

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 250 of 2018**

- Bholi & Another S/o Ant Ram Aged About 23 Years By Caste Satnami, R/o Village Paraghat, P. S. Masturi District Bilaspur Chhattisgarh,
- Basant S/o Punni Lal Aged About 18 Years By Caste Satnami, R/o Village Paraghat, P. S. Masturi District Bilaspur Chhattisgarh,

---- Appellants**Versus**

- State Of Chhattisgarh Through The Police Station Masturi District Bilaspur Chhattisgarh,

---- Respondent

For Appellants : Shri C.K.Kesharwani, Advocate
For Respondent/State : Shri R.K.Mishra, Dy.A.G.,

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Judgment on Board by Manindra Mohan Shrivastava,J.

01/11/2018

We have heard this appeal and with the consent of the parties, decide the matter finally.

2. Appellants were tried for the alleged commission of offence under Sections 302/34, 323/34 in S.T. No. 382/2001. The trial of the appellants ended in their acquittal along with other accused. The judgment of acquittal was, however, challenged by filing criminal revision by victim Raju in Cr. Rev. No. 376/2003. The order of acquittal was, however, set aside vide order dated 22.08.2016 on following considerations:

“16. So far as appreciation of the evidence adduced by the prosecution regarding respondents 1 to 4 are concerned, it appears that the court below has overlooked the entire material available while recording findings of acquittal by affording benefit of doubt to respondents 1 to 4. The court below got hypertechnical while appreciating the material adduced and the findings recorded by the trial court is perverse which requires interference. We are of the considered view that the court below failed to appreciate the entire evidence adduced and thereby arrived at a conclusion which cannot be held proper. As per promptly lodged First Information Report (Ex.P-2), merged (Ex.P-34 and Ex. P-35) and other facts, the prosecution had adduced evidence by examining Raju (PW-3), Jankibai (PW-5) regarding involvement of respondents 1 to 4. There is no iota of doubt regarding identification, though the incident committed in the night, but the victim and witnesses and accused were of same village, well known to each other. With this, the prosecution had adduced evidence regarding participation of respondents 1 to 4. The medical evidence is in corroboration with the statement of eye-witness and injured eye-witness regarding participation of respondents 1 to 4. The prosecution had adduced sufficient evidence regarding promptly lodged First Information Report, MLC, compliance of the Code, injuries noticed in the postmortem report, query report stating certain facts, seizure of battle axe and club from respondents 1 to 4, the presence of respondents 1 to 4, their participation, unquestioned identity. The trial Court failed to appreciate the entire evidence. The trial court also failed to appreciate the evidence adduced by these injured witness and eyewitness regarding role of respondents 1 to 4 in the light of promptly lodged First Information Report, evidence of Janakibai (PW-5), injured eye-witness, received injury through her statement was recorded after 15 days, but looking to the First Information Report (Ex.P-2) regarding the crime and other facts, if witnesses were improving their version they are required to be appreciated for the facts which in the eyes of law are admissible and acceptable. It is required from the trial court to appreciate the entire material before it and thereafter to record its findings not merely on the basis of hypertechnical view. As per settled law, revisional court cannot go into it and appreciate entire merits which is a subject matter of the trial court. We are of the view that findings and order of the acquittal passed by the court below for respondents 1 to 4 are perverse as the court below has overlooked the material on record and not appreciated the entire evidence on its right perspective adduced by the prosecution.”

3. The revision was allowed in part and the judgment dated

11.02.2003 passed in S.T. No. 382/2001, in so far as it related to the present appellants, namely Bholi & Basant is concerned, was set aside. The matter was remanded back to the trial court with a direction to rehear the parties i.e. State and respondents 1 to 4 therein, and pass judgment afresh as per provisions of law, without being influenced by any of the observations and appreciation by the trial court in the judgment dated 11.03.2003.

