
(2014) 10 CAL CK 0001
In the Calcutta High Court
Case No : C.R.A. No. 531 of 2008

Jagannath Biswas and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 392, 403, 429
Penal Code, 1860 (IPC) — Section 120A, 120B, 161, 165A, 218
Prevention of Corruption Act, 1988 — Section 5(1)(a), 5(2)

Citation : (2014) 4 CALLT 575

Hon'ble Judges : Asim Kumar Roy, J

Bench : Single Bench

Advocate : Souvik Mitter and Ayan Basu, Advocates for the Appellant;
Madhusudan Sur, Advocates for the Respondent

Judgement

Asim Kumar Roy, J.—In a Sessions Trial held before the learned Additional District and Sessions Judge, Fast Track - 3rd Court, Barrackpore, 24 Parganas (N) total 8 persons viz. Jagannath Biswas, Chitta Sarkar, Tapas Biswas, Robin Ray, Sripati Majumder, Ashu Bairagi, Nitya Biswas and Swapan Biswas were convicted under section 341/326/307 read with section 34 I.P.C. and were sentenced to suffer R.I. for 1 month and to pay fine of Rs. 500/- in default to suffer R.I. for 10 days for their conviction under 341/34 I.P.C., to suffer R.I. for 10 years and to pay fine of Rs. 500/- in default to suffer R.I for 1 year under section 326/34 I.P.C, to suffer R.I. for 10 years and to pay fine of Rs. 500/- in default to suffer R.I for 1 year under section 307/34 IPC. Against the aforesaid order of conviction and sentence all the aforesaid 8 convicts preferred an appeal being Criminal Appeal No. 531 of 2008 before this High Court. The said appeal was then came up for hearing before a Division Bench comprising of Hon''ble Justice Girish Chandra Gupta and Hon''ble Justice Indira Banerjee. After hearing of the appeal while Justice Girish Chandra Gupta was of the opinion that except appellant Jagannath Biswas, the prosecution was not able to establish the charges against the remaining 7, and while upholding the order of conviction and sentence

passed against the appellant Jagannath Biswas acquitted the remaining 7 convicts, whereas the Hon"ble Justice Indira Banerjee was of the opinion that the prosecution has failed to prove charges against all the 8 appellants and they were entitled to acquittal. In view of such difference of opinion the appeal has now been referred before this Court under section 392 of the Code of Criminal Procedure.

2. Mr. Ashis Sanyal, the learned Counsel appearing on behalf of the 7 appellants, in respect of whom both the learned Judges of the Division Bench were consensus in their opinion that against them no charge has been established for which they were convicted, vehemently contended that in this reference under section 392 Cr.P.C. this court is devoid of any jurisdiction to reopen their case. He further contended both the learned Judges of the Division Bench having concurred that those 7 appellants were entitled to acquittal and thus allowed the appeal, in this reference it would not be permissible for this Court to form any opinion as to the correctness of the same. In this regard he relied on a decision of the Hon"ble Apex Court in the Case of Bhagat Ram Vs. State of Rajasthan, , the background of facts of that case, were as follows :

"Two accuseds Bhagat Ram and Ram Swaroop were tried before the Special Judge, Ganganagar for offences under section 120B IPC for conspiring to extort a bribe of Rs. 2000/- from one Niranjan Das. In addition to that Bhagat Ram was also charged under section 161/218/347/389 IPC and under section 5(1)(a) read with section 5(2) of Prevention of Corruption Act, while Ram Swaroop was additionally charged under section 165A IPC. Both of them were acquitted in the trial, when the State of Rajasthan preferred an appeal before the High Court challenging their acquittal. The appeal was heard by a Division Bench and same was dismissed, so far that relates to the order of acquittal of Ram Swaroop in respect of all offences. The Division Bench also dismissed the said appeal against the acquittal of Bhagat Ram, so far that relates to the offences punishable under section 347/218/389/120B IPC. However, there was a difference of opinion between the learned Judges on the point as to whether the acquittal of Bhagat Ram for offences under section 161 IPC and under section 5(1)(a) of the Prevention of Corruption Act should be maintained or not. Accordingly, the said appeal was referred under section 429 Cr.PC, 1898 (new section 392 Cr.PC, 1973) before a Single Judge. While one of the learned Judges was of the opinion that the order of acquittal of Bhagat Ram for offences under section 161 IPC and section 5(1)(a) of the Prevention of Corruption Act should be maintained and the appeal be dismissed, the other learned Judge opined that Bhagat Ram was guilty of both the offences. The learned Single Judge, before whom the said appeal was referred under section 429 Cr.PC, came to the conclusion, both Ram Swaroop and Bhagat Ram are guilty for the offence under section 120A IPC, punishable under section 120B IPC. However, the learned Single Judge in view of the decision of the Division Bench did not set aside the acquittal of Ram Swaroop but set aside the acquittal of Bhagat Ram for the offences under section 218/347/120B IPC and convicted him under section 218/347/161/120B IPC and

