

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.172 of 2015

Arising Out of PS.Case No. -49 Year- 2006 Thana -BHAWANIPUR District- PURNIA

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1. Md. Gaffar @ Md. Ghaffar.
 2. Md. Aziz.
Both sons of Late Habib
 3. Md. Arif Son of Md. Aziz.
 4. Md. Shahbaz, Son of Md. Gaffar @ Md. Ghaffar
All resident of village: Shahidganj, Police Station: Bhawanipur, District-
Purnia.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

For the Appellant/s : Mr. Bishwanath Prasad Singh, Adv.

For the Respondent/s : Mr. Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 11-09-2017

Appellants, Md. Gaffar @ Md. Ghaffar, Md. Aziz, Md. Arif, Md. Shahbaz have been found guilty for an offence punishable under Section 323 IPC and sentenced to undergo R.I. for six months as well as fined of rupees five hundred, under Section 307/94 IPC and sentenced to undergo R.I. for ten years as well as fine of rupees ten thousand. In default of payment of fine to undergo S.I. for three months additionally under both heads vide judgment of conviction and sentence dated 18.02.2015 recorded by Third Additional Sessions Judge, Purnea in Sessions Trial No.1316/2006.

2. PW.8, Md. Moiz filed written report on 17.06.2006 divulging therein that on 16.06.2006 his children as well as children of Md. Aziz, Md. Gaffar @ Md. Ghaffar quarreled during course of play whereupon, he had scolded the children and then,



took his children to his place. Today morning at about 07:00 A.M. Md. Aziz, Md. Gaffar @ Md. Ghaffar, Md. Arif, Md. Shahbaz armed with lathi, danda reached at his house and began to abuse. On protest made by him, all the four named above began to assault with lathi, danda indiscriminately as a result of which he sustained severe injury. His father came in rescue who was assaulted by Md. Gaffar and Md. Arif. His wife Afsana Khatoon came in rescue who was assaulted by Md. Aziz and Md. Shahbaz. On hue and cry, the persons of the surrounding came and rebuked the accused persons whereupon, they left the place. Then thereafter, he along with his wife, father, came to P.S. to file a case.

3. At an initial stage, case was registered under Sections 341,323,448,504/34 of the IPC however, first attempt was made by the I.O. to add Section 325, 307 of the IPC which was allowed vide order dated 21.06.2006. Subsequently thereof, vide order dated 22.06.2006 it was converted under Section 302 of the IPC wherein, after concluding investigation charge sheet was submitted. The trial commenced relating to murder of Rajjak along with along with murderous attack over informant Md. Moiz along with his wife Afsana Khatoon.

4. As prosecution had failed to examine doctor in likewise manner failed to exhibit the postmortem report, inquest report with regard to death of Rajjak over which appellants were acquitted for an offence punishable under Section 302 of the IPC. But, they have been found guilty for the offences as indicated above and sentenced therefore which has been assailed under



instant appeal.

5. 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 of the occurrence. It has also been pleaded that members of the prosecution party might have sustained injuries in different manner at different place and on account of dispute amongst the parties who are close agnate and are residing in the same house, this false case has been filed. However, neither any DW nor a chit of paper has been adduced in the case.

6. In order to substantiate its case prosecution had examined altogether nine PWs. PW.1 Md. Abbas, PW.2 Kalimuddin, PW.3 Md. Kailu, PW.4 Md. Azarul, PW.5 Kalamuddin, PW.6 Afsana Khatoon, PW.7 Dr. Rabindra Kumar Verma, PW.8 Moij Alam @ Md. Moij, PW.9 Gupteshwar Dubey. Prosecution had also exhibited Ext.1 Series-Injury Report. As stated above, appellants/accused did not enter into defense.

