

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Crl.R.C.No.422 of 2014

M.Shanmugasundaram

.. Petitioner

Vs.

1. The State, rep., by
The Inspector of Police,
Shevapet Police Station,
Salem District.

2. A.Kanagaraj

.. Respondents

Criminal Revision filed under sections 397 r/w 401 of Criminal Procedure Code, to set aside the judgment made in C.A.No.76 of 2013, dated 22.01.2014, on the file of the III Addl. District and Sessions Judge, Salem, by ordering retrial of the case by setting aside the judgment of conviction imposed in S.C.No.320 of 2010, on the file of the 3rd Additional Assistant Sessions Judge, Salem, dated 27.01.2012.

For Petitioner : Mr.C.K.M.Appaji

For 1st Respondent : Mr.P.Govindarajan
Additional Public Prosecutor

For 2nd Respondent : Mr.P.Jagadeepan

O R D E R

Material on record discloses that the revision petitioner has been charged under Section 307 IPC., in S.C.No.320 of 2010, on the file of the 3rd Additional Assistant Sessions Judge, Salem. On trial, vide judgment, dated 27.01.2012, the Court found him guilty, under Section 324 IPC., and sentenced him to pay a fine of Rs.5,000/- and in default, simple imprisonment for one month. Being aggrieved by the same, the defacto complainant has filed an appeal in C.A.No.76 of 2013, on the file of the learned Additional and District Sessions Judge, Salem. After examining the materials on record, the learned Additional and District Sessions Judge, Salem, set aside the judgment made in S.C.No.320 of 2010, dated 27.01.2012 and remitted the matter back to the learned 3rd Additional Assistant Sessions Judge, for retrial and directed re-

examination of Pws.8 and 9 and to receive the additional documents filed by the defacto complainant. After providing a reasonable opportunity to submit the documents, the learned 3rd Additional Assistant Sessions Judge, Salem, has been directed to dispose of S.C.No.320 of 2010, within a period of three months, from the date of receipt of the records. Against the judgment made in the appeal filed by the defacto complainant, the present revision has been filed.

2. Inviting the attention of this Court to Section 372 Cr.P.C., (Amendment), 2008, Mr.C.K.M.Appaji, learned counsel for the revision petitioner/accused submitted that the victim is entitled to file an appeal, only against the judgment of acquittal or enhancement of sentence or for compensation, but no appeal is filed by the defacto complainant for re-trial under Section 372 Cr.P.C. He further submitted that when the appellate Court itself is empowered to take additional evidence, under Section 379 Cr.P.C., there is absolutely no necessity to remit the matter to the 3rd Additional Assistant Sessions Judge, Salem, re-examining Pws.8 and 9 and also to receive additional documents filed by the defacto complainant. In this context, he relied on a decision reported in Rajeshwar Prasad v. State of West Bengal reported in AIR 1965 SC 1887.

3. Placing reliance on a decision of the Apex Court in Bir Singh v. State of Uttar Pradesh reported in AIR 1978 SC 59, learned counsel for the revision petitioner submitted that when the evidence of prosecution witnesses is cogent and clear, discretion exercised by the appellate Court, in remitting the matter to the trial Court, for re-examination of the evidences of Pws.8 and 9 and also permitting PW.1, to mark documents, amounts to filling up the gaps and lacunae, which is not permissible.

4. Inviting the attention of this Court to the date of incident, ie., 17.09.2009, date on which, a proviso is incorporated to Section 372 Cr.P.C., with effect from 31st December, 2009 and placing reliance on the decisions of the Apex Court in National Commission of Women v. State of Delhi reported in 2011 CrI.L.J. 962 and D.Sudhakar v. Panapu Sreenivasulu reported in 2013 CrI.L.J. 2764, learned counsel for the revision petitioner submitted that C.A.No.76 of 2013, filed on the file of the learned Additional and District Sessions Judge, Salem, itself, is not maintainable and therefore, the judgment recorded in C.A.No.76 of 2013, deserves to be set aside, on the grounds of maintainability.

5. On the merits of the case, learned counsel for the revision petitioner submitted that the appellate Court had failed to consider that PW.8 has deposed that PW.1 was admitted in Mohan Kumaramangalam Hospital at 7.15 P.M., with certain injuries and that he had run away from the hospital, before the commencement of

the treatment. According to the learned counsel, Accident Register has been marked through him, as Ex.P1.

