

(1971) 08 PAT CK 0008
In the Patna High Court
Case No : Criminal Rev. No. 531 of 1969

Titu Tanti and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 25-08-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 106
Penal Code, 1860 (IPC) — Section 147, 148, 323, 324

Citation : (1971) PLJR 626

Hon'ble Judges : S. Anwar Ahmad, J; M.P. Verma, J

Bench : Division Bench

Advocate : Prem Shankar Sahay, Rudradeo Kumar Sinha and Keshav Srivastava, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision : Allowed

Judgement

S. Anwar Ahmad, J.—The petitioners were initially tried by a first class Munsif-Magistrate, who by his judgment dated the 10th March, 1967, convicted petitioner Madhu Tanti (petitioner no. 2) under Sections 324 and 148, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for one year under each count. He convicted the rest of the petitioners under Sections 323 and 147, Indian Penal Code, and sentenced them to rigorous imprisonment for six months under each count. All the sentences were ordered to run concurrently. On appeal, the 4th Additional Sessions Judge, Bhagalpur, by his Judgment dated the 20th September, 1967, set aside the convictions and sentences imposed on the petitioners and sent the case back to the learned Magistrate in the following terms.

In the circumstances, therefore, the proper course for the learned Magistrate would be to retry the case and examine the public documents filed on behalf of the defence as well as the documents which had been proved and adduced on behalf of the defence.

The appeal is, accordingly, allowed and the order of conviction and sentence

passed by the learned Magistrate is hereby set aside. The case is remanded for retrial by the learned Magistrate u/s 423 Criminal Procedure Code from the stage of defence. The learned Magistrate will reconsider the evidence already adduced on behalf of the prosecution and which is on the record as also the evidence already adduced on behalf of the defence. Neither party shall adduce further evidence. He will also hear the arguments advanced on behalf of the parties and then dispose of the case according to law.

After remand, the case was heard by another first class Munsif-Magistrate. As directed by the appellate court, he exhibited the documents relied upon by the defence, heard learned advocates of both parties and convicted the petitioners once again under the same sections but imposing lesser sentences on them. The sentence imposed u/s 324 against Madhu Tanti was one of six months" rigorous imprisonment while the sentence imposed u/s 323 against the rest was three months" rigorous imprisonment each. No separate sentence u/s 147 or 148 was passed against the petitioners. On appeal, the convictions and sentences awarded to the petitioners were upheld.

2. The only point urged before us on behalf of the petitioners is that the order of remand, dated the 20th September, 1967, passed by the 4th Additional Sessions Judge, Bhagalpur, was illegal and, therefore, all subsequent proceeding taken thereunder must be knocked down. In support of his argument learned counsel has relied upon a number of decisions of this Court and of the Supreme Court. They are: (1) Gajanand Thakur V. Emperor (A.I.R. 1916 Pat 219); (2) Bhaso Singh V. Emperor [A.I.R. 1918 Pat 582(2)]; (3) Sri Krishna Prasad Sinha Vs. Emperor, ; (4) Md. Bashir Ahmad Vs. The State, and (5) Pandit Ukha Kolhe Vs. The State of Maharashtra, . In the case of (1) Gajanand Thakur (AIR 1916 Pat 219) it was held by this Court that the Sessions Judge's order setting aside the convictions and sentences, ordering a retrial of the accused, and directing the Magistrate to take additional evidence was wholly illegal. This view was followed by another Bench of this Court in the case of (2) Bhaso Singh [A.I.R. 1918 Pat 582(2)]. The case of Bhaso Singh is on all fours with the facts of the present case. In that case also at the appellate stage the Sessions Judge set aside the conviction and sentence and ordered retrial, but at the same time directed that the evidence already on record should be treated as evidence in the case. It was held that the order was contrary to the provisions of Sections 423 and 428, Code of Criminal Procedure, and, therefore, illegal. In view of the fact, however, that the petitioners had been in jail for a considerable time, no retrial was ordered. Their conviction and sentence were set aside and they were ordered to be released forthwith. The case of (1) Gajanand Thakur (A.I.R. 1916 Pat 219 supra) was Followed by Rowland, J. in (3) Sri Krishna Prasad Sinha Vs. Emperor, . Similar view was expressed by another Bench of this Court in (4) Md. Bashir Ahmad V. The State (AIR 1951 Pat 252). It was held:

