

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.31 of 2015

Arising Out of PS.Case No. -245 Year- 2012 Thana -GAYA MUFFSIL District- GAYA

Munna Paswan @ Navin Paswan Son of Mahendra Paswan Resident of vill-Senaut,
P.S-Muffasil, District-Gaya

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 108 of 2015

Arising Out of PS.Case No. -245 Year- 2012 Thana -GAYA MUFFSIL District- GAYA

Mithailal @ Mitlai Lal son of Sahadeo Ramani, resident of village- Sonout, P.S.-
Moffasil, District- Gaya

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 117 of 2015

Arising Out of PS.Case No. -245 Year- 2012 Thana -GAYA MUFFSIL District- GAYA

Maigar Singh Son of late Satish Singh Resident of Village- Senaut, Police Station-
Muffasil District- Gaya.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (SJ) No.31 of 2015)

For the Appellant/s : Mr. Ashok Kumar, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CR. APP (SJ) No.108 of 2015)

For the Appellant/s : Mr. Manish Kumar No.2, Adv.

For the Respondent/s : Mrs. Abha Singh, APP

(In CR. APP (SJ) No.117 of 2015)

For the Appellant/s : Mr. Ashok Kumar, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 23-11-2017

How the trial has been sacrificed on account of
indolency of the court as well as incompetency of the prosecutor
or being collusive/negligent one, the present appeal happens to be
glaring example. Though all the appellants, namely, Mithailal @



Mitlai Lal (appellant of Criminal Appeal (SJ) No. 108 of 2015), Maigar Singh (appellant of Criminal Appeal (SJ) No. 117 of 2015) have been found guilty for an offence punishable under Section 3(i)(xi) of the SC/ST (POA) Act as per para-28 of the judgment impugned though charged under Section 3(i)(xii) of the SC/ST (POA) Act, directing each of the appellant i.e. Maigar Singh as well as Mithailal @ Mitlai Lal to undergo R.I. for one year as well as to pay fine appertaining to rupees one thousand and in default thereof, to undergo S.I. for fifteen days while they alongwith Munna Paswan @ Navin Paswan (appellant of Criminal Appeal (SJ) No. 31 of 2015), have been found guilty under Section 376/511 of the IPC and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to rupees five thousand and in default thereof, to undergo R.I. for six months additionally, vide judgment of conviction dated 17.11.2014 order of sentence dated 20.11.2014 passed by First Additional Sessions Judge cum Special Judge, Gaya in connection with SC/ST Trial No.63/2013 arising out of Gaya Muffasil P.S. Case No.245/2012 but, the same would not be sufficient to condone the wrong which, the learned lower court had committed during course of conduction of trial.

2. For proper appreciation of the same, first of all the factual as well as submissions made on behalf of appellants to be taken note of. PW.9, Savitri Devi who happens to be grandmother of the victim (CW.1 name withheld) aged about 14 years gave her fardbeyan on 15.08.2012 at about 10:15 PM alleging inter alia that her granddaughter (victim) had gone to defecate herself towards road at about 08:00 PM. After sometime her co-villager,



Baleshwar Manjhi as well as Jagdish Manjhi came to her place and divulged that co-villager Beni Yadav, Laxmi Yadav and Siya Saran Yadav have seen Maigar Singh, Munna Paswan @ Navin Paswan and Mithailal @ Mitlai Lal committing rape upon victim (name withheld) whereupon, they tried to apprehend them but, managed to escape. Victim happens to be unconscious lying at school building. Then thereafter, she along with so many villagers gone to the school premises, had seen the victim lying unconscious over the ground with the help of villagers, they took the victim to the Police Station. It has also been disclosed that a full pant found at the place of occurrence had also being produced. It has further been disclosed that the victim happens to be deaf and dumb but is a literate. Kishore Manjhi her Bhagina stood as FIR attesting witness.

3. After registration of the case, as Gaya Muffasil P.S. Case No.245/2012 under Section 376(2)(G) of the IPC, 3(i)(xii) of the SC/ST (POA) Act, investigation commenced and after concluding the same, charge sheet was submitted and that happens to be basis for trial which concluded in a manner, as indicated above.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C is that of complete denial. However, neither oral nor documentary evidence has been adduced on their behalf.

5. The learned counsel for the appellants have submitted that the conviction and sentence recorded by the



learned lower court happens to be wrong, illegal, perverse, erroneous and on account thereof, it could not survive. To substantiate the plea, it has been submitted that informant PW.9 is not an eyewitness to occurrence. The evidence of Investigating Officer, PW.10 did not support the prosecution version relating to the occurrence as nothing incriminating has been found at the place of occurrence which could suggest commission of the occurrence inside the school premises. It has also been submitted that investigation has been conducted in perfunctory manner as the Investigating Officer failed to connect the full pant with any of the appellant. Witnesses of the surrounding have not been examined. The Investigating Officer had simply performed paraphernalia while placing charge sheet against the appellant without any basis and foundation.

