

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 7 OF 2005

Sagarbai w/o Chokhaji Bansode
Age 65 years, Occ. Household,
R/o. Bhogalgaon, Tq. Georai
District Beed

...Applicant
(Ori. Complainant)

versus

1. The State of Maharashtra,
Through Police Inspector,
Police Station, Talwada
Tq. Georai, District Beed

(Copy to be served on A.P.P.
High Court of Judicature
at Bombay, Bench at Aurangabad)

2. Keshav s/o Shivram Puri,
Age 42 years, Occ. Agriculture
R/o. Bhogalgaon, Tq. Georai
District Beed

(Ori. Accused)
...Respondents

.....

Mr. S.S. Thombre, advocate for the applicant
Mr. B.V. Virdhe, A.P.P. for respondent No.1-State
Mr. S.A. Gaikwad, advocate for respondent No.2

.....

CORAM : V. K. JADHAV, JJ.

**Date of Reserving
the Judgment :28.09.2018**

**Date of pronouncing
the Judgment :16.10.2018**

JUDGMENT :-

1. By way of this criminal revision application, the revision

applicant is challenging the judgment and order of acquittal dated 12.10.2004 passed by the IVth Adhoc Additional Sessions Judge, Beed in criminal appeal No. 27 of 2002, thereby setting aside the judgment and order of conviction dated 14.8.2002 passed by the IIIrd Ad-hoc Assistant Sessions Judge, Beed in Sessions Case No. 135 of 2001, thereby convicting the respondent No.2 original accused for the offences punishable under Sections 304 Part II of I.P.C. and sentencing him to suffer R.I for five years and also to pay fine of Rs.1000/-, in default to suffer R.I. for six months.

2. It is the case of the applicant that on 30.9.2001 at about 8.30 p.m. when she and deceased Jaya were present in her house, at that time, respondent No.2-accused came to her house and asked whereabouts of the son of accused viz. Madan. At that time, the accused threatened the complainant that he will not allow her son to stay in the village as like his elder brother Dinkar. At that time accused saw deceased Jaya and asked as to how she was there and suddenly the accused gave push to Jaya by his knee and resultantly Jaya fell down on the stony steps of the house of the complainant and received severe injuries. The complainant shouted and upon hearing shouting of the complainant, the accused ran away and thereafter other persons came to the spot of incident and she narrated the incident to them. The applicant-complainant, due to

heavy rain, could not lodge complaint at police station and therefore, on 1.10.2001, the complaint came to be lodged at police station Talwada. The Talwada police accordingly registered crime No. 42 of 2001 for the offence punishable under Section 304 of I.P.C.. After completion of investigation, charge sheet came to be filed against the accused. The case was committed to the Court of Sessions. The prosecution has examined in all eight witnesses. The learned Assistant Sessions Judge, Beed, after considering the evidence placed on record and after examining the witnesses, convicted and sentenced the respondent-accused, as aforesaid.

3. It is further case of the applicant that respondent No.2-original accused had preferred criminal appeal No. 27 of 2002 in the Court of Sessions at Beed. However, the learned Adhoc Additional Sessions Judge, Beed, by judgment and order dated 12.10.2004 has allowed the appeal and set aside the conviction awarded by the lower court and acquitted respondent No.2-original accused. Hence, this criminal revision application.

4. Learned counsel for the applicant-original complainant submits that the appellate court has not appreciated the evidence led by the prosecution in its proper perspective and has erred in holding that the prosecution has not established its case beyond reasonable

doubt that the accused is responsible for the murder of deceased Jaya. Though the delay caused in filing the complaint has been explained in detail, the learned Additional Sessions Judge has recorded perverse findings on the same, without considering the proved fact that there was heavy rain in the night between 30.9.2001 to 1.10.2001 and there was no any male member in the family of the complainant. In view of the provisions of Section 28 of the Code of Criminal Procedure, 1973, the Assistant Sessions Judge is empowered to try the case, however, learned appellate court has committed an error in giving a finding that the Assistant Sessions Judge is not empowered to try the case punishable under Section 304 of I.P.C. Learned Additional Sessions Judge has totally overlooked the evidence of P.W.2 Sagarbai (complainant), P.W.3 Rambhau, P.W.4 Vaishali and P.W.6 Dr. Prathviraj Chavan, which state that deceased Jaya fell down on the steps due to the push given by the respondent accused by his knee, in which she sustained injury to her brain and died on the spot. The appellate court has committed error in observing that there is no external injury found on the body of deceased Jaya. Learned counsel for the applicant-complainant thus submits that there is ample evidence on record against the respondent-original accused to prove the charge under Section 304 Part II of I.P.C. and thus the revision may be allowed.

