

(1988) 09 PAT CK 0029

In the Patna High Court

Case No : Criminal Revision No. 864 of 1995 with Criminal Revision No. 988 of 1985

Ayodhya Rai and anr

APPELLANT

Vs

The State of Bihar
 Prabhu Rai and 4 Ors Vs Ashok Kumar

RESPONDENT

Date of Decision : 22-09-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 354(3), 360, 361, 397
Penal Code, 1860 (IPC) — Section 147, 148, 323, 324, 325

Citation : (1989) PLJR 304

Hon'ble Judges : B. Prasad, J

Bench : Single Bench

Advocate : Ashwini Kumar Sinha, for the Appellant; Shashi Anugrah Narayan, Indu Sinha for the State, for the Respondent

Final Decision : Allowed

Judgement

B. Prasad, J.—These two applications in revision under sections 397 and 401 of the Code of Criminal Procedure, 1973 (hereinafter called the "Code") are directed against the judgment passed in Criminal Appeal No. 294/6 of 1982/1985 by Shri Sohailur Rahman, 9th Additional Sessions Judge, Patna dismissing the appeal and confirming, the judgment of conviction passed in Case No. 353(c) of 1977/T.R. No. 39 of 1982 by Satyender Pratap Narain Sahi, Judicial Magistrate, 1st Class, Danapur, by which the learned Magistrate had convicted the petitioners u/s 323 of the Indian Penal Code and had sentenced them to undergo rigorous imprisonment for one year each. He further convicted all the petitioners except the petitioner, Prabhu Rai, u/s 147 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for three months each. Sc far as petitioner, Prabhu Rai, is concerned, he was convicted u/s 148 of the Indian Feral Code and sentenced to undergo rigorous imprisonment for three months. All these sentences were ordered to run concurrently. Since these two revision applications arise out of the same judgment they have been heard together and are being

disposed of by the common judgment. One Jai Mangal Rai was the complainant in this case. However, after the institution of the complaint petition he died and therefore, he could not be examined as a prosecution witness. His case was that his house was situated in village Sahpur Daudpur in Dinapore Subdivision and was located towards west of the municipal lane running from south to north. The houses of the petitioners were also located in the vicinity west of this municipal lane. The petitioners had put up barbed wire facing to the western wall of their houses due to which this municipal land had narrowed down. The complainant and his family members found difficulty in passing through this municipal lane. On 3.7.1977 at 7.30 P.M. the complainant was coming back from Punaichak to his residence on a bicycle. The petitioners suddenly appeared before him. Petitioner, Ram Chandra Rai, ordered to assault on which petitioner, Prabhu Rai, who was armed with iron rod hit the complainant on his left leg. The complainant fell down on which petitioners, namely, Ayodhya Rai and Satya Narain Rai, who were armed with lathies assaulted him with the same. Witnesses came there and the complainant was taken into Dinapore hospital from where he was removed to P.M.C.H. He was kept in P.M.C.H. from 3.7.1977 to 3.9.1977. Thereafter he filed a complaint petition on the basis of which the cognizance was taken. The case was transferred to the court of the learned Magistrate named above who convicted the petitioners in the manner indicated above.

2. In these revision application, the petitioners have contended that no occurrence, as alleged by the prosecution, had taken place and they have been falsely implicated. There has been a great delay in lodging the complaint petition inasmuch as the alleged occurrence is said to have taken place on 3.7.1977 whereas the complaint petition was filed on 7.9.1977. This delay has been left unexplained. Only four P.Ws. have been examined, out of whom, P.W. 4 is the Doctor, Vijay Shanker Singh. At the time of his examination no injury report, X-ray report or any other document was available to him. Only interested witnesses have been examined in this case. The petitioners are respectable persons of the locality and, therefore, the learned trial court should have dealt with them under the provisions of section 360 of the Code. On these grounds, amongst others, it was contended that the judgment of conviction of the learned Magistrate as also the judgment passed by the learned Additional Sessions Judge be set aside and the petitioners be acquitted.

