

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.114 of 2015

Arising Out of PS.Case No. -374 Year- 2008 Thana -DANAPUR District- PATNA

1. Narendra Rai @ Jyot Rai Son of Late Ghanshyam Rai Resident of Village-Varuna, P.S.m - Bikramganj, District- Rohtas(Bihar).

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 118 of 2015

Arising Out of PS.Case No. -374 Year- 2008 Thana -DANAPUR District- PATNA

Bindeshwari Sharma @ Gurujee

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 140 of 2015

Arising Out of PS.Case No. -374 Year- 2008 Thana -DANAPUR District- PATNA

1. Rauni Singh Son of Ram Badan Singh Resident of Village - Saidanpur Masadi, P.S. - Gaurichak, District - Patna (Bihar) At present Residing at Mohalla - Defence Colony, Raghurampur, P.S. - Shahpur (Danapur), District - Patna (Bihar).

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

Appearance :

(In CR. APP (SJ) No.114 of 2015)

For the Appellant/s : Mr. Vikramdeo Singh, Adv.
Mr. Vinay Kr. Mishra, Adv.

For the Respondent/s : Mrs Abha Singh, APP

(In CR. APP (SJ) No.118 of 2015)

For the Appellant/s : Mr. K.K. Jha,
Mr. Amish Kumar,
Mr. K. C. Jha, Advocates

For the Respondent/s : Mr.S.A. Ahmad, APP

(In CR. APP (SJ) No.140 of 2015)

For the Appellant/s : Mr. Om Prakash Pandey,
Mr. Vinay Kr. Mishra, Advocates.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 26-06-2018



CR. APP (SJ) No.114 of 2015 wherein Narendra Rai @ Jyot Rai is the appellant, CR. APP (SJ) No.118 of 2015 wherein Bindeshwari Sharma @ Gurujee is the appellant and CR. APP (SJ) No.140 of 2015 wherein Rauni Singh is the appellant have commonly originated against the judgment of conviction dated 22/01/2015 and order of sentence dated 09/02/2015 whereby and whereunder all the appellants have been found guilty for an offence punishable under Section 395 IPC and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for six months additionally. Appellants, Narendra Rai @ Jyot Rai and Rauni Singh have further been found guilty under Section 412 IPC, however, no separate sentence has been inflicted therefor by the Additional District & Sessions Judge-II, Danapur, Patna in Sessions Trial No. 780/2010, on account thereof, have been heard together and are being disposed of by a common judgment.

2. Armed miscreants raided United Bank of India, Usri-Shikarpur Branch on 16/12/2008 at about 10:00 AM and on the pretext of threatening endangering lives of employees by means of fire arm decamped with cash of Rs. 52,550/-, though earlier disclosed as Rs. 82,215/- though some of them were assaulted whereupon on the written report of Branch Manager, Ganesh, (PW 1), Danapur PS Case No. 374/2008 was registered at an initial stage under Section 394 IPC



against unknown. During course of investigation, participation of more than five miscreants were traced out some of whom, on account of being suspected were apprehended, remanded from different cases, having inculpatory extra judicial confessional statement at their end, recovery of cash though in meagre amount has been shown against them and further, one of the police personnel who was deployed at the Bank, Indukant Mishra (PW 11) identified some of the accused during course of TIP whereupon, so many chage-sheets were filed and that happens to be the basis for conduction of trial, concluded by way of recording acquittal against co-accused, Karan Singh @ Painter while convicting the appellants in a manner as indicated above.

3. It is also evident from the lower court record that two of the accused Pappu Manjhi and Ashok Yadav escaped during course of trial whereupon their trials were separated.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. However, nothing has been adduced in defence.

5. The prosecution, in order to prove its case, had examined altogether 12 PWs who are PW-1, Ganesh Kumar (informant) PW-2, Meghnath Nath, PW-3, Shyam Narayan Singh Azad, PW-4, Ajay Kumar Sinha, PW-5, Jai Nath Verma, PW-6,



Buneshwar Prasad, PW-7, Nirmal Kumar, PW-8, Raman Kumar, PW-9, Sri Kant Pathak, PW-10, Harendra Nath Pandey, PW-11, Indukant Mishra and PW-12, Dr. A. K. Singh. Side by side had also exhibited Ext-1, Written report, Ext-2 and Ext-3/1, Seizure list dated 23.12.2008, Ext-3/2, Signature of the then SHO on the FIR, Ext-4, Confessional statement Narendra Rai, Ext-4/1, Confessional statement of Ronny Singh, Ext-4/2, Signature of Bindeshwar Sharma on his confessional statement, Ext-4/3, Confessional Statement of Karan Singh @ Painter dated 19.11.2009, Ext-5, TIP chart, Ext-5/1, Signature of Assistant Jailor on TIP Chart, Ext-6, Driving License of Rauni Singh, Ext-6/1, ATM Card of Rauni Singh, Ext-6/2, Dependent I-Card of Rauni Singh, Ext-7, Signature of Dr. A.K. Singh on injury report. Defence has not been able to lead ocular as well as documentary evidence.