Learned counsel for the applicant-original complainant, in order to substantiate his submissions, placed reliance on the judgment of the Supreme Court in the case of ***Fahim Khan vs. State of Bihar (now Jharkhand), reported in 2012 AIR (SC) (Supp.) 389.***

5. Learned counsel for the respondent-accused submits that the Assistant Sessions Judge, Beed is not legally empowered to try the case as the offence under Section 304 of I.P.C. is punishable with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine, if the act by which death is caused is done with an intention of causing death or of causing such bodily injury as is likely to cause death. Learned counsel submits that there was delay in lodging the complaint and such unexplained delay is fatal to the prosecution case. The learned Assistant Sessions Judge/Trial Court has failed to properly appreciate the merits of the matter. The material on record is insufficient, unacceptable and untrustworthy. Learned counsel for respondent No.2-original accused thus submits that the revision is liable to be dismissed.

Learned counsel for the respondent-accused in order to substantiate his submissions, placed reliance on the following cases:-

- i) Prabhakar @ Babu Laxman Pawar vs. State of Maharashtra and Anr. reported in 2013 (1) Mh.L.J. (Cri.) 411;
- ii) State of Gujarat vs. Jaysukh @ Harsukh Hakubhai, reported in 1995 (2) G.L.H. 524.

6. I have also heard learned A.P.P. for the respondent State.

7. The interference of the High Court in the order of acquittal is limited only to the following exceptional cases:-

- i) Order under revision suffers from glaring illegalities
- ii) Or has caused miscarriage of justice
- iii) Or when it is found that the trial court has no jurisdiction to try the case
- iv) Or where the trial court has illegally shut the evidence which otherwise ought to have been considered
- v) Or Where the material evidence which clinches the issue has been overlooked.
- vi) Where the admissible evidence is wrongly brushed aside as inadmissible.
- vii) Where the acquittal is based on the compounding of the offence which is invalid under the law.

8. In the case of **Vimal Singh vs. Khuman Singh and another**, reported in **AIR 1998 SC 3380**, in para 7 of the judgment while coming to the ambit of power of the High Court under Section 401 of Cr.P.C., the Supreme court has made the following observations:-

“7. Coming to the ambit of power of High Court under Section 401 of the Code, the High Court in its revisional power does not ordinarily interfere with judgments of acquittal passed by the trial court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the trial court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial court has no jurisdiction to try the case or where the trial court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 401 mandates that the High Court shall not convert a finding of acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction. No doubt, the High Court in exercise of its revisional power can set aside an order of acquittal if it comes within the ambit of exceptional cases enumerated above, but it cannot convert an order of acquittal into an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial. In fact, Sub-section (3) of Section 401 of the Code forbids the High Court

in converting the order of acquittal into one of conviction. In view of the limitation on the revisional power of the High Court, the High Court in the present case committed manifest illegality in convicting the appellant under Section 304, Part - I and sentencing him to seven years' rigorous imprisonment after setting aside the order of acquittal."

9. The revision jurisdiction of the High Court as contemplated under Section 401 of Cr.P.C. operates within narrow limits and can be exercised only in exceptional cases where interests of public justice require interference for the correction of gross miscarriage of justice. It cannot be exercised because the lower court has taken a wrong view of the law or mis-appreciated evidence on record. The revision power of the High Court is to be exercised when there is manifest error of law or glaring defect in the procedure.

10. In the instant case, trial was conducted by the Assistant Sessions Judge though the accused was facing charge under Section 304 of I.P.C. Section 304 of I.P.C. reads as under:-

"304. Punishment for culpable homicide not amounting to murder- Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

11. Thus, the offence of culpable homicide not amounting to murder is punishable with imprisonment for life or imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extent to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. The offence of section 304 of I.P.C. is triable by the Court of Sessions.

12. Section 9 of Code of Criminal Procedure defines the Court of Sessions, which reads as under:-

“9. Court of Session.- (1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation.- For the purposes of this Code, “appointment” does not include the first appointment, posting or promotion of a person by the Government to any service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.”

13. In terms of sub-section (3) of section 9 of Cr.P.C. the High Court may also appoint Additional Sessions Judge and Assistant Sessions Judge to exercise jurisdiction in the Court of Sessions. However, Section 28(3) of Cr.P.C. lays down that the Assistant Sessions Judge, may pass any sentence authorised by law except the sentence of death or of imprisonment for life or of imprisonment for a term not exceeding ten years. Section 28 of Cr.P.C. reads as under:-

“28. Sentences which High Courts and Sessions Judges may pass.-

(1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.”