4. The operative part of the order passed in Criminal Revision is as under and we consider it necessary to reproduce herein below:-

17. Consequently, the instant criminal revision succeeds in part. Impugned judgment dated 11.02.2003 passed in Sessions Trial No. 382/2001 so far as it relates to respondents 5 to 8 is concerned, the same is affirmed. The impugned judgment so far as it relates to respondents 1 to 4 regarding affording them benefit of doubt and acquitting the respondents 1 to 4 is concerned, is hereby set aside. The matter is remanded back to the trial court with a direction to the trial court to re-hear the parties, i.e. The State and the respondents 1 to 4 and pass a judgment afresh as per provisions of law without being influenced by any of the observations and appreciation of the trial court in the judgment dated 11.02.2003.”

5. It appears that after the judgment of acquittal of four accused namely Khikwa, Bholi, Rakesh and Basant (Bholi and Basant, appellants herein) was set aside and the matter was sent back to the trial court for re-hearing, learned trial court re-framed charges and held trial *de novo* and passed the impugned judgment of conviction and order of sentence against which the appellants Bholi and Basant have filed this appeal.

6. Submission of learned counsel for the appellant is that the

impugned judgment of conviction and order of sentence is liable to be set aside only on the short ground that though it was open for the trial court to re-appreciate and rehear, the trial could not be conducted *de novo* because this Court had set aside the judgment of acquittal and remanded the matter only for re-hearing as distinguished from retrial. Therefore, all that was required by the trial court was to take up the matter for final arguments affording opportunity to the appellant and the State and pass fresh judgment in accordance with law.

7. On the other hand State counsel would submit that even if the argument of the appellants is to be accepted, the moment learned trial court proceeded to frame fresh charges, it ought to have been challenged before this court and having not done allowing the impugned judgment of conviction and order of sentence to be passed, it lies in the mouth of the appellants to challenge the judgment of conviction and order of sentence on such ground.

8. The order passed by the Division Bench of this Court in Cr. Rev. No. 376/2003 vide order dated 22.08.2016, in relevant para 16 and 17, which have already been reproduced herein above, unmistakably shows that this Court, after having perused the records and the judgment of the learned trial court, recorded a finding that the trial court failed to appreciate the evidence adduced by the witnesses with regard to the role of the appellants herein and two other accused. It was further recorded that the trial court was required to appreciate the entire evidence and thereafter record its findings and not merely on the basis of hyper technical view. A further observation was made, which shows why this Court set aside this order and sent the matter back to the trial court was that this court held that revisional court could not go into it

and appreciate the entire merits and this is a subject matter of the trial court holding that the order of acquittal was perverse as the order was passed overlooking the record and without looking at the matter in proper perspective, without appreciating evidence, the judgment of acquittal was set aside. With this background and finding, this Court remanded this matter back to the trial court with a direction to rehear the matter.

9. It is therefore crystal clear that there was no direction by this Court that there should be *de novo* trial. The word “rehearing” mentioned in para 17 of the order passed in revision cannot be understood to mean retrial, particularly, in view of the findings recorded in para 16 which impelled this court to set aside the judgment of acquittal and send the matter back to the trial court. Re-hearing and retrial are not one and the same and in this regard, we consider it appropriate to refer to the observation made by the Allahabad High Court in the matter of **Bhagwat Singh & Others Vs. State through Udai Bhan Singh and Another** reported in **AIR 1959 ALLAHABAD 763 (v 46 C 224)** which is as under :

3. The provisions of Section 145 were amended with effect from 1-1-1956 by the Code of [Criminal Procedure \(Amendment\) Act](#) (No. 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that if any witnesses are to be examined, they must be the persons whose affidavits have already been put in; no person can be examined as a witness unless his affidavit is on the record. Sub-section (1) states the contents of the preliminary order to be issued by the Sub-Divisional Magistrate; he is required to order the parties only to file written statements, documents and affidavits of persons on whom they rely.