6. It has also been submitted that from the initial version it happens to be Beni Yadav (PW.2), Laxmi Yadav (PW.1) and Siya Saran Yadav (PW.5) who had seen the occurrence but during course of trial, they have not supported the case of the prosecution so much so that they failed to claim themselves to be an eyewitness to occurrence. Apart from this, the other witnesses that means to say PW.3, Jagdish Prasad, PW.4, Siya Saran Yadav, PW.6 Baleshwar Manjhi, PW.7 Kishore Manjhi, they too gone volte-face to the prosecution. In its continuity, it has also been submitted that doctor PW.8 who had examined the victim on the alleged date of occurrence itself had not asserted that victim was ever raped. In the background of aforesaid deficiency, the learned lower court should not have relied upon sole testimony of CW.1.



The victim whose evidence happens to be fragile considering her status inconsonance with her tender age. Moreover, the pant which was produced never been cared by the Investigating Officer to get it properly verified, chemically examined in order to trace out whether semen was there or not and if so, its group inconsonance with group of any of the appellant and so, in cumulative effect, the judgment did not justify its prevalence.

7. The learned Additional Public Prosecutor supported the finding recorded by the learned lower court but submitted that instead of convicting the appellants for an offence punishable under Section 376/511 of the IPC as well as Section (i)(xi) of the SC/ST (POA) Act relating to appellants Maigar Singh as well as Mithailal @ Mitlai Lal should have been extended also up to Munna Paswan @ Navin Paswan.

8. Altogether ten witnesses namely PW1-Laxmi Yadav, PW.2-Beni Yadav, PW.3-Jagdish Prasad, PW.4-Aalu Baigan, PW.5-Siya Saran Yadav, PW.6-Baleshwar Manjhi, PW.7-Kishore Manjhi, PW.8-Dr. Shakuntala Nag, PW.9-Savitri Devi, PW.10-Nagendra Singh as well as also exhibited Ext.1-Signature of Kishore over fardbeyan, Ext.2-Injury (medical) report, Ext.3-Formal FIR, Ext.4-Endorsement over fardbeyan, Ext.5-Production cum seizure list. Victim has examined as CW.1.

9. The learned counsel for the appellants are right in submitting that material witnesses PW.1 to PW.7 have gone volte-face to the prosecution. They completely denied their status as well as towards occurrence. They also denied having their



statement recorded under Section 161 Cr.P.C. by the Investigating Officer. Be that as it may, while examining PW.10 the Investigating Officer the prosecutor completely ignored the same, and further, even failed to draw attention of PW.10 towards earlier statement of those witnesses recorded under Section 161 of the Cr.P.C. From the record, it transpires that the learned lower court allowed the event to proceed unnoticed, and is a first instant of distress.

10. At the stage of framing of charge, when the court had framed charge against the accused persons under Section 376(2)(G) of the IPC as well as Section 3(i)(xii) of the SC/ST (POA) Act, the court should have also framed charged under Section 3(2)(v) of the SC/ST (POA) Act in the background of offence of gang rape prescribing sentence more than ten years. The appellants were knowing since before that the victim happens to be the member of scheduled caste/scheduled tribe, being their co-villager. At least even during course of trial, proper exercise would have been taken by way of amendment/addition of charge, which the court failed, and is the another instance of dejection.

11. While examining the victim as CW.1 who admittedly happens to be deaf and dumb, the learned lower court should have considered (a) in case it found to be guided by the date of occurrence i.e. 15.08.2012, the then prevailing Section 119 of the Evidence Act would have governed the issue which reads as follows:

Dumb witnesses - A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in the open court. Evidence so given to be oral



evidence.

At the present juncture Section 279 as well as Section 282 of the Cr.P.C. is also to be taken note of which deals with the issue in hand and in the aforesaid background, the remark of interpreter should have been at the end of the deposition relating to authenticity thereof. That is clearly lacking.

(b) If the same is taken with the date of examination of CW.1 which happens to be on 11.09.2014, the same should have been under the guise of amended section 119 of the Evidence Act which requires certain exercise to be at the end of the court. For better appreciation same is quoted below:

“119. Witness unable to communicate verbally—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed”

Certainly, there happens to be no videography nor the order sheet divulges like so. This happens to be third instance of incapability of the learned lower court.

12. Apart from this, from the first para of the deposition of CW.1, it is evident that court had given some sort of remark relating to the victim and the same happens to be “witness is dumb and deaf and illiterate and therefore her statement is being recorded with assistance of expert of language of dumb and deaf Kumar Manish but, from the signature of the victim having at the



end of the deposition clearly suggest that she would not be an illiterate. That means to say, the learned lower court had purposely been indulged in such kind of activity and the reason therefor would be best known to the learned lower court. The certificate did not suggest that any effort was taken at the end of the learned lower court to know about the same, when the fardbeyan specifically discloses that the victim happens to be literate, nor there happens to be any kind of divulgence at the end of the interpreter that victim was illiterate. Furthermore, from the order sheet dated 11.09.2014 it is evident that interpreter was not at all administered oath.

