

(2005) 02 AHC CK 0275
In the Allahabad High Court
Case No : Criminal Revision No. 2692 of 1984

Shyam Sunder Singh, Ashok Singh and Santosh Kumar Singh
alias Haider

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 21-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 391, 391(2)
Penal Code, 1860 (IPC) — Section 323, 324, 325

Citation : (2005) 02 AHC CK 0275

Hon'ble Judges : K.N. Ojha, J

Bench : Single Bench

Advocate : Surendra Singh and R.S. Parihar, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

K.N. Ojha, J.—Instant revision has been preferred against order dated 29.9.1984 passed by learned Special Judge (Economic Offences), Allahabad, whereby Criminal Appeal No. 137 of 1983, Shyam Sunder Singh and two Ors. v. State of U.P. was allowed and conviction of Shyam Sunder Singh, Ashok Singh and Santosh Kumar Singh alias Haider under Sections 325, 324, 323 I.P.C. was set aside and the case was remanded for fresh decision with a direction that evidence existing on record would be treated as valid and admissible. However, if any party wants to lead any fresh evidence, he should be given opportunity for the same and if the prosecution leads any evidence the accused would be re-examined u/s 313 Cr. P.C. and an opportunity to lead evidence in defence would be given and thereafter the case would be decided on merit after hearing the parties. Impugned order dated 20.9.1984 was passed by learned Special Judge (Economic Offences), Allahabad against order of conviction and sentence dated 18.8.1983 passed by Judicial Magistrate IV, Allahabad, in Criminal Case No. 666 of 1980, State v. Shyam Sunder Singh and two others.

2. The facts of the case as revealed from the record is that one Sampat Singh of village Govindpur, police station Sarai Aqil, district Allahabad, was ploughing his field on 10.6.1980 at 4.30 P.M. when the revisionists Shyam Sunder Singh, Ashok Singh and Santosh Kumar @ Haider went there and assaulted Sampat. His son Mathura went to his rescue, but he was also injured. It is said that Shyam Sunder and Ashok were armed with Lathi and Santosh Kumar @ Haider was armed with Pharsa. The witnesses Mahadeo, Tirath and Sheo Adhar Singh of village Govindpur intervened and later on Sampat Singh lodged FIR on the same day at 8.00 P.M. by name against the revisionist. After investigation charge sheet was submitted against them.

3. Revisionists pleaded not guilty. A counter version was set up by Shyam Sunder Singh in his statement u/s 313 Cr. P. C. that incident had taken place at his house when he was assaulted by Sampat and his associates. He also claimed that plot in dispute was owned by him.

4. Prosecution examined injured witnesses Sampat and Mathura and two witnesses Mahadeo and Sheo Adhar Singh, who were named in the FIR. The learned Magistrate believed in the prosecution story and passed order of conviction against all the three accused and imposed sentence of six months" R.I. u/s 325 I.P.C., four months" R.I. u/s 324 I.P.C. and four months" R.I. u/s 323 I.P.C. against revisionist Shyam Sunder Singh with a direction that the sentences would run concurrently but granted benefit of probation of First Offender's Act to Ashok Singh and Santosh Kumar Singh @ Haider for keeping peace and maintaining good conduct for one year and for being released on furnishing bonds of Rs. 3000/- each and two sureties.

5. In appeal the learned Special Judge (Economic Offences) Allahabad held that it appeared from the judgment of the Magistrate that a cross complaint in regard to the incident was filed by Shyam in Sunder Singh against Sampat and others and was also pending in the said Court. Although copy of the complaint was not filed nor the copies in of the statements of witnesses examined in the complaint case was filed yet the learned Magistrate took advantage of the pendency of that case and utilized the evidence of the complaint case, which could not be done because the judgment was to delivered on the basis of the led evidence led in the case, which was proceeding on FIR of Sampat. The appellate Court believed that the injuries were caused at the field as alleged by the prosecution and not at the house of the accused. But it was observed that the magistrate could not rely on the statement of two witnesses examined in the complaint case as evidence of cross case could not be utilized because each case has to be decided on the evidence laid in that case and AIR 1975 SC 151, Mitthu Lal v. State of M.P. was relied on in which the Hon''ble Apex court held that each case must be decided on the evidence on record in it and evidence recorded in another case cannot be taken into account in arriving at the conclusion. Therefore, while deciding the appeal the order of conviction and sentence was set aside and a direction was made that the learned Magistrate would forget about the complaint filed by

Shyam Sunder Singh and evidence led therein and he would base his decision only on the evidence led in the State case. It was also held that it was of utmost importance to adjudicate as to which party was aggressor and finding about possession of the land was also to be given and if the dispute centers round the field, point of private defence of property was also to be considered. With these observations the order of conviction and sentence passed by the learned Magistrate was set aside and the case was remanded for fresh decision, to record evidence if so required and make finding.