Sub-section (4) lays down how the Sub-Divisional

Magistrate is to proceed after the parties have appeared before him; he is required to peruse the written statements. The provisions of Section 145 were amended with effect from 1-1-1956 by the Code of [Criminal Procedure \(Amendment\) Act](#) (No. 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that documents and affidavits, if any put in, hear the parties and decide which party was in possession on the relevant date. There is a proviso to the effect that he "may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein." This provision means that he is required to peruse only the statements, documents and affidavits and then hear the parties and conclude the inquiry; he is not required to examine any person as a witness.

The evidence of persons on whom the parties rely is required by the legislature to be given in the form of affidavits and in no other form; the direction to the parties in the preliminary order is that they should adduce the evidence of the persons, on whose evidence they rely, by putting in their affidavits. The proviso enables the Magistrate to examine orally any person whose affidavit has been put in if a person's affidavit has been put in, he can be examined as a witness, (if the Magistrate considers his oral examination necessary); but a person whose affidavit has not been put in is not allowed to be examined orally at all. The provisions of Section 145 were amended with effect from 1-1-1956 by the Code of [Criminal Procedure \(Amendment\) Act](#) (No. 26 of 1955). Previously affidavits were not The provisions of Section 145 were amended with effect from 1-1-1956 by the Code of [Criminal Procedure \(Amendment\) Act](#) (No. 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that

The phrase "hear the parties" only means that arguments should be heard and does not include oral examination of the parties and their witnesses. The Magistrate is bound to hear the parties; the word used in Sub-section (4) is "shall". The compulsion to hear the parties means compulsion to hear their arguments; there can be no compulsion to record the statements of the parties and their witnesses in the absence of anything else to show

that he is bound to examine them orally.

If the law contemplates that he is only to receive affidavits of the persons on whom the parties rely, i. e. of the parties and their witnesses, the phrase "hear the parties" cannot include examining them and The provisions of Section 145 were amended with effect from 1-1-1956 by the Code of [Criminal Procedure \(Amendment\) Act](#) (No. 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that their witnesses orally. The same words are used in [Section 146](#) (1 A) and there they cannot mean the oral examination of the parties and their witnesses because there is a separate provision for such examination. The proviso to Sub-section (4) indicates that the Magistrate has not got the power to summon and examine any other person; if he had the power to summon and examine any person whether his affidavit has been put in or not, the proviso would have been differently worded.

Sub-section (9) does not confer any right upon a party to examine a person as its witness; it only lays down the procedure to be followed in procuring the attendance of its witnesses. Whether it has a right to examine a witness or not has to be ascertained from other provisions. All that the Sub-section means is that if a party has a right to examine a witness orally, it may obtain from the Magistrate a summon directing him to attend the court. The first proviso to Sub-section (4) is the only provision which confers a right upon a party to examine a witness orally in the court; so Sub-section (9) must be read with the first proviso to Sub-section (4).

10. We find that the learned trial court took up the matter trial *denovo*, by framing charges again and then recording fresh evidence.

11. Merely because the accused in the retrial did not raise any serious objection, the order passed by the trial court which is in the teeth of the order passed by this court in order passed earlier in Criminal Revision No. 376/2003, it cannot be said that this objection now cannot be taken up by the appellants before this court.

12. The order impugned therefore appears to be completely contrary to the directions issued by this Court and only on this ground, the impugned judgment cannot be sustained in law and has to be set aside. We can only remind the trial court that it is required to rehear the matter as per the direction passed in earlier Criminal Revision as contained in para 17 of this order and then decide the matter as per the directions issued by the Court.

13. As the appellants have been taken into custody after the passing of impugned judgment of conviction, the appellants shall be released on each of them furnishing a personal bond of Rs. 25,000/- with two local surety to the sanctification of the trial court forthwith for their appearance before it as and when directed till the trial is concluded and the judgment is passed in accordance with law.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge