
(2014) 04 CHH CK 0027
In the Chhattisgarh High Court
Case No : Criminal Revision No. 94 of 2014

Harishankar Prasad Sahu and Others	Vs	APPELLANT
State of Chhattisgarh		RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 34, 386
Penal Code, 1860 (IPC) — Section 34, 498-A

Citation : (2014) 3 CGLJ 300

Hon'ble Judges : P. Sam Koshy, J

Bench : Single Bench

Advocate : Vivek Sharma, Advocate for the Appellant; Arvind Shukla, Panel Lawyer for Respondent-State, Advocate for the Respondent

Judgement

P. Sam Koshy, J.

1. By way of instant Criminal Revision, the applicants have challenged the judgment dated 4.1.2014 passed by Sessions Judge, Korba, in Criminal Appeal No. 38/2013.

2. The applicants are aggrieved by the judgment dated 4.1.2014, to the extent of the Sessions Judge, while passing the impugned judgment after setting aside the judgment of conviction and order of sentence dated 25.6.2013 passed by Chief Judicial Magistrate, Korba in Criminal Case No. 1195/2010, has remitted back the matter for retrial after taking a fresh evidence of certain witnesses who were not cited as a witness by the prosecution either in the charge-sheet or at any point of time during the evidence before the trial Court.

3. Brief facts leading to the instant case are that in the year 2003, marriage of the complainant (Smt. Dhaneshwari Sahu) was solemnized with applicant No. 1 (Harishankar Prasad Sahu). According to the complainant, immediately after about 2 years of marriage, applicant No. 1 (husband of the complainant) and applicants No. 2 & 3 (brother-in-law and father-in-law of the complainant,

respectively) started ill-treating and harassing the complainant and also subjected her to cruelty on account of demand of dowry. As per the complainant, on 1.8.2010, applicant No. 1 on account of non-fulfilling the demand of dowry assaulted the complainant with fist-blows as a result of which she received injuries on her ear and eye. Thereafter, it is alleged that applicants No. 2 & 3 were also called on the said date and on their coming, they had also started physically and mentally torturing the complainant and also used to abusive language.

4. This incident of 1.8.2010 was reported to the Police Outpost Ramur, by the complainant (PW-2), vide Ex. P-2. On the matter being reported to the police, the police had sent the complainant for medical examination. Thereafter, upon the investigation being completed, a charge-sheet was filed against the accused applicants for offence punishable u/s 498-A read with Section 34 of IPC and the matter was put to trial before the Court of Chief Judicial Magistrate, Korba, in Criminal Case No. 1195/2010.

5. The Chief Judicial Magistrate, Korba, after completion of the trial, found the applicants to be guilty of having committed the offence punishable u/s 498-A read with Section 34 of IPC. Accordingly, the trial Court, vide its judgment of conviction and order of sentence dated 25.6.2013, convicted the applicants for the offence punishable u/s 498-A read with Section 34 of IPC and sentenced them to undergo R.I. for one year and fine of Rs. 500/- and in default of payment of fine, to suffer additional S.I. for one month.

6. This judgment dated 25.6.2013 was challenged by the accused applicants before the Sessions Judge, Korba, in Criminal Appeal No. 38/2013.

7. The Sessions Judge, Korba, while hearing the appeal of the accused applicants, without entering into the merits of the case, found that the trial Court has not acted properly to the extent that the prosecution has not examined a Doctor to establish the alleged injuries sustained by the complainant on 1.8.2010 and that the trial Court also did not find it fit to call for the Doctor as a witness to give his evidence and that the trial Court should have called the Doctor to prove the medical report which was a part of the charge-sheet. The Sessions Judge has, observing the provisions of Section 311 of Cr.P.C., said that the Court had all the powers to summon the material witness and examine a person in the event if the Court would find that the evidence of such witness is essential for the just decision of the case. For the said reason, exercising of powers conferred upon the appellate Court u/s 386(B)(1) of Cr.P.C., the Sessions Judge, Korba, vide its judgment dated 4.1.2014, remitted the matter back to the trial Court, after setting aside the judgment of conviction and order of sentence dated 25.6.2013, with a direction that the trial Court should call for Dr. Arun Tiwari, the ENT Specialist and also the Doctor who had examined the complainant on 1.8.2010 and to decide the case afresh in accordance with law on its own merits.

8. It is this judgment dated 4.1.2014 passed by the Sessions Judge, Korba,

which has been challenged by the accused applicants in the instant Criminal Revision.