6. Learned counsel for the revisionists has submitted that even if the appellate Court was of the view that evidence of complaint case could not be considered or the points of self-defence or possession of plot or which party was aggressor was to be considered, still the appellate court itself could consider all these points and there was no justification to remand the case.

7. Section 391 of Cr. P.C. contemplates as below:

"391. Appellate Court may take further evidence or direct it to be taken.-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Sessions or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

8. The learned counsel for the revisionist has also relied on (20) 1983 ACC 126, *Shyamdhara v. State*, in which it has been held by this Court that:

"If the Addl. Sessions Judge felt that the examination of certain prosecution witness was necessary and in this absence the case against the applicant was not made out then he could straightway acquit the applicant. If, however, he considered that it was necessary to examine him, then he could call for his testimony u/s 391(2) and then decide the appeal himself. The case could not be remanded for retrial that in any case it was bound to help the prosecution to remove whatever lacuna was found in the evidence. There could also be no direction that though the case was being remanded such witness's evidence be recorded and the old evidence be taken into consideration and then the case be disposed of because on retrial of the evidence all the earlier trial is washed away and the case has to be decided on fresh evidence newly recorded.

The impugned order of remand by the Addl. Sessions Judge is set aside. The

Addl. Sessions Judge shall reconsider the matter and if he feels the evidence of aforesaid witness is very necessary he may call for it u/s 391(2) and if he feels that nothing short of retrial of the accused would be necessary, he may order retrial de novo without any direction that the old evidence recorded earlier shall also be relied upon."

9. In instant case the occurrence is said to have taken place on 10.6.1980 i.e. about 25 years before. If the case is remanded back and additional evidence is adduced by the parties in order to ascertain the fact as to who was aggressor in Marpeet and what was the evidence in the cross case, the learned Magistrate will again take some years to deliver the judgment, while it is reported by the C. J.M. that one of the accused Santosh Kumar Singh @ Haidar has died. This is a case in which four fact witnesses were examined. They are Sampat Singh, Shiv Adhar Singh, Mathura Prasad and Mahadeo. Besides PW 6 and Dr. V. P. Pandey and Dr. V. P. Gopal were also examined to prove the injuries of both the injured persons, statement of Investigating Officer Yogendra Nath Rai was also recorded. Thus the prosecution has not to adduce any more evidence not it was submitted from the side of the prosecution that some more evidence was to be adduced. If the accused revisionist had to take any plea of self-defence or intended that their evidence in complaint case was to be appreciated, they had to file copies of the statement and papers, if any, but no such application was moved by the accused persons before the learned Magistrate or learned appellate Court. In these circumstances there was no justification to set aside the order of conviction and sentence passed by the learned Magistrate and to remand the case to the Magistrate for further entering into evidence and decide the case. The remand of the case to the trial court should be made only when injustice would be caused in case the case is not remanded and if the evidence is recorded by the appellate Court there would be so much substantial change or addition in evidence that one of the party would be deprived for the case being properly considered by the trial court and thus will not get opportunity of first appeal. But this is not such a case. In this case there has been never a prayer of the prosecution to fill up any lacuna or to adduce any further evidence. If there was any defect in the finding of the trial court to have considered the evidence, which was not on the record of this file, it was open for the appellate Court to have considered the evidence in its own way on all those points, which-were required and relevant in the case as was permissible under law. Therefore, when almost the finding was to be made on the evidence already on record the Appellate Court had to decide the case itself rather than to send back this case again to be decided while the case has seen such a long time during the pendency of the case before the trial court and the Appellate Court.

10. If the Appellate Court was of the view that the points as to who was aggressor in the case or the point of self-defence was to be taken and copy of the statement of the complaint case was also necessary and it could be considered only when it was brought on record, the Appellate Court was fully empowered for admitting such papers in evidence and decide the appeal as is

contemplated u/s 391 of Cr.P.C. If such power could be exercised by the Appellate Court, further lingering of the case could be avoided. Interest of justice requires that such discretion was to be exercised by the Appellate Court and the appeal was to be decided accordingly. This was not such a case in which the application of the State for adducing evidence was rejected. While the witnesses were not examined, which were to be examined by the trial court and therefore, there was necessity to remand the case.

11. In these circumstances the discretion, which was exercised by the learned Appellate Court by remanding the case has been contrary to the spirit of Section 391 of Cr.P.C. and it deserves to be set aside.

12. The appeal is allowed and the impugned order of remand dated 20.9.1984 passed by the Appellate Court is set aside,

13. Let the record be sent to the learned Special Judge (Economic Offences), Allahabad for deciding the appeal on merit in accordance with law, where the parties will appear on 17.3.2005 for participating in the further proceeding of the appeal.

14. It may be emphasized that the occurrence took place in 1980, hence the learned Special Judge (Economic Offences), Allahabad, will make effort to decide the appeal as far as possible within four months from the date of receipt of the record.