6. Learned counsel for the revision petitioner further submitted that the appellate Court has failed to consider the evidence of PW.9, Superintendent of Gokulam Hospital, wherein he has also deposed that PW.1 took treatment as inpatient in the said hospital from 17.09.2009 to 30.09.2009 and though he has marked a Certificate, as Ex.P7 that the injury sustained by PW.1, was grievous, during cross-examination, he had categorically stated that the Policeman have not been examined.

7. It is the further contention of the learned counsel for the revision petitioner that when the prosecution witnesses have deposed in a clear and cogent manner, there is no necessity to remit the matter for re-trial and re-examination of Pws.8 and 9 and also to mark certain documents through the defacto complainant.

8. Inviting the attention of this Court to the relevant portion of the impugned judgment in C.A.No.76 of 2013, learned counsel for the revision petitioner further submitted that though the trial Court has observed that the injury sustained by PW.1, measures 1.3 x 1.5cm muscle depth lacerated wound over the left lower chest lateral aspect and PW.9, Doctor, has also given an opinion that the injury was grievous one, no document was filed to prove the same. Even the CT Scan and other particulars of surgery have not been filed before the trial Court. Pws.8 and 9, Doctors have not deposed that the injuries sustained by PW.1 was sufficient to cause death or likely death in normal circumstances. Therefore, he submitted that there is absolutely no evidence, to find the revision petitioner guilty under Section 324 IPC.

9. Learned counsel for the revision petitioner further submitted that the appellate Court has failed to consider that there was no previous enmity between PW.1 and the accused, being the Diploma Holder, aged 29 years, who ought to have been acquitted of the charges under Section 324 IPC.

10. Per contra, justifying the discretion exercised by the learned Additional and District Sessions Judge, Salem, Mr.P.Jagadeesan, learned counsel for the defacto complainant submitted that even assuming that the appeal is not maintainable, in the light of the law laid down by the Apex Court, this Court, in exercise of the revisional powers, can decide the correctness of the judgment made in S.C.No.320 of 2010, dated 27.01.2012, on the file of the 3rd Additional Assistant Sessions Judge, Salem. On the merits of the case, he submitted that the evidences of Pws.8 and 9, have not been properly adverted to, by the trial Court and therefore, remitting the matter by the appellate Court for re-trial, need not be disturbed.

Heard the learned counsel for the parties and perused the materials available on record.

11. Before advertng to the merits of the case, as to whether, the learned appellate Court Judge, by exercising the discretion, in remitting the matter to the lower Court, for re-examination of the prosecution witnesses, viz., Pws.8 and 9 and to receive additional documents filed by the defacto complainant, is correct or not, this Court deems it fit to address the issue, as to whether, the appeal filed by the defacto complainant, under Section 372 Cr.P.C., is maintainable, in the light of the decisions, relied on by the learned counsel for the revision petitioner.

12. In National Commission of Women v. State of Delhi reported in 2011 Crl.L.J. 962, occurrence had taken place on 14th April, 2003. Relying primarily on the dying declaration which was the suicide note, the learned Additional Sessions Judge, Karkardooma Courts, Delhi, by his judgment dated 21st April, 2008, convicted the accused under Section 306 of the IPC and sentenced him to rigorous imprisonment for 10 years with a fine of Rs.5,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months in addition, and to imprisonment for life under Section 376 of the IPC and a fine of Rs.5000/- and in default, to undergo rigorous imprisonment for six months; both the sentences to run concurrently. The accused filed an appeal to the High Court. The High Court, vide judgment, held that a case under Section 306 was not made out and that the accused was entitled to acquittal under that provision. But on the question of the offence under Section 376, reduced the term of imprisonment for life to that already undergone. The National Commission for Women filed a Special Leave Petition. On the aspect, as to whether, amendment made to Section 372 (Act 5 of 2009), with effect from 31st December, 2009, would enable the victim to file an appeal, before the High Court, the Hon'ble Supreme Court, at Paragraph 5, held as follows:

"Chapter XXIX of the Code of Criminal Procedure deals with "Appeal"(s). Section 372 specifically provides that no appeal shall lie from a judgment or order of a Criminal Court except as provided by the Code or by any other law which authorizes an appeal. The proviso inserted by Section 372 (Act 5 of 2009) w.e.f. 31st December, 2009, gives a limited right to the victim to file an appeal in the High Court against any order of a Criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an

inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence."

