
(1999) 10 KAR CK 0009
In the Karnataka High Court
Case No : Criminal Appeal No. 151 of 1997

State	Vs	APPELLANT
S. Viswanath		RESPONDENT

Date of Decision : 13-10-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 354, 376, 511

Citation : (2000) 2 KCCR 1313

Hon'ble Judges : N.S. Veerabhadraiah, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : B.V. Pinto, Additional State Public Prosecutor, for the Appellant; E.R. Divakar, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

M.F. Saldanha, J.—An interesting point of law has arisen in this Criminal Appeal filed by the State and we shall briefly indicate as to how precisely the issue has fallen for determination. The Respondent-accused before us was originally charged with having committed an offence punishable u/s 376 Indian Penal Code in S.C. No. 22 of 1988, the allegation being that on 17.9.1987 at about 5.30 p.m. he is alleged to have been involved in a sexual assault on a minor girl by the name of Lakshmiddevamma. That case ended in a conviction for the offence punishable u/s 354 Indian Penal Code. The accused, as indicated by us earlier, was originally charged with having committed an offence punishable u/s 376 Indian Penal Code but the findings recorded by the trial Court are to the effect that only the lesser offence punishable u/s 354 Indian Penal Code was made out. By implication therefore, the accused was acquitted of the offence punishable u/s 376 Indian Penal Code and was convicted of the lesser offence punishable u/s 354 Indian Penal Code and sentenced to undergo R.I. for eighteen months and to pay a fine of Rs. 2,000.00. The accused preferred an appeal to this Court being Criminal Appeal No. 689 of 1990 which was disposed of on 16th December, 1995. The procedural error that was pointed out to the High Court when the appeal was

argued was that it is mandatory for the trial Court to put to the accused at the time when the statement u/s 313 Code of Criminal Procedure is recorded all the incriminating evidence that the prosecution has led against the accused and the law prescribes that this has to be done in order to afford the accused an opportunity of tendering an explanation for that evidence or in relation to those circumstances. The High Court found that the learned trial Judge had committed a serious error in only having put one composite question to the accused and that the provisions of Section 313 Code of Criminal Procedure had been breached. On this ground, the conviction and sentence were set aside and the case was remanded to the trial Court with a specific direction that the remand is at the stage of the 313 Criminal Procedure Code statement which had to be correctly recorded and the case then disposed of according to law.

2. The learned trial Judge after the remand complied with the requisite formalities and disposed of the Sessions case through judgment and order dated 28.11.1996. One of the factors which the Court took into account was that the accused had been regularly attending the trial Court for virtually nine years as the earlier case was of the year 1997 and having regard to the length of the proceeding and trial the accused had been subjected to, the Court awarded a fine of Rs. 2,000/- in default, three months R.I. The State has challenged the validity of this order through the present appeal and the contention is that the acquittal u/s 376 Indian Penal Code is wrong and that the Court must modify the order of the trial Court and convict the accused for the offence punishable u/s 376 Indian Penal Code. The accused is served and unrepresented and having regard to his status, it was obvious to us that he is not in a position to make necessary arrangements and we have therefore appointed learned Advocate Sri E.R. Diwakar as Amicus Curiae. The learned Advocate has perused the entire record of this lengthy proceeding. We have thereafter heard the learned Advocates on both sides on merits.

3. The submission canvassed on behalf of the State is that this Court on the earlier occasion while disposing of Criminal Appeal No. 689 of 1990 has set aside the judgment and order of the trial Court in S.C. No. 22 of 1988. The learned Additional State Public Prosecutor submitted that it is true that the High Court only directed re-recording of the statement u/s 313 Code of Criminal Procedure but he was quick to point out to us that the direction to the trial Court was to thereafter dispose of the case according to law. His submission is that this meant that the learned trial Judge had to re-appraise the evidence and to record fresh findings and that it was open to the trial Court to either acquit or convict the accused on the basis of the record. The learned Additional State Public Prosecutor further submitted that it was not a restricted mandate but that if the evidence justified that it was open to the trial Court to convict the accused under the original charge i.e. Section 376 Indian Penal Code or any lesser offence if the law so required. He submits therefore that since the trial Court has convicted on a lesser charge and since according to him the record justifies a conviction u/s 376 Indian Penal Code, that the present appeal is perfectly competent. The

