

(2008) 11 CAL CK 0039
In the Calcutta High Court
Case No : C.R.R. No. 865 of 2008

Sailesh Pal alias Sailesh Kumar Pal

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 12-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 417, 439, 439(4)

Evidence Act, 1872 — Section 113A

Penal Code, 1860 (IPC) — Section 304, 304B, 306, 498A

Citation : (2008) 11 CAL CK 0039

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Joymalya Bagchi and Mr. Deep Chaim Kabir, for the Appellant; Himangshu De, A. Jana and Mr. P.K. Tarafdar for O.P. No. 2 to 6, Mr. Sanat Chowdhury, for the Respondent

Judgement

Ashim Kumar Roy, J.—In a sessions trial the accused/opposite party Nos. 2, 3, 4, 5 and 6 who happened to be the husband and the relations of the husband were acquitted of a charge under sections 498A/304B of the Indian Penal Code.

The petitioner who happened to be the father of the victim girl in the instant criminal revisional application challenged the said order of acquittal.

2. The scope of the High Court, in exercise of its revisional jurisdiction, to interfere with an order of acquittal fell for consideration before a Bench of the Hon'ble Supreme Court comprising of four Hon'ble Judges in the case of D. Stephens v. Nosibolla, reported in 1951 Criminal Law Journal 510. Thereafter in plethora of cases the same point came up for consideration before the Apex Court but upto now the Apex Court has not deviated from the view taken by it in the case of D. Stephens v. Nosibolla (supra). The law laid down by the Apex Court in the case of D. Stephens v. Nosibolla (supra) still hold the field where the Apex Court held as follows:

"The revisional jurisdiction conferred on the High Court u/s 439 of the Code of

Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government 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."

In the case of *K. Chinnaswamy Reddy v. State of A.P. & Ors.*, reported in 1963 (1) Cri LJ 8, A three Judges Bench of the Hon'ble Supreme Court in similar circumstances:

"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 of 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 retrial, 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 AIR 1998 SCC (Cri) 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."

Thereafter in several decisions the Apex Court followed the same principle of law and the position has not yet been altered. In a very recent decision in the case of *Johar & Ors. v. Mangal Prasad & Anr.*, reported in (2008) 2 SCC (Cr) 89, the Apex Court followed the same principle.

3. During the trial of the case in hand the prosecution examined as many as 12 witnesses. Out of them P.W.1, Sailesh Pal is the father of the deceased, P.W. 2 Chinmoy Pal her uncle, P.W. 3 Ajit Kundu, her maternal uncle, P.W.4 Pradip Kanjilal, uncle declared hostile, P.W.7 Tarak Das uncle, P.W.8 Gita Rani Paul mother of the victim while rests are the police personnel and the doctor.

4. It is the case of the prosecution that the only daughter of the P.W.1 Sailesh Kumar Pal, Srabani Pal was married with Santanu Sarkar the accused No.2 herein on January 16, 2004. At the time of the marriage although sufficient dowry by way of cash and jewelry were given but their entire demand could not be fulfilled. It is the further case of the prosecution that she was regularly subjected to torture both physically and mentally by the accused persons for demand of the balance dowry and on April 21, 2005 she committed suicide by hanging.