imposed the sentences. So far as, Ram Swaroop was concerned he did not interfere with the order of acquittal passed by the Division Bench. Then two separate Special Leave Petitions were filed before the Hon''ble Apex Court. One by Bhagat Ram challenging the order of conviction and sentence passed against him, another by the State challenging the order of acquittal passed in favour of Ram Swaroop. The Hon''ble Apex Court dismissed both the Special Leave Petition."

3. Mr. Sanyal in order to substantiate his argument that so far as the 7 appellants whom he was representing and were acquitted on a concurrent findings that their guilt was not established, cannot be reopened strenuously relied on paragraph 13 of the said decision which is reproduced below.

"In view of the fact that the State appeal against the acquittal of Bhagat Ram for offences under sections 120B, 218, 347 and 389 IPC had been dismissed by the Division Bench, it was, in our opinion, not permissible for the third judge to reopen the matter and convict Bhagat Ram for offences under sections 347, 389 and 120B IPC. The matter had been referred under section 429 of the Code of Criminal Procedure to Jagat Narayan, J. because there was a difference of opinion between Tyagi, J. and Lodha, J. regarding the correctness of the acquittal of Bhagat Ram for offenses under section 161 IPC and section 5(1)(a) of Prevention of Corruption Act. Jagat Narayan, J. could go only into this aspect of the matter and arrive at his conclusion. The present was not a case wherein the entire matter relating to the acquittal or conviction of Bhagat Ram had been left open because of a difference of opinion between the two judges. Had that been the position, the whole case relating to Bhagat Ram could legitimately be considered by Jagat Narayan, J. and he could have formed his own view of the matter regarding the correctness of the order of acquittal made by the trial judge in respect of Bhagat Ram. On the contrary, as mentioned earlier, an express order had been made by the Division Bench upholding the acquittal of Bhagat Ram for offenses under sections 120B, 218, 347 and 389 IPC and the State appeal in that respect had been dismissed. The above decision of the Division Bench was binding upon Jagat Narayan, J. and he was in error in convicting Bhagat Ram for offences under sections 120B, 218 and 347 IPC despite the order of the Division Bench. It was, in our opinion, not within the competence of the learned judge to reopen the matter and pass the above order of conviction in the face of the earlier order of the Division Bench whereby the order of acquittal of Bhagat Ram made by the trial judge in respect of the said three charges had been affirmed. The order of the Division Bench unless set aside in appeal to this Court, was binding and conclusive in all subsequent proceedings between the parties. The principle of res judicata is also applicable to criminal proceedings and it is not permissible in the subsequent stage of the same proceedings or in some other subsequent proceedings to convict a person for an offence in respect of which an order for his acquittal has already been recorded. The plea of autrefois acquit as a bar to prosecution embodied in section 403 of the Code of Criminal Procedure is based upon the above wholesome principle."

4. The judgement so relied by Mr. Sanyal was one of a Division Bench, comprising of two Judges, however, a three Judges Bench of the Apex Court in the case of Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P. reported in 2006 (1) SCC (Cri) 661 held otherwise. It was explicitly clear from the observation made in the aforesaid Judgment according to the Apex Court when an appeal is heard by the High Court before a bench of judges and they are divided in opinion, the appeal with their opinion, shall be laid before another Judge of that Court, and that Judge, after such hearing as he think fit, shall deliver his opinion and the judgment and order shall follow that opinion. In the said decision, relying on an earlier decision of the Apex Court in the case of Hethubhar v. Sate of Gujarat, reported in 1970 Criminal Law Journal 138, it was further held that..... whole case is to be dealt with by the third Judge and not merely the difference between the two Judges comprising the court of appeal and the third Judge was free to resolve the difference, as he thought fit. In the light of the ratio as laid down, in the Case of Radha Mohan Singh @ Lal Saheb and Ors (Supra), by a three Judges Bench of the Supreme Court, the submissions of Mr. Sanyal merits no consideration.

