

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.527 of 2015

Arising Out of PS.Case No. -193 Year- 2011 Thana -TURKAULIYA District-
EASTCHAMPARAN(MOTIHARI)

=====

1. Reyaz, s/o Late Md. Rabbe Alam Mian, resident of Village- Dargah Tola Malahi,
P.S.- Malahi, District- East Champaran.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 574 of 2015

Arising Out of PS.Case No. -193 Year- 2011 Thana -TURKAULIYA District-
EASTCHAMPARAN(MOTIHARI)

=====

1. Arjun @ Arjun Kumar @ Aman Kumar s/o Haris Nat r/o Village - Dargah, Birti
Tola, P.S. - Malahi, Dist - East Champaran.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 586 of 2015

Arising Out of PS.Case No. -193 Year- 2011 Thana -TURKAULIYA District-
EASTCHAMPARAN(MOTIHARI)

=====

1. ADAM @ ADAM HUSSAIN @ AADAM Son of Safi Ahmad, Resident of
village- Dargah Tola, Malahi, P.S.- Malahi, District- East Champaran

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (SJ) No.527 of 2015)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae

For the Respondent/s : Mr. Z. Hoda, APP

(In CR. APP (SJ) No.574 of 2015)

For the Appellant/s : Mr. Krishna Kant Singh, Adv.

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

(In CR. APP (SJ) No.586 of 2015)

For the Appellant/s : Mr. Binod Kumar Singh, Adv.

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

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-07-2018

On repeated calls, none appears on behalf of appellant,



Reyaz (Cr. Appeal (SJ) No. 527/2015), on account thereof, Sri Ranbir Singh has been requested to assist the court as an amicus curiae while on behalf of other appellants Sri Krishna Kant Singh and Sri Binod Kumar Singh have appeared.

2. Since all these three appeals arise out of common judgment of conviction and sentence, have been heard together and are being decided by a common judgment.

3. Appellants, Reyaz, Arjun @ Arjun Kumar @ Aman Kumar, and Adam @ Adam Hussain @ Aadam have been found guilty for an offence punishable under Section 342 IPC and each one has been sentenced to undergo SI (as not specified) for one year as well as to pay fine of Rs. 1000/- in default thereof, to undergo RI for 2 months (contradiction), under Section 457 IPC and sentenced to undergo SI for 5 years (as not specified), under Section 376 IPC and sentenced to undergo SI for 10 years (as not specified) with a further direction, to run the sentences concurrently vide judgment of conviction dated 21.07.2015 and order of sentence dated 25.07.2015 passed by 8th Additional Sessions Judge, East Champaran, Motihari in Sessions Trial No. 959/2013.

4. The victim (PW 1) (name withheld) filed a written report on 16.05.2011 alleging inter alia that she has come to the place of her sister, Punam Devi wife of Madan Sah of Village-Paidan Patti Bhada, PS-Harsiddhi, who for the present is residing in a rented building



lying at Raghunathpur. In the night of 15.05.2011 while they were asleep, four persons intruded inside after pushing the door wherein there was no latches and for that, it was simply closed by stocking bricks from inside, caught hold of her, gagged her mouth, lifted her to other room. Her sister also followed her and perceiving the situation was to raise alarm but, was caught hold of by one of them, gagged her mouth and then thereafter, remaining three got her naked after gagging her mouth and took full control. After lying her down, one of them committed rape and then, the another one who caught hold of her sister replaced him and during intervening period anyhow, her sister got an opportunity to get herself freed, raised alarm attracting neighbours, whereupon all the rapists escaped therefrom. On query, her sister had disclosed the person who had committed rape as Reyaz (with full address) and the second rapist to be Pappu. Two persons who were controlling her were identified as Arjun and Md. Adam Hussain.

5. After registration of Turkauliya PS Case No. 193/2011, investigation was taken up and after concluding the same, keeping the investigation pending against remaining accused, charge-sheet has been submitted in two stages against accused Reyaz as well as Arjun, Md. Adam Hussain whereupon, cognizance of an offence against them were taken followed with trial which ultimately met its logical conclusion, subject matter to these appeals.



6. 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. It has also been suggested that victim was frequent visitor of the police station and, at the instance of police got them involved in the present case. However, nothing has been adduced in defence.

7. In order to substantiate its case, prosecution had examined altogether 6 PWs who are PW-1, the victim, PW-2, her sister, Poonam Devi, PW-3, Hasmuddin Ansari, PW-4, Nazma Khatoon, PW-5, Nabi Rasool, and PW-6, Ram Janam Ram. Side by side had also exhibited Ext-1, Formal FIR, Ext-2, Charge-sheet. As stated above nothing has been adduced in defence.