13. Furthermore, from the deposition it is evident that para-1 to 4 it happens to be the examination-in-chief while from para-5 to onwards there happens to be cross-examination. The aforesaid cross-examination happen to be in form of question and answer. It is further evident from the aforesaid deposition that court had not recorded any kind of remark with regard to competency of the expert whether he was properly dealing the victim while interpreting the questions having put at the end of the accused and in likewise manner, whether the interpreter was correctly interpreting the same as some questions were repeatedly asked, whereupon at, first instance affirmed the act of gang rape, while subsequently, shown as an attempt, which the learned lower court pick up to grant relief in favour of appellants although the evidence in its entirety would have been considered by the lower court.

14. In ***State of Rajasthan v. Darshan Singh*** reported



in **2012 Cr.LJ. 2908**, it has been held:

“16. We have also gone through the entire evidence and concur with the findings recorded by the High Court.

Basic argument which has been advanced by both the parties before us is on the admissibility and credibility of the sole eyewitness Geeta (PW 16).

Admittedly, Geeta (PW 16) had not been administered oath, nor was Jaswant Singh (PW 1), her father who acted as interpreter when her statement was recorded in the court. In view of the provisions of Sections 4 and 5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness. This Court in *Rameshwar v. State of Rajasthan AIR 1952 SC 54* has categorically held that the main purpose of administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility.

However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence.

17. In *M.P. Sharma v. Satish Chandra AIR 195 SC 360*, this Court held that: (AIR p. 304, para 10)

“10. ... A person can ‘be a witness’ not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like.”

18. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law



requires that there must be a record of signs and not the interpretation of signs.

19. In *Meesala Ramakrishnan v. State of A.P.* (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that “verbal” statement does not amount to “oral” statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that the witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

20. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing, if literate or through signs and gestures, if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

21. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

15. That being so, the whole process gone in mechanical way and the ultimate causality happens to be that of justice. After perceiving the entire scenario, it is evident that there happens to



be miscarriage of justice whereupon attracts de-novo trial by way of amending the charge as well as getting the victim re-examined on that very score under the guise of principle laid down by the Apex Court as reported herein above.

16. In **Vinod Kumar vs. State of Punjab** reported in (2015) 3 SCC 220.

“3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognise “the felt necessities of time” and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes “fair trial” for the accused as well as the prosecution?”

17. In **Ajay Kumar Ghoshal Etc. Vs. State of Bihar & Another** reported in **2017(1) PLJR 458 (SC)**:

“10. Section 386 Cr.P.C. deals with the powers of the appellate court. As per Section 386 (b) Cr.P.C, in an appeal from a conviction, the appellate court may:- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.

11. Though the word “retrial” is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or



the Court refused to hear certain witnesses who were supposed to be heard.

12. 'De novo' trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold 'de novo' trial. But the question is when such power should be exercised. As stated in *Pandit Ukha Kolhe vs. State of Maharashtra* (1964) SCR 926, the Court held that:

"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

13. This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, "a de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable; it should be limited to the extreme exigency to avert 'a failure of justice'. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial". In *State of M.P. vs. Bhooraji and Ors.* (2001) 7 SCC 679, the Court went on to say further as follows:

"8....This is because the appellate court has plenary powers for revaluating and



reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation."

14. In Bhooraji's case, the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465 (1). After noticing the above provisions, the Court observed in paragraphs (15) and (16) of the order as follows:

"15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by a failure of justice occasioned on account of such error, omission or irregularity? This Court has observed in Shamnsaheb M. Multtani vs. State of Karnataka {2001 (2) SCC 577} thus:

"23. We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (the



simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment*, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.”

15. In *Gopi Chand vs. Delhi Administration* AIR 1959 SC 609, a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Code of Criminal Procedure, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; accordingly, set aside the orders of conviction and sentence and the Constitution Bench held as under:-

“29.the offences with which the Appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the Appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the Appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible.”

16. In *Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.* (2004) 4 SCC 158, [Best Bakery case] being an extraordinary case, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a ‘de novo’ trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in Best Bakery case for retrial was in the extraordinary circumstances and cannot be applied for all cases.

17. After considering the question a “speedy trial” and “fair trial” to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always



be demand of justice, in Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi) (2012) 9 SCC 408, this Court held as under:-

“41. ‘Speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A ‘de novo trial’ or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal



system and the interests of the society are not altogether overlooked.”

18. That being so, the judgment of conviction and sentence recorded by the learned lower court is set aside. All the appeals are allowed, remitting the matter to the learned lower court to proceed afresh in terms of direction having given herein above. All the appellants are on bail which is extended only for fortnight, during midst thereof, all the appellants will surrender before the learned lower court with a prayer which the learned lower court will consider in accordance with law. In case of failure at the end of appellants, then in that event, the learned lower court will be at liberty to proceed against them in accordance with law.

19. Office to transmit the record through special messenger. From perusal of lower court record, the judgment impugned particularly relating to examination of C.W.1 suggest some sort of dubious activity or in competency whereupon needs to be properly visited by the Standing Committee in administrative side. Office to prepare shadow record and then thereafter place it before the Standing Committee at once.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	28.11.2017
Transmission Date	28.11.2017

