



2024:UHC:9989

HIGH COURT OF UTTARAKHAND
AT NAINITAL

Criminal Miscellaneous Application No. 286 of 2015

Mr. Kishor Sharma and others ... Applicants

Versus

State of Uttarakhand and another ..Respondents

Advocates : Mr. Vinod Sharma, learned counsel for the applicants
Mr. K.S. Bora, learned Deputy Advocate General for the State of Uttarakhand
Mr. R.S. Sammal, learned counsel for respondent No. 2

Reserved on :16.12.2024

Delivered on :27.12.2024

Hon'ble Manoj Kumar Tiwari, J.

1. This Criminal Miscellaneous Application under Section 482 CrPC is filed, challenging order dated 21.02.2015, passed by learned Ist Additional Sessions Judge, Udham Singh Nagar, in Criminal Appeal No. 30 of 2013. By said judgment, application under Section 391 CrPC, filed by complainant was allowed.

2. It transpires that respondent No. 2 lodged an FIR against applicants in Police Station, SIDCUL, Pant Nagar on 30.07.2006 and upon investigation, chargesheet was filed against applicants under Sections 323, 325, 504, 506 IPC. Learned trial court convicted the applicants for offence punishable under Section 323 IPC and sentenced them to six months' imprisonment with fine of Rs. 500/- each and, acquitted them of the charge of offences punishable under Sections 325, 504, 506 IPC vide judgment and order dated 23.01.2013.

3. Dissatisfied with the punishment given to the accused persons, respondent No. 2 filed appeal against trial court's



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judgment, which is registered as Criminal Appeal No. 30 of 2013 and is pending. In the said appeal, respondent No. 2 moved an application under Section 391 CrPC, for adducing additional evidence which was allowed vide order dated 21.02.2015. Applicants are aggrieved by said order.

4. Heard learned counsel for the parties and perused the record.

5. Applicants were acquitted of the charge under Section 325 CrPC for the reason that, neither X-ray plate was produced to prove the nature and gravity of injuries sustained by respondent No. 2 nor the radiologist was examined, as witness for bringing home the charge of Section 325 I.P.C.

6. In the aforesaid appeal, complainant (respondent No. 2), moved an application under Section 391 CrPC stating that, X-ray plate and report dated 31.07.2006 are available in the record maintained by concerned government hospital, therefore, Principal Medical Superintendent of the concerned hospital may be directed to produce X-ray plate/X-ray report before the Court and the radiologist may also be summoned and examined by the Court.

7. The appellate Court allowed the application for adducing additional evidence filed by respondent No. 2, vide order dated 21.02.2015. Learned appellate Court observed that original medical report and supplementary medical report of the injured, Mr. P.P. Arora, are part of record of the trial Court, however, prosecution failed to produce the X-ray report dated 31.07.2006 in respect of injured, P.P. Arora. Learned appellate Court has observed



that if examination of the radiologist was necessary to bring home the charge under Section 325 IPC, then it was the duty of the trial Court to summon and examine the radiologist. The appellate Court further observed that the appeal has not been filed by the prosecution, but by the injured himself.

8. Section 391 CrPC enables appellate court to take further evidence or direct it to be taken. For ready reference, Section 391 CrPC is extracted 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 Session 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 injury.”

9. Learned counsel for applicants submitted that the impugned order, is unsustainable as the prosecution had sufficient opportunity to bring X-ray report/plate on record and also to summon the radiologist as witness before trial court and if prosecution failed to discharge its burden during trial, then it cannot be permitted to fill in the lacuna at appellate stage. In support of this contention, learned counsel for applicants relied upon judgment rendered by Hon'ble Supreme Court in the case of Rambhau and



another vs. State of Maharashtra reported in (2001) 4 SCC 759.

10. Learned counsel for applicants further submitted that it is settled position in law that if two reasonable conclusions are possible based on evidence on record, then appellate Court should not disturb the finding of acquittal recorded by trial Court, as held in the case of Sadhu Saran Singh Vs. State of UP and others, reported in (2016) 4 SCC 357.

11. The judgment rendered in the case of Sadhu Saran Singh (supra) does not support the applicants. Appellate Court has not disturbed finding of acquittal recorded by the trial Court and it has merely permitted additional evidence to be taken on record. Additional evidence can be accepted on record if the appellate Court thinks such additional evidence to be necessary for deciding an appeal.