8. While assailing the judgment of conviction and sentence, it has been submitted by the learned Amicus Curiae as well as learned counsel for the appellants, Arjun Kumar and Adam Hussain, that the finding recorded by the learned lower court is not at all substantiated by the materials having been available on the record. In order to justify the same, it has been submitted that there happens to be inordinate delay in launching the instant prosecution without any explanation and that being so, there happens to be a major set back to the prosecution. In likewise manner, It has also been submitted that the doctor has not been examined and that being so, there is absence of corroborative evidence. In similar way, It has also been submitted



that the Investigating Officer has also not been examined whereupon truthfulness of the version of prosecutrix could not be assailed to the extent that (a) whether laches were available/not available on the door of the room wherein prosecutrix along with her sister (PW 2) was sleeping, (2) whether there was any room as alleged whereunder the victim was raped, (3) objective finding relating thereto, (4) the presence of persons of the locality, surrounding, neighborhood. Apart from this, it has also been submitted that version of prosecutrix could not be relied upon on account of material exaggeration regarding which, her attention had been drawn. Furthermore, It has also been submitted that her version is found completely demolished by her sister, PW-2. The other witnesses PWs-3, 4, and 5 also failed to support the case of the prosecution. So submitted that in the background of aforesaid nature of evidence, these appeals appear to be fit for being allowed after setting aside the judgment impugned.

9. On the other hand, learned APP controverting the submissions having been made on behalf of appellants, has submitted that the sole version of prosecutrix is found sufficient to justify the conviction and sentence in case, it inspires confidence. Though the other witnesses did not support the version of the prosecutrix but PW-2 had supported to some extent and further, the victim herself detailed the same. It has also been submitted that there happens to be no delay in institution of the case. It has further been submitted that neither the



prosecuting agency nor the court had taken pains to procure the attendance of remaining witnesses rather, the trial proceeded in mechanical manner in the background of character of remaining witnesses adverse to the prosecution and that happens to be the reason behind absence of doctor and Investigating Officer. So submitted that it is a fit case wherein the matter be remanded for getting the Investigating Officer and doctor examined and then, the learned lower court to pass the judgment afresh in accordance with law after hearing both the parties.

10. Perused the lower court records. From perusal of the charge-sheet, it is evident that 11 persons have been named as witnesses including that of Dr. Ravi Ranjan, Motihari, Dr. Seema Kumari, Sadar Hospital and Investigating Officer, Birendra Kumar Singh. Furthermore, from column-8 of the charge-sheet, it is apparent that Birendra Kumar Singh as well as Manzar Alam have been identified to be the Investigating Officers of the case. From column-18, it is evident that police report was submitted by Manzar Alam, surprisingly, he had not shown himself under the category of charge-sheet witnesses. Apart from this, from the lower court record it is also evident that on 25.05.2015, prosecution had failed to procure the attendance of one of the witnesses, Ranjan Verma, might be Ravi Ranjan but the order-sheet dated 25.05.2015 did not divulge presence of aforesaid witness rather it speaks prosecution witness is absent and



the aforesaid activity speaks otherwise. It is also evident that against independent witnesses, namely, Jamil Miyan, Laxmi Sah, Rahmat Ali warrant of arrest non bailable was issued as is evident from endorsement made at the margin of order-sheet dated 02.03.2015 but learned lower court had not tried to follow up by procuring execution report.

11. It is further evident from the margin of order-sheet dated 13.05.2015 that summon was issued against the Investigating Officer on 14.05.2015 but again, no concrete steps were taken by the learned lower court. It is further evident from the order-sheet dated 27.05.2015 that the office was directed to issue letter upon the Superintendent of Police, East Champaran, Motihari for getting the presence of Investigating Officer, doctor and the same was complied with on 28.05.2015. On subsequent date i.e. 17.06.2015 the case was fixed without having any kind of DO letter addressed to the concerned Superintendent of Police.

12. From perusal of the different order-sheets, it is apparent that learned lower court was found influenced with the activity of the prosecution witnesses whereunder they became *volte face* to the prosecution which ought not be as the courts are not expected to be indifferent while proceeding with the trial giving mechanical consideration. After all, the court has to do justice wherein to acquit the innocents, simultaneously, guilty should not be spared at



least on account of lapses at the end of the court itself.

13. So far remand is concerned, in ordinary course of nature, it should not be unless and until there happen to be miscarriage of justice which, as indicated hereinabove, is found duly exposed on account thereof, inert of learned lower court.

14. 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 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. Chinnaswamy Ready 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."

14. *****

15. *****

16. And to elaborate the same relied upon earlier pronouncements as incorporated under the following paragraphs:-

12. In **K. Chinnaswamy Ready 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)

15. 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.

16. Accordingly, the judgment impugned is set aside.

All the three appeals are allowed remanding the matter to learned lower court to examine the remaining witnesses and for that Superintendent of Police, East Champaran, Motihari is directed to produce the remaining witnesses including doctor and Investigating Officer and for that office is directed to keep surveillance over the steps taken at the end of Superintendent of Police in a manner that all the witnesses should be examined within two months and then thereafter, giving an opportunity to the appellants to enter into defence without giving undue adjournment, will hear the argument and then would pass judgment in accordance with law. The whole exercise must be completed within five months.

17. Bail bonds of the appellants are hereby cancelled



directing them to surrender before the learned lower court, at once, failing which the learned lower court will be at liberty to proceed against them in accordance with law and then the time schedule as directed hereinabove will not be operative.

18. Appellants would be at liberty to renew their prayer for bail which the learned lower court will consider in accordance with law.

19. The first and last pages of the instant judgment be handed over to the amicus curiae for the needful.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	24.07.2018
Transmission Date	24.07.2018