7. Learned counsel for the appellants while challenging the judgment impugned has submitted that the same has been passed in a mechanical manner without appreciating the evidences in its right perspective on account thereof, is fit to be set aside. To substantiate the same, it has submitted that in initial version the prosecution concealed the fact that both the parties are cousin brothers, uncle residing in the same house on account thereof, assertion of the informant that they have come duly armed from their houses and then occurrence took place happen to be palpably false apart from having adverse impact over manner



as well as genesis of occurrence. Furthermore, it has also been submitted that at an initial stage, informant had alleged that first of all he was assaulted. Then his father came in rescue who was assaulted and subsequently to that, his wife, who also came in their rescue, was assaulted. When the evidence of informant is considered, then in that event, it is apparent that firstly his father was assaulted and then thereafter, others were assaulted. Apart from this, there happens to be major exaggeration in the evidence of the PWs and on account thereof, the evidences of the PWs are fit to be rejected. In likewise manner, the Investigating Officer PW.9 during course of inspection of the P.O. had not found connecting evidences apart from the fact that P.O. has been identified to be common court yard of the prosecution as well as accused persons which happens to be inconsistent as per evidence of informant and that being so, it is a fit case wherein appeal should be allowed.

8. The learned Additional Public Prosecutor supported the finding recorded by the learned lower court and submitted that evidence of injured witnesses which lie on higher pedestral is to be accepted. From the evidence available on the record it is evident that they are consistent with regard to the P.O. as well as manner of occurrence whereupon, finding recorded by the learned lower court did not attract interference.

9. Now coming to evidences, it is evident PW.1, Md. Abbas, happens to be hearsay as had stated that after returning from Bahiyar he came to know that there was quarrel amongst the Md. Gaffar and Md. Aziz. In likewise manner, PW.2 as well as



PW.3 also stood. PW.5 was declared hostile by the prosecution.

10. PW.4 is Md. Azarul who had deposed that on the alleged date and time of occurrence he had gone to place of occurrence to bring milk. He had further stated that there was dispute amongst children of Aarif and Moij a day prior to the occurrence wherein Rajjak (father of Moij) removed his children and in the aforesaid background, Rajjak his son Moij and wife of Moij were assaulted by Aziz, Aarif, Gaffar and Shahbaz with lathi. Rajjak had sustained hurt over his head while Moij over his both shoulder. Wife of Moij was assaulted by Gaffar. In para-2 of his cross-examination he had stated that he had made statement before the police but he is unable to say what kind of statement he had made. In para-3, he had stated that both the parties originate from common ancestor and on that very score, he had stated that father's name of Rajjak happens to be Habib who had five sons, Aziz, Rajjak, Kamal, Gaffar and Iliyash. Rajjak and his branches are the prosecution while Aziz and Gaffar and their sons are the accused persons. He had further stated that no partition has taken place in the family up till now. He had further stated that he happens to be brother-in-law of Samim who happens to be brother-in-law of Moij. In para-4, he had stated that his house lies near the house of both the parties. At the time of occurrence he was at his house. Then had stated that he had gone to the Darwaja of Kamal in order to bring milk. Kamal happens to be uncle of informant, Md. Moij. He had further stated that he saw the occurrence accordingly. In para-5, he had stated that he remained at the Darwaja of Habib for half an hour. During midst thereof, large number of persons assembled there but he is not



remembering their names. Then had denied the suggestion that as he happens to be relative of the informant, on account thereof, falsely deposed.

11. PW.6 is Afsana Khatoon one of the injured. She had stated that on the alleged date and time of occurrence while she was frying flat rice in her courtyard Sahwaj, Aziz came in the courtyard with lathi and began to abuse. Her husband came there whereupon both began to assault him with lathi as a result of which, her husband sustained injury over his head as well as other parts of body. Her father-in-law, Rajjak came in rescue who was assaulted by Aarif and Gaffar. She was assaulted by Ashmina, Rabina, Aarif, Gaffar with lathi as a result of which, she sustained fracture of his right hand. People assembled who took away, her father-in-law, husband and her to Bhawanipur P.S. where case was instituted. It has further been disclosed that on account of dispute having amongst the children, instant occurrence has taken place. In para-2, she had stated that all the accused persons belong to her family. They are cousin brother as well as uncle of her husband. In para-3 she had stated that the children quarreled a day prior to the occurrence. Matter was pacified. There was no cause for commission of the occurrence. Then had stated that she along with accused persons reside in the same courtyard. During course of occurrence, none of the villagers came. Accused persons came and began to hurl lathi blow indiscriminately as a result of which they sustained injuries. In para-4, she had stated that blood had fallen down from the injury of her father-in-law in the courtyard. Her hand was fractured as a result of which she became unconscious. She regained sense at



hospital. She had also stated that her husband also regained sense at the hospital. Then had denied the suggestion that they have sustained injury at some other place in different manner and on account of land dispute, instant case has been registered.