3. At the time of hearing, Shri Shashi Anugrah Narayan, learned counsel for the informant, in both the cases, has submitted that the present applications cannot be entertained under the provision of sections 397 and 401 of the Code inasmuch as it is beyond the scope of the revisional power of this Court. According to him there is no provision of second appeal and the points raised by the petitioners cannot be considered and decided in a criminal revision.

4. As against it on behalf of the petitioners, Shri Ashwini Kumar Sinha, learned counsel in both the cases, has submitted that the present applications, very well, come within the revisional jurisdiction of this Court and therefore, the points

raised in them can be heard and disposed of by this Court in exercise of its revisional power. Since the questions raised by the learned counsel for the informant goes to the jurisdiction of this Court this point is being taken up in the beginning and is being disposed of.

5. On behalf of the informant reliance has been placed on the case of State of Orissa Vs. Nakula Sahu and Others, . This was a case under the Code of Criminal Procedure, 1898 (hereinafter called the "Old Code"). Section 397 of the new Code corresponds to section 435 of the old Code. Similarly section 439 of the Old Code corresponds to section 401 of the new Code. In paragraph 9 of this judgment it has been observed as follows:

Although the revisional power of the High Court u/s 439 read with section 435 is as wide as the power of Court of appeal u/s 423 of the Code, it is now well settled that normally the jurisdiction of the High Court u/s 439 is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest "error on a point of law which has consequently resulted in-flagrant miscarriage of justice. Inspire of the wide language of section 435 , the High Court is not expected to act u/s 435 or section 439 if it is hearing an appeal.....The power being discretionary, it has to be exercised judiciously and not arbitrarily or lightly.

It was further observed in this judgment that where neither the trial court nor the Sessions Judge committed any error of fact or law in arriving at their conclusions and the High Court upset their concurrent findings in exercise of the revisional jurisdiction and acquitted the accused, the order of acquittal passed by the High Court was fit to be set aside.

6. The learned counsel appearing on behalf of the petitioners in these two applications has not challenged this proposition of law. He has submitted that obviously the jurisdiction of this Court while exercising its revisional powers, is limited and circumscribed. He has, however tried to show that the present case is clearly within the revisional powers of this Court distinguishable from the facts of the aforesaid decision. In support of his contention he has referred to the judgment of the learned Additional Sessions Judge confirming the judgment of conviction passed by the learned trial court.

7. I have carefully gone through the judgment dated 5.10.1985 of Shri Sohailur Rahman, 9th Additional Sessions Judge, Patna. Referring to the injuries of the complainant in paragraph 8 of his judgment he has stated that the complainant was injured and brutally assaulted and this is proved by doctor (P.W. 4). Unfortunately, the evidence of the doctor has not been discussed by the learned Additional Sessions Judge. A close scrutiny of his evidence shows that one Jai Mangal Rai was referred to P.M.C.H. on 3.7.1977 and he was admitted there. P.W. 4 has proved Exts. 1 and 2. Ext. 2 is the discharge slip showing that a person of this name was admitted in the hospital on 4.7.1977 and was discharged therefrom on 3.9.1977. Ext. 1, however, makes interesting reading.

On its basis the prosecution has contended that the patient (the complainant) was referred from Danapur Sub divisional Hospital to P.M.C.H. on 3.7.1977 since he was in precarious condition. Ext. 1 is, however, dated 3.10.1977 and not 3.7.1977. It is not clear under what circumstances Ext. 1 was issued. Moreover, there is nothing in Exts. 1 and 2 to show that the patient in question was referred from Danapur Hospital to P.M.C.H. In any view of the matter, Ext. 1 does not fit in with the case of the prosecution. So far as P.W. 4 Doctor, Vijay Shanker Singh, is concerned it appears that he has simply proved Exts. 1, 2 and 3. Ext. 3 is also dated 3.9.1977. From these exhibits it however, does not appear that at any stage P.W. 4 has ever examined the complainant. In spite of it the learned lower appellate court has mentioned in paragraph 8 of his judgment that the fact that the complainant was brutally assaulted has been proved by P.W. 4. It is surprising to note that a Senior Officer of the rank of the Additional Sessions Judge has dealt with the evidence of P.W. 4 as also with the case of the parties in a cavalier manner without making any attempt to scrutinise the evidence of P.W. 4 which was on record.