learned Counsel did in the course of his submissions before us amply demonstrate to us that the evidence on record is good enough to sustain a conviction either u/s 376 Indian Penal Code or certainly u/s 376 read with 511 Indian Penal Code. We need to record here that there is a legal hurdle in the way of the State which is the only reason why we have refrained from interfering with the order passed by the trial Court.

4. Mr. Diwakar who appears on behalf of the Respondent-accused draws our attention to the fact that when the accused had preferred Criminal Appeal No. 689 of 1990 which was against his conviction for the offence punishable u/s 354 Indian Penal Code, that the State had not preferred any appeal challenging the acquittal of the accused u/s 376 Indian Penal Code by the trial Court. His submission therefore is that the acquittal u/s 376 Indian Penal Code had attained finality and that the High Court was only dealing with the limited question relating to the conviction u/s 354 Indian Penal Code and that therefore, even when the High Court remanded the case to the trial Court the remand order was confined to Section 354 Indian Penal Code. He therefore submits that in the light of this clear background that the State is totally and completely precluded at this point of time from challenging the acquittal of the accused u/s 376 Indian Penal Code for the reason that the acquittal is not part of the present order under challenge but that it is part of the earlier judgment which has attained finality to this extent. In this regard, his further submission was that assuming that the accused did not challenge his conviction u/s 354 Indian Penal Code and was satisfied with undergoing the sentence, that there would have been no question of the issue regarding Section 376 Indian Penal Code being reopened since the State had not filed any appeal against that acquittal. Consequently, his submission was that no relief is competent in the present appeal and that it is liable to be dismissed.

4. We do concede that the position is relatively complicated and that it is very necessary to very clearly define as to what is the scope of the present appeal. For this purpose, we need to go back to Criminal Appeal No. 689 of 1990 and to address to ourselves the question as to what were the orders that the High Court was competent to pass when that appeal was heard. We take note of the additional fact of utmost importance namely that the High Court was only dealing with a conviction u/s 354 Indian Penal Code and that there was no appeal by the State in relation to the acquittal u/s 376 Indian Penal Code. In that situation, the only two possibilities in that appeal were that the Court could have set aside the conviction u/s 354 Indian Penal Code or confirmed it or the third possibility was that the case could have been remanded. What we need to say is that in that appeal, in the absence of a State appeal challenging the acquittal u/s 376 Indian Penal Code, that the High Court could not have convicted the accused for the heavier offence punishable u/s 376 Indian Penal Code because there was no appeal against acquittal nor was there an appeal for enhancement. It is this legal position that really provides guidelines for us in definitely finding out the scope of the present appeal. The Respondent's learned Counsel is right when he points

out to us that in this restricted background, the partial remand by the High Court for procedural reasons was confined, restricted and circumscribed to the offence punishable u/s 354 Indian Penal Code only. Undoubtedly, the trial Court could have either acquitted or convicted under this Section but it would not have been open to the trial Court without the earlier acquittal order having been set aside to have convicted the accused u/s 376 Indian Penal Code on remand. It is this very position that gets transposed to the High Court and that being the position in law, it is unambiguous that it is not open to the State to challenge the earlier order of acquittal which has now become final or to pray that the accused be convicted for the offence punishable u/s 376 Indian Penal Code. There is a clear and definite bar in the way of any such relief being granted and this being the well defined legal position, no relief is competent in the present appeal.

5. Under these circumstances, Criminal Appeal No. 151 of 1997 fails and stands dismissed on merits. We direct the Office to pay a sum of Rs. 1,000.00 as professional charges to the learned Advocate Sri E.R. Diwakar who has assisted the Court by appearing as Amicus Curiae Counsel.