

(2013) 11 PAT CK 0043
In the Patna High Court
Case No : Criminal Revision No. 236 of 2003

Bindeshawar Sah

APPELLANT

Vs

State of Bihar, Siya Ram Chaudhary, Suresh Chaudhary and
Surendra Chaudhary

RESPONDENT

Date of Decision : 14-11-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401
Evidence Act, 1872 — Section 9

Citation : (2013) 11 PAT CK 0043

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : A.K. Singh, Tarun and Mr. Mr. Krishna Singh, for the Appellant;
Madan Kumar, Addl. P.P. Incharge, for the Respondent

Final Decision : Dismissed

Judgement

Aditya Kumar Trivedi, J.—In spite of having been noticed, the Opposite Parties No. 2 to 4 have failed to put their appearance and on account thereof only the petitioner as well as learned APP have been heard. Petitioner/informant has challenged the judgment dated 22.01.2003 passed by Sri A.N.K.N. Sinha, Presiding Officer, Additional Court No. 1, FTC- Vaishali at Hajipur in Sessions Trial No. 62/2005 acquitting the O.P. Nos. 2 to 4.

2. It has been submitted on behalf of the petitioner that the learned lower court had failed to comply with the mandatory provision of law while noticing the doctor who had conducted postmortem over the dead body of deceased, Yogendra Sah as well as the I.O. Because of the doctor and I.O. were not properly noticed on account thereof their presence for evidence was not secured and for their absence the prosecution was so blamed by the P.O. concerned while recording impugned judgment of acquittal. So, the judgment of acquittal rendered by the learned lower court is found to be suffering from gross procedural error and on account thereof, is fit to be set aside. It has further been

submitted that prosecution had adduced 11 witnesses in support of its case who have had thoroughly supported the case of the prosecution arraying the O.P. Nos. 2 to 4 to be author of injuries over the person of deceased Yogendra Sah, however did not find favour by the learned lower court which ought to have been.

3. It has been submitted that fair trial is the essence of criminal jurisprudence. It is a sound principle of law that an innocent should not be convicted but simultaneously the guilty should not be let off. By non procurement of appearance of I.O. as well as doctor, the learned lower court virtually left no other option than to acquit the O.P. Nos. 2 to 4. So submitted that it is a fit case wherein the matter should be remanded back for evidence of doctor as well as I.O. after setting aside the judgment of acquittal. Also referred 2003 Sahebrao Mohan Berad Vs. State of Maharashtra,

4. On the other hand, learned APP submitted that speedy trial is the mandate of law as well as happens to be constitutional right of the accused. It has further been submitted that the learned lower court had taken all possible efforts as permissible in the eye of law to procure attendance of I.O. as well as doctor but unfortunately, could not succeed. As there happens to be no procedural lapses, hence judgment impugned did not warrant interference.

5. From the L.C. record, it is evident that charge was framed on 14.07.97. The case was closed on 07.01.2003. During intervening period, it is evident that court had taken, pain to issue summon against the doctor as well as I.O. even at the changed address. Not only this, Dasti summon was also served upon the additional P.P. on his request but all have gone futile. That happens to be the exercise done by the court for the purpose of procurement of appearance of doctor and I.O.

6. The application of revisional power against a judgment of acquittal happens to be the subject matter of consideration times without number. In Venkatesan v. Rani as reported in 2013 (4) BLJ 73 (SC), it has been explained in following manner under paragraphs-6 and 7 after taking into account the earlier pronouncement having on this very score:--

6. To answer the questions that have arisen in the present case, as noticed at the very outset, the extent and ambit of the revisional jurisdiction of the High Court, particularly in the context of exercise thereof in respect of a judgment of acquittal, may be briefly noticed. The law in this regard is well settled by a catena of decisions of this Court. Illustratively, as also chronologically, the decisions rendered in Pakalapati Narayana Gajapathi Raju and Others Vs. Bonapalli Peda Appadu and Another, Akalu Ahir and Others Vs. Ramdeo Ram, Mahendra Pratap Singh Vs. Sarju Singh and Another, , K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, and Logendra Nath Jha and Others Vs. Shri Polailal Biswas, may be referred to. Specifically and for the purpose of a detailed illumination on the subject the contents of paras 8 and 10 of the judgment in the case of Akalu Ahir v. Ramdeo Ram (supra) may be usefully extracted below:--

8. This Court, however, by way of illustration, indicated the following categories of cases which would justify the High Court in interfering with a finding of acquittal in revision:--

(i) Where the trial Court has no jurisdiction to try the case, but has still acquitted the accused;

(ii) Where the trial Court has wrongly shut out evidence which the prosecution wished to produce;

(iii) Where the appellate Court has wrongly held the evidence which was admitted by the trial Court to be inadmissible;

(iv) Where the material evidence has been over-looked only (either?) by the trial Court or by the appellate Court; and

(v) Where the acquittal is based on the compounding of the offence which is invalid under the law.

