. the judgments of both the Courts below, the depositions of the witnesses and other materials on records. Considered the rival submissions of the parties.

5. In the instant criminal revision the first point which comes for consideration of this Court, whether a criminal revision against an order of acquittal lies before a Court of Sessions. The Section 399 of the Code of Criminal Procedure delineate the Sessions Judges power of revision. According to the said provisions, in any proceeding by way of revision, the Sessions Judge is empowered to exercise all or any of the powers conferred on the High Court under Sub-section (1) of Section 401 of the Code and the provisions of Sub-sections (2), (3), (4) and (5) of Section 401 of the Code shall, so far as may be, apply to such revisional proceedings and references in the said sub-sections to the High Court shall be construed as references to Sessions Judge.

It would not be out of place to note that Section 400 of the Code empowered an Additional Sessions Judge to exercise all the powers vested on the Sessions Judge, under Chapter XXX of the Code of Criminal Procedure.

I, therefore, have no hesitation to hold that the Sessions Court is very much empowered to entertain a criminal revision against an order of acquittal.

6. Now the next question arises for consideration whether the Court below was justified and acted well within the ambit of its revisional power to interfere with a finding of acquittal.

7. The learned Trial Court acquitted the petitioners on the following grounds:

Firstly, although P.W.1, the de /bcfo-complainant before the Court alleged that two years after her marriage the accused persons started torturing her on demand of dowry but in her FIR, Exhibit 1, it was her case that she was subjected to torture on demand of dowry by the accused persons just a few days after her marriage and as such the P.W.I, Arzina Bibi, the victim wife seems to have been resiled from her earlier version.

Secondly, the P.W. 1 Arzina Bibi alleged in the Court that due to the torture of the accused persons she sustained bleeding injury and bodily pain and was admitted at Malda Hospital and further stated that she was treated medically at Itahar and Raigunge Hospitals and her father P.W.6 Anauddin Ahamed stated before the Court that due to the assault on his daughter she sustained fracture on her left rib and had bleeding injury in her mouth for which she was treated by Dr. Panchanan Saha of Malda. None of those doctors being cited as witness nor examined during trial, the version of the P.W.I and P.W.6 on the point of alleged injury sustained by the P.W.I stand shaken to a great extent.

Thirdly, both the P.W.2 Rina Bibi and P.W.3 Samina Bibi, who according to the P.W. 1 the victim wife, were present at the time when she was allegedly tortured by the accused persons remained silent as regards to the alleged injuries sustained by P.W.I during such assault.

Fourthly. P. W.6, the father of the victim wife not only alleged in his evidence that his daughter was subjected to torture both physically and mentally by the accused persons for dowries also alleged that the accused persons instigated P.W.I to commit suicide by saying "Jale jhap diya maro, fashi diya maro" and according to P.W.6 he heard all about the same from the P.W.I, his daughter but P.W.I in her deposition never alleged anything about such instigation by the accused persons.

Fifthly, according to P.W.I and P.W.6 there was consistent torture both physically and mentally upon her by the accused persons on demand of dowry, but admittedly no complaint has been made to the police about such incident and there was no explanation for the same.

Sixthly, both P.W.2 Rina Bibi and P.W. 3 Samina Bibi claimed in then-depositions that P.W.I Arzina Bibi was subjected to torture in their presence and according to P.W.I, the de /acto-complainant, in her FIR, she named all the witnesses in whose presence she was tortured by the accused but in the FIR the name of both P.W.2 and P.W.3 were not found place and none of the persons named as eye-witnesses in the FIR, except Anauddin Ahamed, the father of the de /ac/o-complainant, was examined during the trial.

Seventhly, the learned Judge observed that no doubt P.W. 1 in her statement has stated that while she was crying P.Ws. 2, 3 and others appeared there and protested against the act of the accused persons and the said persons used to rescue her as and when she was tortured and assaulted by the accused persons. Had there been any substratum of truth behind this claim of P.W. 1 then in the

ordinary course of human conduct she would have definitely disclosed the name of P.Ws.2 and 3 in the FIR as witness to the alleged incident which she admittedly did not. This aspect of this case forces me to say that the above statement of P.W. 1 is nothing but an afterthought to make the P.W.2 and P.W.3 as witnesses to the alleged incident.