12. Per contra, Mr. R.S. Sammal, learned counsel for respondent No. 2 relied upon judgment rendered by Hon'ble Supreme Court in the case of Ashok Tshering Bhutia Vs. State of Sikkim reported in (2011) 4 SCC 402. He refers to para 28 and 29 of the said judgment, which are extracted below:-

“Additional evidence

28. Additional evidence at the appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

29. The primary object of the provisions of Section 391 CrPC is the prevention of a guilty man's escape through some



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careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. [Vide *Rajeswar Prasad Misra v. State of W.B.* [AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] , *RatilalBhanjiMithani v. State of Maharashtra* [(1971) 1 SCC 523 : 1971 SCC (Cri) 231 : AIR 1971 SC 1630] , *Rambhau v. State of Maharashtra* [(2001) 4 SCC 759 : 2001 SCC (Cri) 812 : AIR 2001 SC 2120] , *Anil Sharma v. State of Jharkhand* [(2004) 5 SCC 679 : 2004 SCC (Cri) 1706 : AIR 2004 SC 2294] , *ZahiraHabibulla H. Sheikh v. State of Gujarat* [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] and *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385 : AIR 2010 SC 2352]

13. Learned counsel for respondent No. 2, further submitted that his client had handed over all documents/evidence in respect of the injuries sustained by him to the investigating officer; however, investigating officer, for reasons best known to him, did not place those documents on record, which resulted in miscarriage of justice as accused persons were acquitted of the charge under Section 325 I.P.C.

14. He further submitted that learned appellate Court is right in observing that it was the duty of the trial Court to summon the radiologist and other evidence available in Jawahar Lal Nehru District Hospital, Rudrapur, if that was necessary to bring home the charge under Section 325 I.P.C. against the accused persons and acquittal of the accused persons for the said offence, despite availability of cogent evidence in a government hospital, has resulted in miscarriage of justice. He submits that by allowing the application under Section 391 CrPC, learned appellate Court has merely permitted production of certain documents/reports which are lying in record room of the government hospital. Thus, he submits that no new evidence has been permitted to be brought on record and whatever documents are available in the concerned



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government hospital, have been permitted to be placed on record. Thus, he submits that learned appellate Court has exercised its power under Section 391 CrPC, to secure ends of justice and any interference with the said order would result in miscarriage of justice. He submits that accused persons cannot get benefit of lapse on the part of prosecution of not bringing the material evidence on record and the mistake committed by prosecution has rightly been undone by appellate Court.

15. He further submitted that factum of fracture suffered by complainant is proved by X-ray report and X-ray plate available in a government hospital, therefore, that fact can very well be ascertained by appellate Court to ensure that a person who has committed a crime, do not escape due to some careless or ignorant action on part of the prosecution.

16. Hon'ble Supreme Court in the case of Brigadier Sukhjeet Singh (Retired) MVC VS. State of Uttar Pradesh and others, reported in (2019) 16 SCC 712 has summarised the legal position in para 26 of the judgment. Relevant extract of the said judgment is reproduced below:-

“24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in *Rajeswar Prasad Misra v. State of W.B.* [*Rajeswar Prasad Misra v. State of W.B.*, AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] Hidayatullah, J., speaking for the Bench held that a wide discretion is conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because *there would be failure of justice without it*. Following was laid down in paras 8 and 9 : (AIR p. 1892)



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“8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if was possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.”

25. This Court again in *Rambhau v. State of Maharashtra* [*Rambhau v. State of Maharashtra*, (2001) 4 SCC 759 : 2001 SCC (Cri) 812] had noted the power under Section 391 CrPC of the appellate court. Following was stated in paras 1 and 2 : (SCC p. 761)

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same...

2. A word of caution however, ought to be introduced for guidance, to wit : that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in *Rajeswar Prasad Misra v. State of W.B.* [*Rajeswar Prasad Misra v. State of W.B.*, AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.”



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26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 CrPC of the appellate court. All powers are conferred on the court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.

17. In a recent judgment rendered in the case of Ajitsinh Chehuji Rathod Vs. State of Gujarat and Another, reported in (2024) 4 SCC 453, Hon'ble Supreme Court has held that power to record additional evidence under Section 391 CrPC can be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence and that non-recording of such evidence may lead to failure of justice.

18. In the present case, FIR was lodged by the complainant for offences punishable under Sections 392, 323, 504 and 506 IPC; however, after investigation, chargesheet was filed for offences punishable under Sections 323, 325, 504 and 506 IPC. It is thus apparent that Section 392 IPC was dropped and Section 325 IPC was added in the charge sheet, based on evidence collected during investigation.

19. In para 3 of trial Court's judgment, it is mentioned that Section 325 IPC was added based on medical report and statement of witnesses. Therefore, it was incumbent upon the trial Court to summon X-ray report and the radiologist and examine them before recording acquittal of the accused persons. Since this was not done by trial Court which resulted in acquittal of accused persons, therefore, learned appellate Court rightly corrected the said mistake by permitting the complainant to bring additional evidence on record.



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20. Thus, this Court does not find any reason to interfere with the discretionary order passed by learned appellate Court. Accordingly, C482 Application fails and is dismissed.

(Manoj Kumar Tiwari, J.)
27.12.2024

Mahinder/

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Digitally signed by MAHINDER SINGH,
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