These categories were, however, merely illustrative and it was clarified that other cases of similar nature can also be properly held to be of exceptional nature where the High Court can justifiably interfere with the order of acquittal.

10. No doubt, the appraisal of evidence by the trial Judge in the case in hand is not perfect or free from flaw and a Court of appeal may well have felt justified in disagreeing with its conclusion, but from this it does not follow that on revision by a private complainant, the High Court is entitled to re-appraise the evidence for itself as if it is acting as a Court of appeal and then order a re-trial. It is unfortunate that a serious offence inspired by rivalry and jealousy in the matter of election to the office of village Mukhia, should go unpunished. But that can scarcely be a valid ground for ignoring or for not strictly following the law as enunciated by this Court.

The observations in para 9 in the case of Vimal Singh Vs. Khuman Singh and Another, would also be apt for recapitulation and, therefore, are being extracted below.-

9. 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 of exceptional cases enumerated above, but it cannot convert an order of acquittal into an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial.

7. The above consideration would go to show that the revisional jurisdiction of the High Courts while examining an order of acquittal is extremely narrow and of ought to be exercised only in cases where the Trial Court had committed a manifest error of law or procedure or had overlooked and ignored relevant and material evidence thereby causing miscarriage of justice. Re-appreciation of evidence is an exercise that the High Court must refrain from while examining an order of acquittal in the exercise of its revisional jurisdiction under the Code. Needless to say, if within the limited parameters, interference of the High Court is justified the only course of action that can be adopted is to order a re-trial after setting aside the acquittal. As the language of Section 401 of the Code makes it amply clear there is no power vested in the High Court to convert a finding of acquittal into one of conviction.

7. After going through the aforesaid legal principle propounded by the Hon'ble Apex Court, it is apparent that the revisional court has not been identified as toothless rather in appropriate cases, where there happens to be glaring defect manifest from the judgment impugned, the revisional court could take notice thereof and revert the finding, however, in terms of Section 401 of the Cr.P.C. as no judgment of acquittal could be converted into conviction at the instance of private party.

8. So the basic feature for the purpose of attracting the application of revisional power is to be confined to the extent of having any sort of deficiency persisting on the record which could be found sufficient to nullify the conclusions so arrived at much less judgment of acquittal.

9. Now coming to the facts of the case, it is apparent that none is an eyewitness to the occurrence. The prosecution had examined altogether 11 PWs. The prosecution, as is evident from nature of evidence so adduced had, at one occasion, flashed it a case to be based upon circumstantial evidence while at the later stage, unsuccessfully tried to shift therefrom. Moreover, for better appreciation, there should be a glance of the prosecution case.

10. PW-11, the informant, Bindeshwar Sah gave his Fardbeyan on 09.12.1993 at 10.00 a.m. at the place of occurrence disclosing therein that on 08.12.93 at about 8.30 p.m. while he was going to Jandaha market over bicycle to purchase "shroud" on account of death of his neighbour, Bhajan Mahto and as soon as proceeded ahead of Manukhmara Pool lying west to Dih Karnauti Village, he had seen four persons engaged in grappling one person 10-15 feet south to the road.

The person who was being apprehended by them was saying, "leave him" and from the voice, he identified him as Yogendra Sah, his nephew. During midst thereof, one of the four persons who were engaged in apprehending had disclosed, "Suresh, be quick". He identified the voice of Surendra Choudhary, his co-villager. Another one said, "he be shot at". This voice happens to be that of Suresh Choudhary of Village-Karnauti. Soon thereafter, followed two firing sound and then he understood that Yogendra Sah has been shot at by Surendra Choudhary, Suresh Choudhary along with their associates. Thereafter, he perceived one person coming towards him and on account thereof, he returned back to his house and informed his brother Shital Sah who had gone to the place of Sarvesh Singh, Narendra Singh. After some time Sarvesh Singh, Narendra Singh, Ramayan, Sarju along with co-villagers have gone to the place of occurrence where they found Yogendra Sah in pool of blood and was dead. His bicycle was lying there. His Hawai chappal was also there. Because it was too late, therefore, they remained at the place of occurrence awaiting for morning. At that very moment, one Jaikant Mishra had disclosed that while he was returning from Jandaha Market, he had seen Suresh, Siyaram along with two unknown persons sitting at the southern flank of the road near the place of occurrence. On query, they had said that they were waiting for a person. One Raj Kishore Sah of village-Karnauti had also disclosed that about 9.00 p.m. while he was returning from Jandaha Market and reached 200 yards west to brick kiln of Narendra Sah, he had seen Suresh and Surendra proceeding towards western direction. It has further been disclosed that there happens to be cases pending in between Yogendra Sah and Suresh for the last 6-7 years and for that Suresh had threatened his nephew to withdraw the litigation otherwise will have to face the consequences.