After considering a decision of the Apex Court in Pritam Singh v. State reported in AIR (37) 1950 SC 169, at Paragraph 10, the Supreme Court, in National Commission of Women's case, held that appeal is not maintainable. While doing so, the Supreme Court revoked the permission granted.

13. The decision made in National Commission of Women's case (cited supra), is followed by Chattisgarh High Court, in Bhisam Prasad Bareth v. Dinesh Mahant reported in 2012 CrL.L.J. 2157, wherein, having regard to the date of incident, ie., on 05.03.2008, at Paragraphs 12 and 13, the Court held that the appeal filed under Section 372 Cr.P.C., by the applicant/complainant, is not maintainable.

14. In D.Sudhakar v. Panapu Sreenivasulu reported in 2013 CrL.L.J. 2764, wherein, a Hon'ble Division Bench of Andhra Pradesh High Court has dismissed an appeal, filed by the defacto complainant, brother of the deceased. At Paragraph 10, it is held as follows:

"In view of the provisions of Sections 8 and 9 of the Hindu Succession Act, the appellant being a Class - II heir would not inherit anything from his deceased brother, as he is survived by his wife. Thus, the appellant is not entitled to the property of the victim under the applicable law of inheritance. Though the appellant falls in one of the category of heirs as per the Hindu Succession Act, but the Legislature deliberately used the word "legal heir", which strictly means a person who is entitled to the property of the victim under the applicable law of inheritance i.e. Hindu Succession Act. Hence, we are of the considered opinion that when it is the intention of the Legislature to give right of appeal to the legal heir, the appellant will not fall within the definition of "legal heir" and he is not entitled to prefer an appeal to this Court under Section 372 Cr.P.C. against acquittal of the accused. The second issue that falls for our consideration is that the incident has taken place on 07.12.2007 and the amendment to Section 372 Cr.P.C. has come into force w.e.f. 31.12.2009, where the victim can prefer an appeal against acquittal. This issue will not hold us for long, in view of the fact that the Apex Court in National Commission for Women v. State of Delhi, has already held that the amendment is not applicable to cases where the incident has taken place prior to amendment. Therefore, even on this count, the appellant fails, and as such, the appeal is liable to be dismissed as not maintainable."

15. Thus, it could be seen that when the Hon'ble Supreme Court in National Commission of Women's case, held that an appeal under Section 372 (Act 5 of 2009) is available to the victim, against any order of a Criminal Court, acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation, only with effect from 31st December, 2009, ie., on the date, the proviso was inserted to Section 372 (Act 5 of 2009).

16. Reverting back to the case on hand, for any incident, subsequent to the amendment and not earlier to the date on which, the amendment had come into force, ie., on 31.12.2009, the appeal in C.A.No.76 of 2013, filed by the defacto complainant, with reference to the occurrence, dated 17.09.2009, is not maintainable and following the above decisions, the present revision case, has to be allowed.

17. Though the learned counsel for the 2nd respondent prayed that the appeal in C.A.No.76 of 2013, be converted into a revision and accordingly, be proceeded with, this Court is not inclined to do so, for the reason that the decisions, relied on, by the learned counsel for the petitioner, lends support to the facts of this case. On the contention of the revision petitioner that conviction under Section 374 Cr.P.C., ought not to have been recorded, this Court is of the view that it cannot be adjudicated in this revision case, without there being any appeal filed by the accused, before the concerned forum.

18. In view of the above, the order made in C.A.No.76 of 2013, dated 22.01.2014, is set aside and the present criminal revision case is allowed. No costs.

Sd/-
Asst.Registrar (CS II)

/true copy/
सत्यमेव जयते

Sub Asst. Registrar

skm

To

1. The III Addl. District and Sessions Judge,
Salem.
2. The 3rd Additional Assistant Sessions Judge,
Salem.

WEB COPY

3. The Inspector of Police,
Shevapet Police Station,
Salem District.

4. The Public Prosecutor
High Court, Madras

1 cc to M/s.P. Jagadeesan, Advocate, Sr. 27605

1 cc to M.s.C.K.M. Appaji, Advocate, Sr. 27608

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