Eighthlv. the prosecution examined as witnesses during trial some persons, about whom there was no reference in the FIR and left behind all the persons who have been referred as witness in the FIR except P.W. 6.

Ninthly, the learned Magistrate observed, according to the principle of law as laid down in the decisions, viz. 2001 Criminal Law Journal (SC) 170 and 2003 Criminal Law Journal (SC) 1282, the failure of I.O. cannot render the prosecution case doubtful nor there is any necessity to examine all the eyewitnesses, but in the instant case the matter is otherwise, here the prosecution has relied on P.W. 2 and P.W. 3 without examining the FIR named eye-witnesses. Initially not a single FIR named eye-witness was examined by the prosecution, subsequently the prosecution applying the provisions of Section 311 of the Code of Criminal Procedure examined only the P.W.6, who is the father of P.W.1, but curiously enough the prosecution has not taken any pain to examine other FIR named eye-witnesses following the said provisions. Even no explanation for non-examination of those vital FIR named eye-witnesses has been offered. This aspect of the case speaks a volume against the prosecution as because examination of those FIR named eye-witnesses might have help the defence.

Tenthly. in consideration of the submissions of the prosecution that not the quantity of the evidence but the quality of the evidence is important for decision of a criminal trial and evidence of P.W.2 and P.W.3 if considered reliable the accused cannot escape from the charges levelled against them, the learned Magistrate observed that in the instant case the prosecution case is not supported by any reliable and cogent evidence and suffers from inconsistency.

The learned Magistrate further observed that there was no explanation for inordinate delay in lodging the FIR and although the P.W. 1 was driven out from her matrimonial home on August 4,1996, the complaint was lodged only on October 15, 1996 after about 2 months and 10 days and there is no explanation for such delay. The P.W.I admitted in cross-examination that before filing of the case, she instituted a case for maintenance but never made any complaint to the police and thus her plea that after being advised by the police she lodged the complaint in Court and could not have been done due to the financial incapacity are not acceptable.

Lastly, the learned Trial Court observed there is absolutely no evidence as to how and in what manner the P.W. 1 was ill-treated and tortured by the accused persons, there was nothing on record to show that P.W.I being injured was even treated by any doctor or that she ever reported the alleged incident of torture to the police, there is no consistency and corroboration in the statement of P.W. 1

and P.W.6 on the point of the alleged torture. The witnesses who have been referred in the FIR as eye-witnesses to the alleged incident of torture were not examined, the prosecution sought to prove its case by the witnesses not referred in the chargesheet and there was no explanation for inordinate delay for lodging FIR.

8. However, in exercise of revisional jurisdiction the Sessions Court upset the order of acquittal of the petitioners and remanded the matter back for retrial on the following observations:

a) There is evidence of eye-witnesses, P.Ws. 2 and 3 relatives of the accused persons though not named in the FIR and evidence of P.W.6, the father of the victim regarding the demand of dowry and torture.

b) Non-explanation of delay in lodging FIR cannot be fatal for the prosecution where there is cogent evidence without having any vital contradictions.

c) The revision has been preferred by the de facto-complainant as no appeal has been preferred by the State, where prosecution has not examined the FIR named eye-witnesses and doctor.

d) The Revisional Court is to see whether there is miscarriage of justice and whether acquittal was unmerited.

e) There is evidence of relatives of both accused and the de facto-complainant.

f) The relationship is not a factor to affect credibility of a witness and falsity of a particular witness will not ruin it from beginning to end.

g) Failure to examine material witness is denial of fair trial.

h) In Best Bakery case reported in 2004 Calcutta Criminal Law Reporter (SC) 524, it has been held that in a defective conduct of Public Prosecutor the Court should not be mute spectator and duty of the Court to be active participation of doing justice. Section 311 of the Code of Criminal Procedure and Section 165 of the Evidence Act conferred vast and wide powers on presiding officer of Court to elicit all necessary materials by playing an active role in evidence collecting process.