In my opinion, the contention that the order of remand dated 31st May, 1958, passed by the learned Additional Sessions Judge was illegal is sound and has got

to be accepted. It seems that the learned Judge did not take proper care to look to the provisions of Section 423 of the Code of Criminal Procedure and to see for himself as to what exact powers he possessed under the Code as an appellate Court hearing appeals against orders of conviction. The powers are enumerated in Clause (b) of Sub-section (1) of that section.

It is obvious that the learned Additional Sessions Judge, if otherwise he was convinced that the conviction of the petitioner was good, could himself rectify the illegality in the imposition of the sentence. But, instead of doing that, he chose to pass an order of remand and directed the learned Magistrate to merely rewrite a judgment on the same evidence, keeping in view the proper and legal sentence which ought to have been imposed under the two sections. In my opinion, therefore, the order was wholly illegal, and it follows as a matter of corollary, that the fresh order of conviction.....cannot stand.

The proposition of law laid down by the aforesaid decisions that a Court cannot act on the evidence already on record in case of retrial, also finds support from the observation of their Lordships of the Supreme Court in the case of (5) Pandit Ukha Kolhe Vs. The State of Maharashtra, . It was held therein that "an order of retrial wipes out from the record the earlier proceeding." It follows, therefore, that the evidence recorded earlier cannot be acted upon in a case where a retrial has been ordered. In the instant case, although an order of retrial was passed by the 4th Additional Sessions Judge (Shri S.N. Basu), he committed an illegality in directing the learned Magistrate to reconsider the evidence on behalf of the prosecution already on record as well as the further evidence adduced on behalf of the defence. This sort of partial retrial is not envisaged by Section 423(1)(b), Code of Criminal Procedure. The Code of Criminal Procedure does not contain any provision as to the remand of a criminal case as has been provided for in the Civil Procedure Code. Clause (b) of Sub-section (1) of Section 423 which is the only provision applicable to the facts of the present case runs as follows:

423. (1) The Appellate Court shall.....dismiss the appeal, or may--

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of Section 106, Sub-section (3), not so as to enhance the same;

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As already stated, retrial means a fresh trial and not a trial in which part of the evidence already recorded is also relied upon for the purposes of recording a finding.

3. The aforesaid discussions make it clear that the order of remand passed by

the learned 4th Additional Sessions Judge (Shri S.N. Basu) remitting the case back to the Munsif Magistrate for partial trial was wholly illegal. By his order, the learned 4th Additional Sessions Judge set aside the order of conviction passed by the Munsif-Magistrate (Shri Lakshmi Charan) and, as the order of remand was illegal, all subsequent proceedings taken against the petitioners must be knocked down as such. Now, only two courses are open to us; either to send back the case for a retrial on fresh evidence to be adduced by the parties or to pass a suitable order in the circumstances of the case to do justice between them. On the facts of the present case, the proceedings were started about six years back and the petitioners have been sufficiently harassed as they had to appear in various courts at various stages. The offence charged against them is not of a very serious type. It has also been brought to our notice that the petitioners have remained in jail for some time. In consideration of all these facts, I think, we ought not to allow further proceedings to go on; and relying on a Bench decision of this Court (2) [Bhaso Singh V. Emperor--A.I.R. 1918 Pat 582(2), supra], where, on similar facts, the accused were released and their conviction was set aside, we allow this application and set aside the conviction of the petitioners. They are discharged from their bail-bonds.

M.P. Verma, J.

I agree.