5. The relevant observation of the Apex Court in paragraph 8 in the case of Radha Mohan Singh @ Lal Saheb and Ors. (supra) is quoted below:-

"Dr. J.N. Dubey, learned Senior Counsel for A-4 and A-5 has submitted that there was a difference of opinion between the two learned judges who had heard the appeal and Hon. S.K. Agarwal, J. was of the opinion that the prosecution had failed to establish the guilt of the accused and they were entitled to be acquitted. In these circumstances, the learned third judge, to whom the appeal had been referred, should have leaned in favour of the view taken by Hon. S.K. Agarwal, J. as a rule of prudence and should not have differed from the findings recorded by His Lordship unless the same were perverse or there were strong and weighty reasons for doing so. We are unable to accept the contention raised. Section 392 Cr.P.C. lays down that when an appeal under chapter XXIX is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal with their opinions, shall be laid before another Judge of that Court, and Judge, after such hearing as he thinks fit, shall deliver his opinion and the judgement and order shall follow that opinion. In Babu and Others Vs. State of Uttar Pradesh, , Hidayatullah, J. (as His Lordship then was) speaking for the Constitution Bench held that Section 429 Code of Criminal Procedure, 1908 (corresponding to the section 392 Code of Criminal Procedure, 1973) contemplates that it is for the third judge to decide on what point he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he things fit. In Hethubha alias Jithuba Madhuba and Others Vs. The State of Gujarat, , it was held that the whole case is to be dealt with by the third judge and not merely the difference between the two judges comprising the Court of appeal and the third judge was free to resolve the difference as he though fit. In State of Andhra Pradesh Vs. P.T. Appaiah and Another, , there was a difference of opinion between two learned Judges of the High Court on the nature of the offence

committed by the accused. One learned Judge held that the accused did not intend to cause death and consequently the offence committed by him was culpable homicide not amounting to murder punishable under section 304 Part I IPC. The other learned Judge held that the offence committed by the accused fell under clause Thirdly of section 300 IPC and the accused was liable to be convicted under section 302 IPC. The third learned judge, after examination of entire evidence on record, came to the conclusion that the same was doubtful and suspicious in character and accordingly acquitted the accused. In appeal filed by the State, it was contended before this Court that it was not open to the learned third Judge to have acquitted the accused when both the learned Judges who heard the appeal initially were of unanimous opinion that the accused was guilty of having committed the offence and they had merely differed on the nature of offence committed by the accused. It was held that having regard to the language used in section 429 Code of Criminal Procedure, 1908, the third judge to whom the case was referred did not over step the limits of his jurisdiction in acquitting the accused merely because there was concurrent finding of both the judges composing the Division Bench that the accused was guilty of some offence or that the difference between the two judges of the Division Bench was confined to the nature of the offence only."

6. In this regard the observations of the Apex Court in Paragraph 24 and 25 in the case of State of U.P. Vs. Dan Singh and others, is also very relevant and quoted below.

"24. When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to section 392 of the Code of Criminal Procedure he may require the appeal to be reheard and decided by a larger bench of judges. This was an option which, under the proviso, was also open for any one of the two judges, namely, B.N. Katju and Rajeshwar Singh, JJ. to exercise, but they choose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinion of the third judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19th May, 1988. Even though the said order purports to relate only to ten out of thirty two accused the said order has to be read along with the earlier order of 15th April, 1987 and, in law, the effect would be that the order dated 19th May, 1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty two accused being convicted under section 325 read with section 34 IPC, while all the other accused were acquitted.

25. Coming to the merits of the case the appellant has contended that all the 28 respondents, in respect of whom the special leave has been granted, should have been convicted of the charges framed against them. It was submitted by learned counsel that there was no valid reason not to accept the testimony of the eight eye witnesses, seven of whom were injured. It was contended that the evidence on record clearly showed that there existed an unlawful assembly the common

object of which was to attack and kill the members of the marriage party who were scheduled castes. It is pursuant to this common object that the members of the unlawful assembly attacked the members of the marriage party which led to death of fourteen and injuries to seven. It was submitted that the said decision is contrary to the well established principles of law and no court could have, on the basis of the evidence on record, acquitted all the respondents of the charges framed against them."