6. All the appellants have been independently represented and basically though they have challenged the finding recorded by the learned lower court but in different modes as well as grounds. That being so, the same is independently dealt with.

7. It has been submitted on behalf of the appellant, Bindeshwari Sharma @ Gurujee that there happens to be no evidence against him to connect with the alleged crime. To substantiate such plea, it has been submitted that the appellant has not been identified at



the court. That being so, no substantial evidence has been produced against him by the prosecution. Mere on the basis of inculpatory extra-judicial confessional statement as well as so alleged call details without fulfilling the mandate of Section 65B of the Evidence Act, would not justify the conclusion arrived at by the learned lower court and that being so, there happens to be no legal ground to justify the finding arrived at by the learned lower court.

8. Appellant, Narendra Rai @ Jyot Rai and Rauni Singh have jointly raised their grievances over the findings recorded by the learned lower court and further submitted that the learned lower court failed to perceive the intricacies so persisting. In order to justify the same, it has been submitted that meagre amount of Rs. 400/ and odd is said to have been recovered from the possession of the appellants and for that, they have been held guilty punishable for an offence under Section 412 of the IPC, would not be a legal ground because of the fact that recovered amount which belonged to the appellants were not put on TIP. That means to say, the Bank officials who have been examined in this case right from PWs-1 to 6 have no occasion to see and identify the recovered cash to be the booty and furthermore, the alleged recovery happens to be after so many days whereupon, there would not be a presumption against the appellants in terms of Section 114 of the Evidence Act and that being so, the



conviction and sentence against them for an offence punishable under Section 412 IPC could not survive. Now, coming over Section 395 IPC, it has been submitted that in worst case there happens to be single identification which in the facts and circumstances of the case appears to be nothing but an outcome of maneuvering skill of police personnel just to ward off the stigma purported to be against them on account of having been failed to trace out and expose the Bank dacoity by way of apprehending the real culprits. Virtually, in order to wrap their incompetency, the police officials adopted this gimmick whereunder, instead of touching the bank officials, took the person of his confidence who stood up to rescue them whereunder, he claimed identification of both these appellants that too, after a long lapse, without any explanation whereupon, appears to be non recognizable in the eye of law and so, recording of guilt for an offence punishable under Section 395 IPC is also found unsustainable.

9. On the other hand, learned APP while refuting the same, has submitted that though case of the prosecution relating to Section 412 of the IPC is found deficient one as, save and except, inculpatory extra judicial confessional statement of the accused, nothing more remains but, so far case under Section 395 IPC is concerned, the same is found duly proved whereupon, the finding recorded by the learned lower court to that extent is fit for



concurrence.

10. Gone through the evidence available on the Lower court records. From perusal of the same it is apparent that (1) PWs 1 to 6 are the bank officials who, during course of their evidences substantiated the factual aspect that means to say commission of dacoity at the United Bank of India, Usri-Shikarpur Branch, but, had not claimed identification of the accused who were present in dock nor they were taken to participate in the TIP during investigation. During aforesaid event, from the relevant order-sheet of the lower court, some sort of abnormal activity has been perceived, which is to be taken care of subsequently, (2) Reliability of the evidence of PW-11, a Police Constable allegedly deployed at the Bank who claimed identification of appellant, Narendra Rai @ Jyot Rai as well as Rauni Singh. (3) Legality of the TIP. (4) Admissibility of the evidence of the police officials on account of non compliance of Section 65B of the Evidence Act.

11. From the format of Charge, it is evident that trial proceeded against six accused persons, namey, 1. Rauni Singh, 2, Narendra Rai @ Jyot Rai, 3. Bindeshwari Sharma @ Gurujee, 4. Ashok Yadav, 5. Pappu Manjhi and 6. Karan Singh @ Painter. Charge was framed on 23.12.2010. From the record it is also evident that till then, out of six accused only one Narendra Rai @ Jyot Rai was under