8. Similarly from paragraph 9 of his judgment it appears that it was contended before him on behalf of the appellants that the previous information with respect to this occurrence was given to the police station but the same was not brought on the record and that its non-production will lead to adverse inference. In this paragraph the learned lower appellate court has conceded that it is a lacuna in the case of the prosecution but has proceeded to observe, without assigning any reason, that in his opinion on this score the prosecution case cannot be disbelieved. It is wellknown that in a criminal case the earliest information with respect to the occurrence, given to the authorities is of a great importance and if the same is at variance from the subsequent information, given to the authorities, it speaks a volume against the prosecution case and creates reasonable doubts in the same. In the present case it appears that the police was informed with respect to the alleged occurrence and the information lodged at the police station was not produced before the learned trial Court. However, the learned Addl. Sessions Judge has brushed aside, this fact even when his attention was drawn to it and a decision was cited before him (1970 P.L.J.R. 172). He has simply stated that in his opinion, on this score, the prosecution case cannot be disbelieved. He has not assigned any reason for the same. He has devoted only paragraph nos. 8 and 9 to the consideration of the whole case of the parties with respect to the alleged occurrence. From his discussions it appears that he has not fully applied his mind to the facts and circumstances of the case and has dealt with it in the most cavalier manner leading to miscarriage of justice. It is not expected from the officer of the rank of the Additional Sessions Judge to deal with the facts of the case in this manner and to make misstatement about the medical evidence on the record. It appears that under these circumstances the judgment of the lower appellate court suffers from many defects and it is not one of those cases in which the judgment of the lower appellate court was free from any defect as was held to be in the case mentioned

above. Therefore clearly the revisional jurisdiction of this Court was attracted since the lower appellate court has committed errors of facts as well as law in arriving at the conclusion and in dismissing appeal.

9. On behalf of the informant reliance has also been placed on the case of Puthumma vs. Muhammad (1986) B.B.C.J. (S.C.) 61. In this case the learned Magistrate held u/s 125 of the Code that the child was illegitimate but granted maintenance. The High Court in revision re-appraised the evidence and disallowed maintenance granted to the child. It was held by the Hon''ble Supreme Court that the learned Judge of the High Court committed an error in making re-assessment of the evidence and coming to the finding that the child in question was not the illegitimate child of the respondent. It was further held that the High Court in its revisional jurisdiction was not justified in substituting its own views for that of the learned Magistrate on a question of fact. Relying on this decision it has been submitted that the findings of the fact by the two courts below should be accepted and this revisional court is not entitled to substitute the same by its own finding.

10. It may be mentioned here that it is well settled that a revisional court cannot substitute its own finding of the fact. The situation here is, however, different. I have discussed in detail the evidence on record in the earlier part of the judgment and have concluded that the judgments of the two courts below suffer from various defects of law and fact leading to miscarriage of justice as a result of which the revisional powers of this Court are attracted. I have not substituted my own views in place of the views of the two courts below so far as the findings of the fact are concerned. Therefore, this decision also is of no avail to the learned counsel appearing for the informant.