Thus, on conjoint reading of sections 9 and 28 of Cr.P.C., it is clear that the jurisdiction of the Assistant Sessions Judge to try the cases is restricted in terms of the sentence as prescribed in Sub-section (3) of Section 28 of Cr.P.C.

14. Chapter XXXV of Cr.P.C. prescribes the irregular proceedings and its effect on the trial etc. Section 461 of Cr.P.C. from the above chapter is relevant for discussion in the present matter and the same is reproduced herein below:-

“461. Irregularities which vitiate proceedings.- if any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

- (a) attaches and sells property under section 83;
 - (b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;
 - (c) demands security to keep the peace;
 - (d) demands security for good behaviour;
 - (e) discharges a person lawfully bound to be of good behaviour;
 - (f) cancels a bond to keep the peace;
 - (g) makes an order for maintenance;
 - (h) makes an order under section 133 as to a local nuisance;
 - (i) prohibits, under section 143, the repetition or continuance of a public nuisance;
 - (j) makes an order under Part C or Part D of Chapter X;
 - (k) takes cognizance of an offence under clause (c) of sub-section(1) of section 190;
 - (l) tries an offender;
 - (m) tries an offender summarily;
 - (n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;
 - (o) decides an appeal;
 - (p) calls, under section 397, for proceedings; or
 - (q) revises an order passed under section 446,
- his proceedings shall be void.”

15. In terms of clause (I) of Section 461 of Cr.P.C., if the Court not being empowered by law in this behalf, tries an offender, that vitiates the proceedings. The said proceedings shall be void in its entirety.

16. In the instant case, the Assistant Sessions Judge, though not empowered under the provisions of Section 9 r/w Section 28 of Cr.P.C. to try the offender for the offence under Section 304 of I.P.C. which is punishable with imprisonment for life, tried the respondent-accused. The learned Assistant Sessions Judge has though recorded the conviction under Section 304 Part II of I.P.C., which prescribes imprisonment of either description for a term which may extend to 10 years or with fine or with both, however, in the trial under Section 304 of I.P.C., on the basis of the evidence, it is for the Court to determine as to whether the case falls under Section 304 Part I or Section 304 Part II of I.P.C.. It cannot be said that since learned Assistant Sessions Judge has convicted the accused under Section 304 II of I.P.C, in terms of the sentence as prescribed under Section 304 II the Assistant Sessions Judge is empowered to try the offender. In terms of clause (I) of Section 461 of Cr.P.C, the entire trial is vitiated and the same is void in its entirety.

17. Learned 4th Adhoc Additional Sessions Judge, who has heard and decided the criminal appeal No. 27 of 2002 preferred by the

respondent-original accused herein, against the judgment and order of conviction passed by the Assistant Sessions Judge, as detailed in the foregoing paras, though taken notice of the irregularities in the procedure, in para 23 of the judgment has simply observed that the trial conducted by the Assistant Sessions Judge in respect of offence of culpable homicide not amounting to murder under Section 304 of I.P.C. is illegal as it caused prejudice to the accused. The learned Ad-hoc Additional Sessions Judge, though discussed the evidence recorded during trial while disposing of criminal appeal No. 27 of 2002, assessed the evidence independently and arrived at his own conclusion. However, in terms of the provisions of Sections 9, 28 and 461(l) of Cr.P.C. the learned Adhoc Additional Sessions Judge should have remanded the case for re-trial. Section 386(b)(i) empowers the appellate court while deciding the appeal preferred against the conviction to order the accused to be re-tried by the court of competent jurisdiction or committed for trial.

18. In the light of above, this Court is left with no other alternative but to remand the matter for re-trial to the Sessions Court. In consequence thereof, the judgment and order of conviction dated 14.8.2002 passed by the IIIrd Ad-hoc Assistant Sessions Judge, Beed in Sessions Case No. 135 of 2001 and the judgment and order of acquittal dated 12.10.2004 passed by the IVth Adhoc Additional

Sessions Judge, Beed in criminal appeal No. 27 of 2002, are required to be quashed and set aside. Hence, the following order:-

O R D E R

- I. Criminal revision application is hereby partly allowed.
- II. The judgment and order of conviction dated 14.8.2002 passed by the IIIrd Adhoc Assistant Sessions Judge, Beed in Sessions Case No. 135 of 2001 and the judgment and order of acquittal dated 12.10.2004 passed by the IVth Ad-hoc Additional Sessions Judge, Beed in criminal appeal No. 27 of 2002 are hereby quashed and set aside.
- III. The trial of Sessions Case No. 135 of 2001 shall be conducted de-novo and the same shall be disposed of by the Sessions Court within a period of one year from today, in accordance with law.
- VI. Criminal revision application is disposed of accordingly. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

rlj/