12. PW.8 is the informant, Md. Moij Alam @ Md. Moij. He had deposed that his son as well as son of Aarif quarreled while plying as a result of which, his father removed his child. On the same day, Aarif, Gaffar and Aziz came with lathi in the courtyard and began to assault his father Md. Rajjak with lathi as a result of which, he sustained injuries over his head. When he came in his rescue, he was also assaulted. His wife was also assaulted as a result of which her hand, leg sustained fracture. Villagers came. Then thereafter, they came to P.S. and instituted a case. His further statement as well as statement of his wife, father was recorded. Thereafter, they were sent to Hospital and from there, to Sadar Hospital, Purnea. Then had stated that they stayed two days at Sadar Hospital, Purnea. Subsequently thereof, doctor had instructed to get his father examined by specialized doctor and under such circumstance, while he was being taken to Silliguri, he died. Postmortem was conducted and then thereafter, dead body was handed over. In para-4 of his cross-examination, there happens to be detailed description of family feud so persisting. Then had stated that age of Aziz happens to be 70-75 years while age of Gaffar happens to be 55-56 years. All of them reside in the same house sharing common courtyard as well as passage. At para-5 he had further stated that his father was treated for 36 hours at Sadar Hospital, Purnea and then thereafter, he died. In para-6, he had further stated that he had



accompanied his father. While doctor had instructed to take him to Silliguri for specialized treatment and during course thereof, he died in the midst of way. Then thereafter, he returned back along with dead body. He informed the police who arrived and then, thereafter, other paraphernalia was completed. He had further stated that after having been instructed he hired jeep through which, he was coming to his house for arranging money and during midst thereof, near village-Bhawanipur his father died whereupon he came to his house. During midst of way, he had not gone to Bhawanipur rather he directly came to his house and then thereafter police came and took the dead body for postmortem. He is unable to say whether inquest was prepared or not. He had further said that his uncle had gone with the dead body to Purnea who, after postmortem took the dead body to his house. Funeral was effected in the village. Accused Aziz had tried to participate in the funeral but was not allowed whereupon returned back. In para-8, he had stated that his mother, sister was present. In para-9, he had further stated that at the time of occurrence, his sister and mother was not present, though they were present during course of treatment of his father. In para-10, he had further stated that children were playing in the courtyard. They quarreled at about 10 AM and then thereafter, his father had removed. Aziz had also removed his children. Later on, both the party quarrelled. This occurrence had taken place on the following day. At that very time he was at the house. Courtyard and Darwaja are contiguous of each other. After hearing an altercation, no sooner than his arrival given 25-30 lathi blows, indiscriminately as a result of which he sustained injury at different parts of the body. Father



was also assaulted in the similar way. His father became unconscious. In para-12 he had stated that place of occurrence was shown to the police. He also shown the blood having been fallen over the earth. Again said that accused persons had removed the same. In para-13, he had shown the boundary place of occurrence as East-Darwaja, West-House of Aziz, North-House of Gaffar and South-His own house. In para-14, he had further stated that accused persons after coming near stove, began to assault his wife. He had further stated that Investigating Officer had seen the stove. In para-15, he had said that occurrence took place for about twelve minutes and during midst thereof, none of the villagers came. In para-16, he had further stated that up till now no partition has been effected though, accused persons have constructed their house separately. Then there happens to be to be cross-examination relating to Azarul. Firstly informant had admitted that he had encroached upon some portion of land of Azarul whereupon his residential house stands but again controverted the same. In para-17, he had further stated that his father was heart patient and his treatment was going on at Purnea. On account of aforesaid disease his father became unconscious. Then had denied the suggestion that on account of heart disease, his father died. In para-18, he had further stated that he will not examine his mother as well as sister. In para-19, there happens to be contradiction.