9. Learned counsel for the applicants has contended that the grievance of the applicants is primarily the fact that when the trial Court had already convicted the applicants for the offence charged and it was the appeal against the conviction of the applicants, then under such circumstances the appellate Court could not have remitted the matter back to the trial Court. It was further contended by the learned counsel for the applicants that the Sessions Court, while exercising the appellate jurisdiction, ought to have considered the fact that both these persons who have been directed to be examined by the appellate Court were not cited as a witness in the charge-sheet by the prosecution nor has the prosecution or for that matter the trial Court found it necessary for examining these witnesses as a material witness for the purpose of establishing the charge against the applicants for the offence punishable u/s 498-A, 34 of IPC. It was also the contention of the learned counsel for the applicants that the powers conferred upon the appellate Court u/s 386(B)(1) of Cr.P.C., does not contemplate or confer the power to remit/remand the case to the trial Court for filling up the lacuna on the part of the prosecution. Learned counsel for the applicants has further contended that from the very fact that the applicants have been charged only for the offence punishable u/s 498-A of IPC and that the medical examination report of the complainant being part of the challan, all along the prosecution as well as the Court below did not find that the Doctor who had examined the complainant on 1.8.2010 and the ENT Specialist Doctor, were the material witnesses to be examined so as to establish the case u/s 498-A of IPC. It was also contended by the learned counsel for the applicants that the Court below i.e. the Sessions Court ought to have appreciated the fact that the charge leveled against the applicants was only for offence u/s 498-A of IPC and that cruelty is an integral part of the offence u/s 498-A of IPC and that the medical evidence which the Sessions Court intends to get proved would not be a sole determining factor for determining and making out a case u/s 498-A of IPC. Accordingly, the learned counsel for the applicants has prayed that the impugned judgment being illegal, improper and unjustified, deserves to be set aside.

10. Per contra, Mr. Shukla, learned counsel for the State, has submitted that on perusal of the impugned judgment, it is evidently clear that the judgment passed by the trial Court is well within the competence and power u/s 386 of Cr.P.C. conferred upon the appellate Court while hearing an appeal. It is also contended by the learned counsel for the State that even otherwise the Court has all the powers to call for the witnesses, u/s 311 of Cr.P.C., and that if such a power so conferred upon the Court has been exercised upon while hearing an appeal, it cannot be said to be an order contrary to law or illegal. Therefore, the learned counsel for the State, has prayed for rejection of the instant Criminal Revision.

11. It is worthwhile at this juncture to refer a decision of Hon'ble Supreme Court made in the case Satyajit Banerjee and Others Vs. State of West Bengal and

Others, , wherein the Hon''ble Supreme Court relying upon its earlier decision in Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, , has held in para 26, that direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence.

12. When the said judgment of Hon''ble Supreme Court is compared with the facts of the instant case, it would reveal that the present is a case where it was an appeal against the judgment of conviction and order of sentence which was under challenge at the behest of the convicted persons and that the appellate Court i.e. the Sessions Judge, Korba, ought to have considered the merits of the appeal in the light of the evidences which have come before the trial Court. The appellate Court could not have assumed a role of a trial Court.

13. From the said judgment of Hon''ble Supreme Court, it is evidently clear that the Court could have remanded the matter only in very exceptional case where it is found that there is a defect of procedure or a manifest error of law resulting a flagrant miscarriage of justice is taken place in the course of the trial Court deciding the case. However, in the instant case, the trial Court in spite of the said alleged deficiency of not examining the Doctor, yet, has reached to the conclusion that the case of the prosecution has been proved and the charge against the applicants for the offence u/s 498-A read with Section 34 of IPC has been established. Thus, it cannot be said that there was a defect of procedure on the part of the trial Court while conducting the trial or that there has been a manifest error of law in the course of conducting the trial Court on the part of the prosecution as well as the trial Court.

14. Recently also the Hon''ble Supreme Court in the case of Mary Pappa Jebamani Vs. Ganesan and Others, has reiterated the fact that only in an extraordinary situation when the first trial is found to be a farce and mock trial could justify the direction of the appellate Court for retrial.

15. Thus, from the two decisions referred to herein above and the judgment referred to by the Hon''ble Supreme Court while passing these two judgments, it is evidently clear that the appellate Court could not have and does not have the power to remand the case for retrial so as to fill up the lacuna on the part of the prosecution and the trial Court, more particularly, when the judgment under challenge before the appellate Court was against the conviction and sentence. Moreover, the complainant is also not aggrieved by the decision of the trial Court in any manner as the decision of the trial Court has not been challenged by the complainant.

16. Thus, for the foregoing reasons, the Criminal Revision is allowed. The impugned judgment dated 4.1.2014 passed by Sessions Judge, Korba, in Criminal Appeal No. 38/2013 is set-aside and the matter is remitted back to the appellate Court for deciding the appeal preferred by the accused applicants, on its own merits.