custody. That means to say, five accused were on bail while one under custody. Earlier order sheets are given up. From the order-sheet dated 17.02.2012, it is evident that custodial accused, Narendra Rai @ Jyot Rai was produced from custody while three accused were present. One was represented under Section 317 CrPC, that means to say, out of six only five accused persons were present. No action was taken against absentee accused. On subsequent date i.e. 14.03.2012, there happens to be specific discloser relating to absence of Pappu Manjhi while accused Bindeshwari Sharma was present and others three were represented under Section 317 CrPC. Custodial accused, Narendra Rai @ Jyot Rai was produced in routine manner. Again no order was passed against the absentee accused. On 02.04.2012, there happens to be specific discloser that only custodial accused, Narendra Rai @ Jyot Rai was produced from custody. Nothing has been said regarding remaining accused who were on bail. Prosecution had filed attendance of five witnesses out of whom, PW-1, Ganesh Kumar, Informant was examined. The next date was fixed on 03.04.2012 on which date custodial accused, Narendra Rai @ Jyot Rai was produced while accused, Bindeshwari Sharma, Karan Singh @ Painter have filed their Hajri. Accused, Rauni Singh and Ashok Yadav were represented under Section 317 of the CrPC. Accused Pappu Manjhi continued with his absence and on account thereof, his bail bond was cancelled,



warrant of arrest non bailable was issued against him fixing 26.04.2012 the date of appearance and further, his trial was separated. Then thereafter, PW-2, Meghnath Nath was examined. That means to say, on 02.04.2012, all the accused were not present. As is mandated under Section 273 CrPC, evidences are to be collected in presence of all the accused though it may not be physical while availing privilege of Section 205 CrPC or 317 CrPC. Such precaution has been prescribed in the interest of the accused so that the accused be able to know about the incriminating material if any, being produced in court against him at the end of prosecution and further to facilitate proper identification of the accused as evidence, identification before the court is substantive piece of evidence. When no grievances have been raised on behalf of appellants/accused with regard to collection of the materials adverse to them in their absence then, whether the court on its own would perceive from the aforesaid vibes under the banner of miscarriage of justice and further, its repercussion is a question of thousand penny.

12. This controversy has got an impact, more particularly, in the background of the fact that whenever an accused is allowed to be represented in accordance with Section 205 CrPC or under Section 317 CrPC, he will have to give up the controversy relating to identification irrespective of nature of plea on that score.



For example, on 03.04.2012, Rauni Singh appellant of Cr. Appeal (SJ) No. 140/2015 and Ashok Yadav, since absconded were represented under Section 317 CrPC, on 16.06.2012 PW-4 was examined on which date. That means to say, Bindeshwari Sharma @ Gurujee was represented under Section 317 CrPC and that happens to be more or less status of the accused on subsequent dates also. It is also evident from the deposition of the witnesses that case of the individual accused was not taken up independently.

13. The ambit and scope of Section 317 CrPC and further, while availing the same what part of interest, the accused has to sacrifice had properly been considered by the Hon'ble Apex Court in the case of *M/S. Bhaskar Industries Ltd vs M/S. Bhiwani Denim & Apparels Ltd* as reported in (2001) 7 SCC 401 wherein under para-17, it has been held as follows:-

“17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. [Section 317](#) of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he



has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.”

14. The learned respective counsels were requested to assist the court on the controversial aspect persisting on the record whereupon, the learned counsels submitted that the defect happens to be uncorrectable in the eye of law and for that relied upon the following judgments :-

1. 2017 (1) PLJR 458(SC), 2. 2018 (2) PLJR 57 (SC), 3. (2013) 4 SCC 186, 4. (1999) 8 SCC 501, 5. (2012) 4 SCC 516, 6. 1975 CrLJ 1402, 7. 1990 CrLJ 397, 8. 1996 CrLJ 46, 9. AIR 1929 Pat 143.

15. However, it has been urged by them that now, retrial should not be directed as it will cause harassment, agony to the appellants who have faced the rigor of trial since 2008, that means to say, for the last 10 years.

16. In *M/S. Bhaskar Industries Ltd (supra)* it has been held as follows:-

“The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be present in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just



for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case.”

17. In *State of Maharashtra v. Dr. Praful B. Desai*

reported in (2003) 4 SCC 601, it has been held as follows:-

12. Considering the question on the basis [of Criminal Procedure Code](#), we are of the view that the High Court has failed to read [Section 273](#) properly. One does not have to consider dictionary meanings when a plain reading of the provision brings out what was intended. [Section 273](#) reads as follows:

"[Section 273](#): Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation : In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Thus [Section 273](#) provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus [Section 273](#) contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of [Section 273](#) does not support the restrictive meaning sought to be placed by the Respondent on the word "presence". One must also take note of the definition of the term 'Evidence' as defined in the [Indian Evidence Act. Section 3](#) of the Indian Evidence Act reads as follows:

"Evidence----Evidence means and includes-----



- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence (2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence"

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video- conferencing.

18. In *Ram Shankar v. State of Bihar* as reported in *1975 CrLJ 1402*, it has been held as follows:-

“6. This non-compliance of the provisions of [Section 353](#) vitiated the entire trial. This view is supported by a Bench decision of this Court in *Bigan Singh v. King Emperor* reported in (1927) ILR 6 Pat 691 : (1928) 29 Cri LJ 260.”