13. PW.9 is the Investigating Officer, Gupteshwar Dubey. He had deposed that after registration of the case, he took up investigation. He had recorded statement of Md. Moij and then thereafter statement of Afsana Khatoon. He also recorded



statement of Rajjak and then inspected the P.O. P.O. happens to be joint courtyard of informant as well as accused. He had shown the boundary, South-House of Informant, North-House of accused Gaffar, East-Afsar Karim, West-House of Md. Aziz. He also took statement of other witnesses. He had further stated that injured were sent to hospital for treatment. Received injury report. Md. Rajjak was referred to Sadar Hospital, Purnea where, during course of treatment died. He received inquest report. Then received postmortem. After concluding investigation submitted charge sheet. In para-4, he had stated that during course of statement Md. Moij had stated that blood had fallen over earth at the place of occurrence. He had not stated that he was to carry his father for better treatment to Silliguri. In para-5, he had stated that during course of investigation, he had not got any kind of information with regard to ailment of Rajjak as well as being of an old age. In para-6, he had stated that Afsana Khatoon had not disclosed names of Rabina, Asmina as her assailant. In para-7, he had stated that he was not informed by anybody with regard to land dispute prevailing amongst the parties. He had further stated that he had not taken statement of any independent witness. He had further stated that Officer-in-charge had informed regarding death of Rajjak and inquest was handed over by him. In para-8, he had further stated that he had inspected the place of occurrence on the date of occurrence itself. He had recorded statement of all the witnesses on same day. He had further stated in para-9 that he had not found any sign at the place of occurrence corroborating the occurrence. He had not taken statement of the witnesses. Then had denied the suggestion that



he made collusive investigation.

14. PW.7 is the doctor who had examined respective injured on 17-06-2006. He had examined Md. Rajjak at 09:50 AM and found the following injuries:

- i. A lacerated wound 3"x1/2"x bone deep on the anterior part of left parietal region of scalp.
- ii. Ecchymosed swelling with mark tenderness on upper part of right forearm. Just below right elbow joint.
- iii. Ecchymosed swelling with tenderness on the lower part of left forearm.

Opinion of nature of all the abovementioned injuries were reserved, as patient was referred to Sadar Hospital, Purnea for treatment. All the above mentioned injuries were caused by hard and blunt substance. Age of injury is within six hours. Exhibited the injury report as Ext.1.

On the same day at about 10 AM he examined Md. Moij aged 40 years, son of Md. Rajjak, resident of village-Sahidganj, P.S.-Bhawanipur, District-Purnea and found following injuries upon his person:

- i. Enlarged ecchymosed swelling on the back covering about whole scapula left side with abrasion 2"x1/2" over the swelling.
- ii. An ecchymosed swelling on the back of right shoulder covering upper part of right scapula back.
- iii. An ecchymosed swelling with tenderness on the lateral side of right elbow.
- iv. An ecchymosed swelling on the right occipital region of the scalp.

Opinion of the nature of all the abovementioned injuries were reserved as the



patient was referred to Sadar Hospital, Purnea for further treatment. All the above mentioned injuries were caused by hard and blunt substance. Age of injury is within six hours. Exhibited as Ext.1/1.

On the same day at 10:10 AM he examined Afsana Khatoon aged 35 years, wife of Md. Moij and found the following injuries on her person:

- I. An ecchymosed swelling with tenderness on upper part of right forearm.
- II. An ecchymosed swelling with tenderness on lower part of left forearm.
- III. Swelling and tenderness on the back of upper part of right shoulder.

Opinion of the nature of the above mentioned injuries were reserved as patient was referred to Sadar Hospital, Purnea for further treatment and necessary action. All the above mentioned injuries were caused by hard and blunt substance. Age of injury is within six hours. Exhibited as Ext.1/2.

During cross-examination, he had stated that he had not received any injury report from Sadar Hospital, Purnea. Then had denied the suggestion that these injury would be caused on fall over hard and blunt substance. In para-6 he had further stated that he had not mentioned with regard to injury no.1 of Md. Rajjak that it was stitched by him as well as was in ordinary course of nature sufficient to cause death. Then had said that he suspected fracture so he had referred all the injured to Sadar Hospital, Purnea.