11. Drawing my attention to the judgment of the learned trial court Shri Ashwini Kumar Sinha, the learned counsel for the petitioners, has submitted that the learned Magistrate has not assigned any reason why he could not give benefit of section 360 of the Code to the petitioners. He has simply stated in paragraph 15 of his judgment that since accused had brutally assaulted the complainant and if they will be given benefit of section 360 of the Code they will certainly be emboldened. It was on this account that he was not in favour of extending the benefit of section 360 of the Code to the petitioners. Here again the consideration of this point and the findings of the learned trial court are fallacious. It is clear that neither the injury nor the X''ray report could be produced before the learned trial court. No paper was produced before him to show that the injured was referred to P.M.C.H. from Danapur hospital. The learned trial court has himself acquitted the accused of the charges under sections 324 and 325 of the Indian Ferial Code on the ground of non-production of the injury report of Danapur hospital, the X''ray report and X''ray plate. While on one hand he has acquitted the appellants of the charges under sections 324 and 325 of the Indian Penal Code, on the other hand, he has held that the accused had brutally assaulted the complaint. These two findings of the learned

Magistrate are self contradictory and, therefore, cannot be accepted. So far as the provisions of sections 360 are concerned, no special reason as required by section 361 of the Code has been given by the learned Magistrate why he did not extend the benefit of section 360 of the Code to the petitioners. He has simply stated that if this benefit is given to the petitioners they will certainly be emboldened since they had brutally assaulted the complainant. The allegation of brutality has not been proved and is neither here nor there. So far as the emboldenment is concerned, this cannot come within the definition of "special reason" mentioned in section 361 of the Code.

12. In this connection a reference may be made to the case of Bishnu Deo Shaw Vs. State of West Bengal, . In this case the expression "special reason" contemplated by section 354(3) and 361 of the Code came up for consideration before the Hon"ble Supreme Court. It has been observed by the Hon"ble Court in this judgment that if the Court refrains from dealing with an offender u/s 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training, or rehabilitation of youthful offenders, where the Court could have done so, section 361 , which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment "special reason" for not doing so. Section 361 thus creates a duty upon the Court to apply the provisions of section 360 wherever it is possible to do so and, to state "special reasons" if it does not do so. In the context of section 360 , "special reasons" contemplated by section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. In the present case no such thing has been done and the reason assigned by the learned Magistrate for not extending the benefit of section 360 of the Code to the petitioners or to any of them is not at all sound and it is not in terms of the provisions of sections 360 and 361 of the Code Hence on this ground also the judgment of the learned trial court suffers from a manifest defect. So far as the learned appellate court is concerned, it has not even taken this matter into consideration.

13. It has been submitted that there has been inordinate delay in lodging the complaint petition before the court. The alleged occurrence is said to have taken place on 3.7.77 where as the complaint petition was filed as late as on 7.9.77. In paragraph 7 of the complaint petition it has been simply stated that the complainant was hospitalised upto 3.9.77. In Ext. 2 also the date of discharge of the complainant has been shown to be 3.9.1977 However, it is not clear why any other member of the family of the complainant could not lodge the complaint petition before the court if really he was ill and confined to the hospital in P.M.C.H. It is also not clear why the police was not informed by him or by the hospital authorities to record the statements of the complainant. The whole thing appears to be shrouded in a mystery. And as such this is also a defect in the case of the prosecution. It is important to note here that the lower appellate court is the final court of fact, however, the learned Additional Sessions Judge in the

most cavalier manner has not even cared to discuss this delay in lodging the complaint petition before the court. He has not taken it into consideration and has not recorded any finding on this point.

14. Under these circumstances, I think that this is a fit case in which the revision applications should be allowed and the judgment of conviction passed by the learned trial court as well as the learned appellate court should be set aside. It is obvious that the learned courts below have not properly appreciated the evidence on record and the provisions of law involved. They have misdirected himself while coming to the conclusions. Under these circumstances, I have got no alternative but to allow these revision applications and to set aside the judgment of conviction of the learned trial court and also the judgment of the learned appellate court upholding the judgment of conviction. In the result, these revision applications are allowed and the judgment of conviction of the learned trial court as also the judgment of the lower appellate court confirming the judgment of conviction of the trial court are quashed. The petitioners are acquitted of the charges levelled against them. They are directed to set at liberty.