In the case of defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure the truth is found, by having recourse to Section 311 instead of throwing hand in the air in despair.

i) FIR named eye-witnesses and doctor have not been examined by the I.O. and even examined by the prosecution u/s 311 of the Code of Criminal Procedure and also appeal has not been preferred by the prosecution, where there is evidence of eye-witnesses P.W.2 and P.W.3 though not FIR named and evidence of father corroborating the prosecution case.

j) It is true that prosecution will not get any opportunity to fill up its lacuna by

explaining the delay or so.

k) The Sessions Court set aside the order of acquittal on the grounds :

i) The vital FIR named witnesses and doctor not being examined relying on the decisions of Best Bakery case.

ii) The credibility of the eye-witnesses P.Ws. 2 and 3 and the father P.W.6 not being considered as per the decision reported in 2004 AIAR (Cr) SC 22.

iii) It is miscarriage of justice as the order of acquittal based on the ground of non-explanation of delay, disclosure of presence of P.Ws. 2 and 3 in the evidence of P.W. 1 is an afterthought and the evidence of P.W. 6, father is as exaggeration.

9. The law as regards to the power of the Revisional Court to interfere with an order of acquittal is well-settled by catena of decisions of the Hon"ble Apex Court. In the case of D. Stephen v. Nosibola reported in 1951 CLJ 510, a Bench comprising of 4 Judges of the Hon"ble Supreme Court authoritatively decided the said point and the law laid down therein still hold the field, although in plethora of cases the same point came up for consideration before the Apex Court. According to the said decisions:

The revisional jurisdiction conferred on the High Court u/s 439, Cr. PC, is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal against which the State has a right of appeal u/s 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 ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record.

Subsequently, in the case of K. Chinnaswamy Reddy v. State of A.P. and Ors. reported in 1963(1) Criminal Law Journal 8, a three-Judges Bench of the Hon"ble Apex Court held:

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 thought fit to appeal but this jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defects 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 Section 439 forbids a High Court from converting a exceptional cases enumerated above, but it cannot convert an order of acquittal 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 re-trial, 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. It is not possible to lay down the criteria for

determining such exceptional cases which would cover all contingencies. Some cases of this kind however may be indicated, which would 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 Court has wrongly held evidence which was admitted by the Trial Court to be inadmissible, or where material evidence has been overlooked either by the Trial Court or by the Appeal Court, or where the acquittal is based on a compounding of the 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 and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4).

Thereafter in several other cases the same point fails for consideration before the Hon"ble Supreme Court, to avoid prolixity, in my view it would be sufficient if this decision of Vimal Singh v. Khuman Singh reported in 1998 SCC 1574, be relied and referred to in addition to the aforesaid decisions referred herein above. In the said decision Hon"ble Apex Court answered the question relying on the decision of Chinnaswamy Reddy (supra) and held as follows:

Coming to the ambit of power of High Court u/s 401 of the Code, the High Court in its revisional power does not ordinarily interfere with judgments of acquittal passed by the Trial Court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the Trial Court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the Trial Court has no jurisdiction to try the case or where the Trial Court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue have been overlooked. These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 401 mandates that the High Court shall not convert a finding of acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction. No doubt, the High Court in exercise of its revisional power can set aside an order of acquittal if it comes within the ambit into an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial. In fact, Sub-section (3) of Section 401 of the Code forbids the High Court in converting the order of acquittal into one of conviction. In view of the limitation on the revisional power of the High Court, the High Court in the present case committed manifest illegality in convicting the appellant u/s 304, Part I and sentencing him to seven years" rigorous imprisonment after setting aside the order of acquittal.

10. Now from the position of law as settled by the Hon''ble Apex Court in the aforesaid decisions, it is above all controversy that the scope of the Court to interfere with an order of acquittal in exercise of its revisional power is very limited and is not as wide as in case of appeal and unless there has been manifest error of law or procedure or unless it is found the Trial Court has illegally shut out the evidence which otherwise to have been considered or where the material evidence which clinches the issue have been overlooked, the interference by the Court against such order of acquittal is completely uncalled for.