7. At this Stage it may be noted Mr. Sanyal while contending as above has not argued on merit.

8. On the following findings, Girish Chandra Gupta, J. opined for acquittal of 7 convicts viz., Chitta Sarkar, Tapas Biswas, Robin Ray, Sripati Majumder, Ashu Bairagi, Nitya Biswas and Swapan Biswas and for upholding the conviction of the appellant Jagannath Biswas,

"(a) The incident took place in the broad daylight.

(b) The attack was made from in front of the victim.

(c) There was no difficulty for the victim to see the assailants.

(d) According to the PW/21 the victim disclosed that two or three assailants had attacked him. But the PW/21 presumably out of his anxiety to refer the patient to the appropriate hospital for proper treatment, did not record the statement of the victim for which the Doctor (PW 21) cannot be blamed. In the case of Bhargavan and Others Vs. State of Kerala, the following view was expressed in paragraph 20:

"So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly pointed out by the Courts below his primary duty is to treat the patient and not to find out by whom the injury was caused."

(e) The statement of the victim was recorded only by the P.W. 16 doctor Lipi Mondal, where 5 out of the 8 appellants were named.

(f) If we proceed on the basis that the figure given to the P.W.21 is the correct figure as regards the number of the assailants then we can safely proceed on the basis that at least three assailants had attacked the victim.

(g) From the statements of the victim recorded by the P.W.16, the I.O. (P.W.22) and the evidence of other witnesses it is clear that Jagannath Biswas the appellant No. 1 was named by almost each of the witnesses except by the P.W.18 whose evidence is not at all credible.

(h) As regards the complicity of the accused Jagannath, we have further assurance from the fact that P.W.6 deposed that after hearing a sound, he rushed towards the place of occurrence and saw the accused Jagannath escaping from the place of the occurrence. The P.W.3 brother of the victim deposed that he had ascertained from the victim that Jagannath and seven others had committed the

crime."

9. Whereas, Indira Banerjee, J. suspected as to whether FIR was actually lodged on June 22, 2005 because the concerned Magistrate put his initial on the FIR on June 24, 2005. At the same time, Indira Banerjee, J. gave much importance to the question of rivalry between the parties and considering the facts before the doctor P.W.21 Surajit Chattopadhyay the Medical Officer posted at Goal Ghar Hospital, where the injured was first taken for her treatment and both to the P.W.8 Niranjana Sarkar and P.W.18 Babar Ali Mondal, who removed the victim to the hospital and then to P.W.22 Nimai Ch. Dey the Investigating Officer of the case, the name of the miscreants including the name of the convict Jagannath Biswas was not disclosed as his assailants was not inclined to rely on the case of the prosecution that at the leadership of Jagannath Biswas and 7 others, the victim was assaulted with bombs and fire arms. According to the prosecution, the victim Gour Mohan Biswas disclosed the names of his assailants to the P.W.16 Dr. Lipi Mondal of R.G. Kar Medical College and Hospital, who treated him there but Indira Banerjee, J. refused to act thereupon because of the reasons, he substituted 3 of the miscreants referred in the FIR by 3 different alleged miscreants. A doubt was also raised on the point when actually FIR was lodged, since according to the police FIR was received at 9.45 am but according to the P.W.1 the maker of the FIR, her statement was recorded and the FIR was registered at 10.45 am. All through it was the case of the P.W.1 that she was taken to the spot by one Rana Biswas and her nephew wrote the FIR at the Police Station but the P.W. 1 in her cross-examination disclosed that on the date of occurrence she did not meet the said Rana Biswas.

10. Now, coming to the merits of the case, I find immediately after the incident P.W. 2 Gour Mohan Biswas, the victim was taken to the Goal Ghar Hospital, Barasat where he was attended by P.W.21 Dr. Surajit Chattopadhyay and to him the injured disclosed that he was assaulted by 2/3 miscreants with bombs and fire arms and at the time of examination injured was fully conscious. It is true in the case of Bhargavan and Others Vs. State of Kerala, , following its earlier decision in the case of Pattipati Venkaiah Vs. State of Andhra Pradesh, , the Apex Court held..... Nondisclosure of names of the assailants to the doctor is really of no consequences as it is the primary duty of the doctor to treat the patient and not to find out by whom injury was caused. While in the first case according to the defence the doctor clearly stated the victim was unconscious when was brought to the hospital and one of the witnesses PW.18 claiming to be an eye witness to the occurrence did not disclose the name of the assailants to the doctor, whereas, in the second case, the two eye witnesses who brought the victim to the hospital did not disclose the name of the assailants to the doctor who attended the victim at the hospital.