15. From perusal of the record, it is evident that learned lower court had proceeded with the trial in casual manner in the background of the fact that in spite of having stated by the



Investigating Officer, PW.9 that he had recorded statement of deceased Md. Rajjak, the aforesaid statement could not be taken as well as marked as an exhibit as was permissible in terms of Section 162 of the Cr.P.C read with Section 32 of the Evidence Act. The Hon'ble Apex Court in **Mukeshbhai Gopalbhai Barot v. State of Gujarat** reported in **AIR 2010 SC 3692** has held as follows:

"4. We have considered the arguments advanced by the learned counsel for the parties. At the very outset, we must deal with the observations of the High Court that the dying declarations Exs. 44 and 48 could not be taken as evidence in view of the provisions of Sections 161 and 162 of the Cr. P.C. when read cumulatively. These findings are, however, erroneous. Sub-section (1) of Section 32 of the Indian Evidence Act, 1872 deals with several situations including the relevance of a statement made by a person who is dead. The provision reads as under :

Sec. 32. Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant. - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :-

(1) When it relates to cause of death. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

We see that the aforesaid dying declarations are relevant in view of the above provision. Even otherwise, Sections 161 and 162 of the Cr. P.C. admittedly provide for a



restrictive use of the statements recorded during the course of the investigation but sub-section (2) of Section 162 deals with a situation where the maker of the statement dies' and reads as under :

"(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

5. A bare perusal of the aforesaid provision when read with Section 32 of the Indian Evidence Act would reveal that a statement of a person recorded under Section 161 would be treated as a dying declaration after his death. The observation of the High Court that the dying declarations Ex. 44 and 48 had no evidentiary value, therefore, is erroneous. In this view of the matter, the first dying declaration made to the Magistrate on 14th September 1993 would, in fact, be the First Information Report in this case."

16. In likewise manner, it is also apparent that there happens to be no execution report with regard to Dr. S.K. Sinha more particularly, in the background of the fact that on 19.09.2012 O/c was directed to issue summon and as per endorsement, it was issued on 20.09.2012 but no execution report is available on record and by such activity and prohibited the prosecution to exhibit the same. It is also apparent that prosecution case was closed at an earlier occasion without taking any positive steps whereupon prosecution had filed a petition under Section 311 Cr.p.C. on 19.11.2011 and the same was allowed vide order dated 16.07.2012. That being so, it was incumbent upon the learned lower court to have properly exercised so that, the opportunity having allowed vide order dated 16.07.2012 would not have frustrated. From the judgment impugned, it is evident that learned lower court had totally ignored the lapses having on its part in spite of the fact that



prayer was allowed under extraordinary power vested to the court in terms of Section 311 of the Cr.P.C. In para-18, it has simply taken up and further, quoted the passage of judgment rendered by the Apex Court as reported in AIR 2012 SC 1, without making proper scrutiny whether same is applicable or not, in the facts and circumstances of the case. By such activity, the learned lower court blocked an opportunity to have proper evidence on the record, which could have facilitated the learned lower court to part with justice.

17. Now coming to other aspect, it is evident that charge is also defective which the learned lower court should have properly taken cognizance in consonance with the allegation attributed by the witnesses, at least by amending the same at an appropriate stage, though has got some sort of shield in terms of Section 464 Cr.P.C. but when considered in its entirety, suggest inefficiency of the learned lower court.

18. The Hon'ble Apex Court in **Ajay Kumar Ghoshal vs. State of Bihar and Anr.** reported in **2017 Cr.L.J. 1428** has held that where miscarriage of justice has occasioned on account of failure on the part of the court itself, then in that event, it happens to be a good ground for remitting the matter. It looks desirable to incorporate relevant paras:

"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 v. State of Maharashtra (1964)



SCR 926:AIR 1963 SC 1531), 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 re-trial 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. v. Bhooraji and Ors.* (2001) 7 SCC 679: (AIR 2001 SC 3372), 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 (AIR 2001 SC 3372) 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 v. State of Karnataka (2001) 2 SCC 577 : (AIR 2001 SC 921) 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 ER 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 v. 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. v. State of Gujarat and Ors.* (2004) 4 SCC 158 : AIR 2004 SC 3114), [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.”