It is also a settled position that the order of acquittal cannot be reversed by taking a different view from that of the Trial Court upon re-appreciation of the evidence, which has already been considered by the Trial Court.

11. I have given my anxious consideration to the findings of the Revisional Court on the basis of which the order of acquittal has been reversed. I, however, do not find that while interfering with the order of acquittal the Revisional Court has come to a finding that the Trial Court has shut out any evidence which otherwise ought to have been considered or the material evidence which clinches the issue have been overlooked. The Revisional Court has also not come to a conclusion that any of the ground on which the order of acquittal is based is otherwise perverse, unreasonable or without any foundation. On the contrary, I found that the Revisional Court re-appreciated the evidence on record and took a different view, may be more acceptable, than that of the Trial Court and set aside the order of acquittal, which of course is not legally permissible.

I have gone through the evidence on record for the limited purpose to see whether any material evidence which clinches the issue have been overlooked or the findings of the Trial Court has the foundation or not and upon such consideration I am fully satisfied that in the instant case the learned Trial Court had not overlooked any material evidence which clinches the issue and its findings are well founded. In my view none of the findings of the Trial Court either unreasonable or perverse.

12. The Revisional Court heavily relied on the decision of a two-Judges Bench of the Apex Court in the case of *Zahira Habibulla H. Sheikh v. State of Gujrat* reported in 2004 Calcutta Criminal Law Reporter 524, commonly known as Best Bakery case and held the Trial Court ought to have take necessary steps for examination of the witnesses named in the FIR and the doctors u/s 311 of the Code of Criminal Procedure. It be noted that that Apex Court in the case of *Satyajit Banerjee v. State of West Bengal* reported in 2005 SCC 276, in paragraphs 25 and 26 held as follows:

Since strong reliance has been placed on Best Bakery case (Gujrat Riots case) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convicted that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a

farce. The witnesses were terrified and intimidated to keep them away from the Court. It is in the aforesaid extraordinary circumstances that the Court not only directed a de novo trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Re-trial was directed to be held out of the State of Gujarat.(Para 25)

The law laid down in Best Bakery case in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for re-trial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case the first trial was found to be a farce and is described as "mock trial." Therefore, the direction for re-trial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in Best Bakery case.(Para 26)

Apart from that in the instant case in hand during the trial the prosecution taking recourse to Section 311 of the Code of Criminal Procedure examined P.W.6 Anauddin Ahamed, the father of the victim wife, but reason best known to the prosecution no attempt has been made to examine the other FIR named witnesses or the doctor thereunder. The doctors were not even examined u/s 161 of the Code during the investigation. In my view, in such circumstances a presumption u/s 114(g) of the Evidence Act is very much available in favour of the defence and sending the matter back for retrial with the opportunity to the prosecution to examine witnesses referred in chargesheet or not would certainly provide an opportunity to the prosecution to fill up its lacuna.

In the case of T.N. Dhakkal v. James Basnett reported in 2002 SCC 1066, a three Judges Bench of the Apex Court observed:

There was no evidence before the Trial Court on the basis of which the appellant could have been linked with the alleged offence. The Trial Court was, thus, justified on the basis of the material before it, to record an order of acquittal. The High Court in its order did not find the order of the Trial Court to be suffering from any perversity or unreasonableness. Under the circumstances, the High Court ought not to have interfered with the order of acquittal and ordered a re-trial for the purpose of examining the two victims u/s 311 Cr. PC, even though their statements had not been recorded even u/s 161 Cr. PC by the Investigating Officer to fill in the lacuna in the prosecution case.

13. Having regard to the materials on record, I am of the opinion that the Revisional Court has exceeded its jurisdiction while interfering with the order of acquittal of the petitioners and thus same cannot be sustained. Hence, the impugned order whereby order of acquittal of the petitioners has been reversed by the Revisional Court is set aside and order of acquittal passed in favour of the petitioners by the Trial Court stands restored.

14. The application stands allowed.

15. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.