11. The occurrence is of the month of December. The time is at about 8.30 p.m.. The place is the chaur (lonely place). Although none of the prosecution witnesses have disclosed on their own nor been cross-examined whether there was fog but certainly being a month of December, a chilly winter at such remote area, it cannot be ruled out. None of the prosecution witnesses had said that deceased Yogendra was away from his house on the fateful day, nor any one had claimed presence of Yogendra near about P.O. since before the occurrence.

12. Then comes the theory of identification. Three persons have got their primacy, the first one being the informant, PW-11 who had claimed identification by voice, the second one, Jaikant Mishra, PW-6 who had claimed presence of Suresh Choudhary and Siyaram Choudhary along with two unknown persons by the side of the road near the place of occurrence and the third one, Raj Kishore Sah who have not been examined during course of trial.

13. The basic principle of cases based on circumstantial evidence happens to be that the links of the chain should be so interlinked which could lead the only conclusion, the only hypothesis regarding guilt of the accused. If any link is found missing, then in that event, the cases based upon circumstantial evidence

have to fall. Apart from having the fact suggested under Fardbeyan, it is also apparent from the Ext-A, B made on behalf of O.P. Nos. 2 to 4 that parties are on litigating terms. Enmity is a double edged sword. It can be a ground for false implication while it can also be a ground for commission of occurrence. However, when the case is based upon circumstantial evidence, motive plays an important role.

14. In the case of Sujit Biswas Vs. State of Assam, , it has been explained under paragraphs-9 and 10 which are as follows:--

9. In M.G. Agarwal Vs. State of Maharashtra, , this Court held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused, and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

Similarly, in Sharad Birdhichand Sarda Vs. State of Maharashtra,), this Court held as under:

Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence.

10. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

15. The prosecution had tried to inter-link the O.P. No. 2 to 4 with the commission of the occurrence and for that the prosecution by examining PW-6 had tried to place the relevance of presence of O.P. Nos. 2 to 4 near about place of occurrence while he was returning from Jandaha market at about 8.00 p.m.. Really, that happens to be the matter of concern because of the fact that PW-6 happens to be co-villager of informant, PW-11 and he had not disclosed nor

PW-11 had disclosed that they had met during midst of way. Not only this, this PW-6 had not disclosed regarding death of Bhajan Sah and to purchase shroud, PW-11 was going to Jandaha market. Not only PW-6 rather one of the witnesses had disclosed the fact that Bhajan Sah died in the night. As such, evidence of PW-11 that he was going to Jandaha market for purchasing shroud on account of death of Bhajan Sah happens to be suspicious one. The other circumstances happens to be while PW-11 was going to Jandaha Bazar, he saw the scuffle which was going on amongst the persons who were 10 to 15 yards away from the road. When he had seen the scuffle then how he failed to identify his nephew and claimed his identification as well as identification of other co-accused by voice. At the present moment, it is worth to be mentioned that neither PW-6 nor PW-11 has disclosed that they have got any source of light. Furthermore, during course of grappling when informant identified the voice that being of Yogendra and Surendra, Suresh, why not he called them and by such action shown his presence. Furthermore, from the evidence of PWs it is apparent that he had claimed identification of only Surendra and Siyaram and not Suresh, who was co-villager. The time gap of presence of PW-6 as well as PW-11 happens to be so approximate that one should not rule out their meeting had there been presence in a manner as suggested by them.

16. Identification by voice is very weak kind of evidence and it cannot be considered as solid plank in favour of prosecution as has been held in Mohan Singh Vs. State of Bihar, under para-32 which is as follows:--

32. However, on the legal issue one thing is clear that identification by voice has to be considered by this Court carefully and on this aspect some guidelines have been laid down by this Court in the case of Kirpal Singh Vs. State of Uttar Pradesh, . In dealing with the question of voice identification, construing the provisions of Section 9 of the Indian Evidence Act, this Court held:--

...It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person recognized may be some-what risky in a criminal trial. But the appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop....

The evidence of PW-11 is lacking on this score. Though the status of parties are of co-villager but informant; as deposed being in service always remained outside. Hence, prosecution was requested to disclose that before the occurrence, PW-11 had occasion to hear voice of Surendra and Suresh.

17. Having analytical approach of the evidence available on the record in consonance with the reason assigned in the judgment impugned it is found that the learned lower court had properly dealt with and minutely gone through the evidence adduced on behalf of prosecution and even after examination of doctor and I.O., the unfortunate fate of prosecution would not found changed as death

of deceased at the alleged P.O. is found properly placed.

18. The decisions so cited and relied upon by the learned counsel for the petitioner as referred above happens to be of no help because of the fact that the aforesaid decisions did not refer with the factual as well as legal points being involved in this revision petition. Petition is found to be devoid of merit and is, accordingly, dismissed.