19. In *Banchhanidhi Singh v. State of Orissa* as reported in *1990 Cr.L.J 397*, it has been held as follows:-

5. [Section 273](#) of the Code of Criminal Procedure provides : --

"Evidence to be taken in presence of accused. -- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his "personal attendance is dispensed with, in the presence of his pleader.

Explanation. --In this section, 'accused' including a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."



[Section 273](#) of the new Code corresponds to [Section 363](#) of the old Code.

The above quoted provisions of [Section 273](#) would show that the evidence of witnesses has to be recorded in the presence of the accused or when his personal attendance has been dispensed with, in the presence of his pleader. On 16-7-1983, the date when PWs 1, 2 and 3 were examined, the personal attendance of the accused was dispensed with, but then when PWs 1, 2 and 3 were examined by the prosecution and their chief examination was being recorded, even the lawyer for the accused was not present in court. As the personal attendance of the accused-petitioner has been dispensed with, when the lawyer for the accused also was not present in the court at the time when the witnesses were to be examined, the court should have adjourned the case on that day to some other date, instead of proceeding with the examination of the prosecution witnesses and should have directed the accused to be present on that adjourned date. The examination of PWs 1, 2 and 3 in the absence of the accused, and when the lawyer representing him was also not present in the court, is in gross violation of the mandatory provisions of [Section 273](#), [Cr.P.C.](#) and on that score alone the entire trial is vitiated. The view I have taken receives support from [Ram Shankar Ray v. State of Bihar](#), 1975 Cri LJ 1402 (Pat). (See also *Bigan Singh v. King-Emperor*, AIR 1928 Patna 143 : 29 Cri LJ 260, *Bishnath v. Emperor*, AIR 1935 Oudh 488 : 36 Cri LJ 1198 and [Mrityunjoy Chatterjee v. The State](#), AIR 1955 Cal 439 : 1955 Cri LJ 1171.)

20. In *State of M.P. v. Budhram* as reported in 1996

Cr.L.J. 46, it has been held as follows:-

“5. It is a matter of grave concern that a man facing trial on charge of having committed seven murders and ultimately found guilty and sentenced to death has to wait for the outcome of his fate longer than necessary but in the facts and circumstances of the case it cannot be helped. The infirmity pointed out above goes to the root of the matter and the case must be remanded back for re-trial. It is equally a matter of concern that in such important trials the accused persons is not produced



before the trial judge from jail on some pretext or the other. This clearly amounts to obstructing the course of justice and the constitutional process. The time has come when this Court is to take stock of the situation and try to evolve remedial measures. With this aim in view a copy of this judgment be placed before the Hon'ble the Chief Justice for being discussed in the next full court meeting.

21. The Hon'ble Apex Court in the case of *Issac @ Kishor v. Ronald Cheriyan reported in 2018(2) PLJR 57 (SC)* dealt with a situation whereunder retrial could be directed, explained under para-11 as follows:-

“10. Under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

11. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

12. In *K. Chinnaaswamy Reddy v. State of Andhra Pradesh and Another*, AIR 1962 SC 1788, the accused had been convicted by the trial court. The



Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the de facto complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction.

This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision.

These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence,



which is invalid under the law.

These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....."

(underlining added)

The same principle was again reiterated in Mahendra Pratap Singh v. Sarju Singh and Another AIR 1968 SC 707.

13. In Matukdhari Singh and others v. Janardan Prasad, AIR 1966 SC 356, accused was tried for offences under Sections 420, 466, 406 and 465/471 IPC and acquitted. The trial court did not frame charge under Section 467 IPC regarding which there were prima facie materials available, that is an offence triable exclusively by the Sessions Court. The High Court, in appeal, set aside the acquittal and ordered retrial. The Supreme Court dismissed the appeal preferred before it. The court referred to earlier decisions in Abinash Chandra Bose v. Bimal Krishna Sen and Another AIR 1963 SC 316 and Rajeshwar Prasad Misra v. State of West Bengal and Another AIR 1965 SC 1887 with reference to the facts of those cases and emphasized that wide discretion available with the Appellate Court in ordering retrial."

22. After analyzing the event as exposed herein before, it is apparent that the learned lower court sailed with the trial in contravention of the settled principle of law whereupon, its conclusion did not justify its concurrence. As such, same is set aside. All the appeals are allowed.

23. Matter is remitted back to the learned lower court for re-trial. Bail bonds of all the appellants are cancelled directing



them to surrender before the learned lower court within a fortnight. In case of fault at the end of appellants, the learned lower court will be at liberty to proceed against them in accordance with law.

(Aditya Kumar Trivedi, J)

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