11. However, in the case at hand, admittedly the P.W.2, the injured and finally survived, when was taken to the hospital was fully conscious and was volunteered to his attending doctor and disclosed that he was assaulted by 2/3

unknown miscreants. This is not a case where the attending doctor had not made any inquiry from the injured as to the history of assault and thus, the name of the assailants was not divulged. Therefore, in my opinion the observation of the Apex Court in the aforesaid two decisions has no manner of application in the background facts of the present case. According to the prosecution the deceased was removed to the hospital from the spot by 2 witnesses namely P.W.8 Niranjan Sarkar and P.W.18 Babar Ali Mondal. While P.W.8 in his evidence disclosed that he did not know how P.W.2 Gour Mohan Biswas received injury, the prosecution case against the appellant became more worst on the evidence of P.W.18 Babar Ali Mondal, who claimed on being asked by him, the injured P.W.2 Gour Mohan Biswas told him that he was assaulted with bombs by 2 unknown persons. The prosecution has not declared the said 2 witnesses hostile and according to the Apex Court in such a situation, the defence can very well rely on the evidence of such witnesses to prove the innocence of the accused. In this regard reliance may be placed in the case of *Raja Ram v. State of Rajasthan* reported in 2005 SCC (Cri) 1050 as also in the case of *Mukhtiar Ahmed Ansari v. State* reported in 2005 SCC (Cri) 1037. Therefore, the evidence of the P.W.18 Babar Ali Mondal that he was told by the injured P.W.2 that he was assaulted by 2 unknown miscreants with bombs and fire arms, can safely be acted upon to conclude the accused who have been charged in the trial are not guilty. It further appears from the cross-examination of P.W.2 injured Gour Mohan Biswas that he made a statement to the police in presence of his wife at Bhatpara State General Hospital, while he was under treatment there. He then claimed that he stated to the Police that Jagannath Biswas shot him and Swapan hurled bombs, when he was coming to Barrackpore Court. However, it was the evidence of P.W.22 Nimai Ch. Dey, the Investigating Officer of the case that the P.W.2 Gour Mohan Biswas, the injured never told him that he disclosed to the police, when he was coming to Barrackpore Court Jagannath Biswas had shot him and Swapan hurled bombs. According to the P.W.16 Dr. Lipi Mondal, who examined the injured at around 11 hrs, on the day of incident, the witness disclosed the name of the appellants as his assailants but in view of the fact that at the earliest opportunity before the doctor at Goal Ghar Hospital, Barasat and to the persons more particularly to the P.W.18 who removed him to the hospital, the P.W.1 the injured specifically stated that he was assaulted by some unknown miscreants, in my opinion, it will not at all be prudent and justified to uphold the order of conviction of the appellants, including the appellant Jagannath Biswas on the evidence of the P.W.16. This disclosure by the injured at the earliest opportunity that he was assaulted by unknown miscreants, certainly impeach his subsequent claim that all the appellants including, the appellant Jagannath Biswas were his assailants and known to him.

12. Besides, above there are other patent infirmities in the prosecution case. The P.W.16 Dr. Lipi Mondal, with reference to the injury report exhibit-6, deposed that to her, the P.W.2 injured Gour Mohan Biswas disclosed the name of the appellants as his assailants. However, it is not disputed in her evidence by the P.W.2, that

the exhibit-6 was a xerox copy of the injury report. In absence of original copy the xerox copy is not admissible in evidence therefore no reliance can be placed on the same. In this regard reference may be made to the decision of the Hon"ble Apex Court in the case of Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh and Another, .

13. In view of the facts that the prosecution has not been able to fix the identity of the appellant by credible evidence as the assailants of the victim, entering into the further details of the case will be futile. Since, the identity of the miscreants was not established beyond all reasonable doubt, this is a case where appellants are entitled to acquittal.

14. In the result, the appeal succeeds and order of conviction and sentence stands set aside. The appellants who are now on bail at once be discharged from their bail bonds.

Urgent photostat certified copy of this order, if applied for be given to the parties at an early date.