It appears from the perusal of the impugned Judgment that the learned trial

Court acquitted the accused persons of the charge u/s 304B of the Indian Penal Code on the ground that there was no evidence on record to show that soon before her death she has been subjected to torture by the accused persons on demand of dowry. Having carefully gone through the evidence on record, I find although there are allegations that she was subjected to torture on demand of dowry but none of the witnesses specified how soon before her death she was subjected to such torture. In this case practically there is no evidence that shortly before her death she was subjected to torture for demand of dowry. There is nothing on record to show that the torture followed by demand of dowry was the proximate cause of her death. The parents of the victim girl as well as her relations except stating that she was subjected to torture after her marriage, marriage took place on January 16, 2004 on demand of balance dowry they have not mentioned anything before her death lastly when she was subjected to such alleged torture. On the contrary it is the categorical evidence of P.W.1, Sailesh Kumar Pal, the father of the victim girl that just seven days before the incident the victim girl Srabani and her husband Santanu came to their house and had their dinner but it was not the case of the prosecution on her last visit to her parents home she had made any complaint against the accused persons about torture on demand of dowry. Thus, it can very safely be said that atleast before a week of her death if not earlier, there was no allegation of any torture on demand of dowry. Moreover, at the time of inquest held in presence of the witnesses who now alleging that she was subjected to torture by the accused persons made no complaint against them. The only prosecution witness the P.W. 7, Tarak Das has specified the time when the victim disclosed to him that she was subjected to torture by her in-laws. According to the P.W. 7 such complaint was made by the victim girl when they met at a Puja Pandel during the Durga Puja of the year 2004. Besides that there was no evidence on record specifying that at what particular point of time she was subjected to torture. Thus, the finding of the trial Court that there was no evidence that shortly before her death she was subjected to torture cannot be said to be against the materials on record.

5. The learned advocate appearing on behalf of the petitioner Mr. Deep Chaim Kabir could not draw the attention of this Court any evidence which shows that shortly before her death she was subjected to torture by the accused persons on demand of dowry, which is one of the basic ingredients of the offence punishable u/s 304B of the Indian Penal Code. Thus, the impugned order of acquittal of the accused/opposite parties of a charge u/s 304B of the Indian Penal Code does not deserve any interference by this Court in exercise of its revisional jurisdiction atleast on the ground of non-consideration of evidence on record which clinches the issue or on unreasonable and perverse findings.

It has been vehemently urged by Mr. Deep Chaim Kabir that even assuming that there was no evidence that just before her death she was subjected to torture but there is specific evidence of the P.W. 7 Tarak Das that in the year 2004 during Durga Puja at the Puja Pandel of the Padmashri Club, G.T. Road the witness met the victim Srabani when she told that she was treated with cruelty by the

accused persons on demand of outstanding dowry and they were instigating her to commit suicide by hanging or by consuming poison. According to Mr. Kabir this statement of the victim girl ought to be treated as her dying declaration and the trial Court ought to have drawn a presumption u/s 113A of the Evidence Act. It is his further submission in view of the evidence on record the accused persons are liable to be convicted u/s 306 of the Indian Penal Code. I have given my anxious consideration to such submissions of Mr. Kabir and have going through the evidence of P.W.7, I find that admittedly the said witness when was examined by the police during investigation did not disclose anything about the same to the police. Therefore, the statement of such witness does not inspire any confidence. In any event such a statement made by the victim to the P.W. 7 nearly six months before her death cannot said to have any proximity with her death. Even if one accepts the prosecution case that the victim told the P.W.7 Tarak Das that she has been subjected to torture by her in-laws on demand of dowry and was asked to commit suicide, till, then such complaint being made about six months before her death cannot be said to have any direct bearing on her committing suicide. In other words, same cannot be accepted to be the proximate cause of her death. I do not find any merit in the submissions of Mr. Kabir and unable to accept the same.

However, in the instant case the accused persons were also charged u/s 498A of the Indian Penal Code but in the judgment of acquittal learned Judge has not assigned any reason as to why the accused persons were acquitted of such charge. There is no discussion in the judgment as regards to the evidence of the prosecution witness towards the allegations of torture upon the victim girl by the accused persons. In such view of the matter while I find no reason to interfere with the order of acquittal of the charge u/s 304B of the Indian Penal Code but I find that order of acquittal of the accused persons of the charge u/s 498A of the Indian Penal Code cannot be sustained. Accordingly, the said order of acquittal is set aside.

6. This criminal revision stands succeeds partly while the order of acquittal of the accused persons u/s 304B of the Indian Penal Code is sustained but so far that relates to the offence u/s 498A of the Indian Penal Code is concerned stands set aside. The case is remitted back to the trial Court to re-consider the matter in the light of the evidence already on record and in accordance with law, as regards to the charge relating to offence punishable u/s 498A of the Indian Penal Code.

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