19. In **Pooja Pal vs. Union of India & Ors.** reported in **(2016) 3 SCC 135**, it has been held:

“**56.** Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in para 41: (*Zahira Habibulla case (2004) 4 SCC 158, SCC pp. 187-88*)

“41. ‘Witnesses’, as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice



triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed."

(emphasis supplied)

57. It was underlined in *Zahira Habibulla case (2004) 4 SCC 158* that if ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice do not get incapacitated in the sense of making the proceedings before the courts, mere mock trials. While elucidating that a court ought to exercise its powers under Section 311 of the Code and Section 165 of the Evidence Act judicially and with circumspection, it was held that such invocation ought to be only to subserve the cause of justice and the public interest by eliciting evidence in aid of a just decision and to uphold the truth. It was proclaimed that though justice is depicted to be blindfolded, it is only a veil not to see who the party before it is, while pronouncing judgment on the cause brought before it by enforcing the law and administer justice and not to ignore or turn the attention away from the truth of the cause or the lis before it, in disregard of its duty to prevent miscarriage of justice. That any indifference, inaction or lethargy displayed in protecting the right of an ordinary citizen, more particularly when a grievance is expressed against the mighty administration, would erode the public faith in the judicial system was underlined. It was highlighted that the courts exist to do justice to the persons who are affected and therefore they cannot afford to get swayed by the abstract technicalities and close their eyes to the factors which need to be positively probed and noticed. The following statement in *Jennison v. Baker (1972) 2 WLR 429*, was recalled: (QB p. 66)

"... 'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.'"

58. It was declared in *Zahira Habibulla case (2004) 4 SCC 158* that the courts have to



ensure that the accused persons are punished and that the might or the authority of the State is not used to shield themselves and their men and it should be ensured that they do not wield such powers, which under the Constitution has to be held only in trust for the public and society at large. That if any deficiency in investigation or prosecution is visible or can be perceived by lifting the veil covering such deficiency, the courts have to deal with the same with an iron hand appropriately within the framework of law, was underlined.

59. Referring to its earlier decision in *Karnel Singh v. State of M.P. (1995) 5 SCC 518*, it was reiterated that in a case of a defective investigation, the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 of the Code or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It recalled as well its observations in *Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517* that the courts are installed for justice-oriented mission and thus, if a negligent investigation or omissions or lapses due to perfunctory investigation are not effectively rectified, the faith and confidence of the people would be shaken in the law-enforcing agency and also in the institution devised for administration of justice.

60. Though, as referred to hereinabove, trial was completed and the accused persons were acquitted, in the textual facts, this Court in *Zahira Habibulla case (2004) 4 SCC 158* did direct retrial as prayed for, to avoid subversion of the justice delivery system and ordered the investigating agency or those supervising the investigation to act in terms of Section 173(8) of the Code as the circumstances would so warrant.

61. The observations and the propositions, though made in the backdrop of a request for retrial, those pertaining to the essentiality of a fair and complete investigation and trial as well as the solemn duty of the courts to ensure the discernment of truth to administer even handed justice as institutions of trust of public faith and confidence, are in our estimate, of universal application and binding effect, transcending the factual settings of a case. An adverse deduction vis-à-vis the quality of investigation and a trial trivialising the cause



of justice, is however the essential prerequisite, for such remedial intervention by way of further investigation, reinvestigation, additional evidence, retrial, etc. to be made objectively but assuredly for the furtherance of the salutary objectives of the justice dispensing system as *contemplated in law, it being of paramount pre-eminence.*”

20. In State (NCT of Delhi) vs. Shiv Kumar Yadav &

Another reported in **(2016) 2 SCC 402**, it has been held:

“**10.** It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.”



21. As such, judgment impugned is set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh in accordance with law. In the aforesaid facts and circumstances of the case, appellants who are availing privilege of bail is extended for four weeks, during midst thereof, will surrender before the learned lower court with a prayer for bail which the learned lower court will consider in accordance with law, failing which, learned lower court will be at liberty to proceed against the appellants in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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

