

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.902 of 2016

Arising Out of PS. Case No.-137 Year-2013 Thana- ITARHI District- Buxar

Shushil Ram Son of Late Dina Nath Ram, Resident of Village- Kharvaniya,
P.S.- Dhansoi, District- Buxar.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (SJ) No. 777 of 2016

Arising Out of PS. Case No.-137 Year-2013 Thana- ITARHI District- Buxar

Lal Saheb Sah @ Lal Saheb Son of late Shivbelash Sah Resident of Village-
Sukarvalia, P.S. Itarhi, district Buxar,.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (SJ) No. 1052 of 2016

Arising Out of PS. Case No.-137 Year-2013 Thana- ITARHI District- Buxar

Kanhaiya Bind @ Kanhaiya Chaudhary Son of Late Indra Bind, resident of
Village- Alampur, Police Station- Itarhi in the district of Buxar.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (SJ) No. 902 of 2016)

For the Appellant/s : Mr. Bachan Jee Ojha, Adv.
Mr. Daisy Kumar, Adv.

For the Respondent/s : Mr. Abhay Kumar, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 777 of 2016)

For the Appellant/s : Mr. Amol Raj, Adv.
Mr. Satish Kumar, Adv.
Mr. Ashutosh Nath, Adv.

For the Respondent/s : Mr. Bipin Kumar, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 1052 of 2016)

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

For the Respondent/s : Mr. Binod Bihari Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 27-09-2019



All these three appeals arise out from the common judgment of conviction dated 6.9.2016 and order of sentence dated 8.9.2016 passed by the Addl. Sessions Judge VI, Buxar in connection with S.Tr.No. 141/2014 arising out of Itarhi P.S.Case No. 137/2013, whereby and whereunder all the appellants, namely, Shushil Ram, Lal Saheb Sah @ Lal Saheb and Kanhaiya Bind @ Kanhaiya Chaudhary have been found guilty for an offence punishable under section 395 of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.10,000/-, under section 120B of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for 30 days, have been heard together and are being conjointly disposed of by a common judgment.

The informant Rajendra Kumar Pandey (P.W.5), who happens to be the priest of Sukarwaliya Thakurbari while was sleeping alongwith co-villager Durgesh Kumar Upadhyay (P.W.4), armed miscreants raided the Thakurwari and on the pretext of firearm compelled the informant as well as Durgesh Kumar Upadhyay to remain idle and then, after breaking open the door stolen away the idol of Ram Janki and Laxman.



It is evident that after registration of Itarhi P.S. Case No. 137/2013 investigation commenced and during course thereof, it is also evident that the accused persons were apprehended and on their confessional statement, there happens to be recovery of the idol, whereupon, charge sheet was submitted for the offence under sections 395, 412, 120B of the I.P.C, whereunder trial commenced but from the judgment impugned, it is evident that the appellants have been convicted and sentenced only for an offence punishable under sections 395 and 120B of the I.P.C.

Defence case as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. It has further been pleaded that the story of so called inculpatory extra-judicial confessional statement is false, fabricated, manufactured and no recovery of idol has been on the basis of the aforesaid forged, fabricated inculpatory extra-judicial confessional statement. Further more, there happens to be specific plea at the end of Kanhaiya Bind @ Kanhaiya Chaudhary that the place of recovery does not belong to him.

Altogether ten P.Ws. Have been examined on behalf of the prosecution and those are P.W.1 Dhanjee Tiwary, P.W.2 Bhriyumuni Choudhary, P.W.3 Kaltu Chaudhary, P.W.4 Durgesh



Kumar Upadhyay, P.W.5 Rajendra Kumar Pandey, P.W.6 Ajay Upadhyay, P.W.7 Ranjeet Upadhyay, P.W.8 Md. Kadir, P.W.9 Nandan Kumar Singh, I.O. and P.W.10 Sudhir Kumar Singh, another I.O. Side by side also exhibited signature of P.W.2 on the seizure list Ext.1, signature of the informant on the Fard Beyan Ext.2, signature of Birendra Upadhyay Ext.2/1, Fard Beyan Ext.3, endorsement of taking charge on the Fard Beyan Ext.3/1, signature of P.W.9 of the F.I.R. Ext.4, Seizure list Ext.5.

Learned respective counsels have vehemently challenged the finding recorded by the learned lower court. It has been submitted at the end of the learned counsel for Lal Saheb Sah (Cr.Appeal No. 777/2016) that absolutely there happens to be no material to connect him with the offence so alleged while the learned lower court without considering that the prosecution is deficient one each and every score much less, failed to disclose the pre-meeting of mind which happens to be the condition precedent for attracting Section 120B I.P.C., and in likewise manner, failed to perceive cogent material to connect him with the alleged occurrence of dacoity convicted and sentenced and so, the same is fit to be set aside.

Learned counsel representing the appellant Shushil Ram has submitted that there happens to be no written inculpatory



extra-judicial confessional statement of the accused on the record and so, whatsoever been, the same happens to be mere hypothetical one, illegally acknowledged by the court considering the evidence of P.W.9 without having corroboration from any corner, much less, there also happens to be missing of link that, at the point of the appellant, recovery was made from the house of a convict. That means to say, recovery was not made at the instance of the appellant and so, his status in accordance with Section 27 of the Evidence Act is found frumpy and so, no legal evidence rests against him.

Learned counsel for Kanhaiya Bind @ Kanhaiya Chaudhary has submitted that there happens to be no evidence on record to justify implication of the appellant because of the fact that the prosecution failed to identify the place wherefrom recovery has been made belonging to the appellant. So far Section 395 I.P.C. as well as Section 120B of the I.P.C. is concerned, that could not be in the background of the fact that the appellant has not been identified in the dock by any of the P.Ws. and further there happens to be no evidence on record to justify pre-meeting of mind for hatching conspiracy. So, in any view of the matter, no offence whereunder the appellants have been convicted and sentenced, justify prevalence.



Learned Addl. P.P. controverted the submission and submitted that the finding of the learned lower court is based upon the materials having on the record, whereupon did not attract interference.

From perusal of the record as well as paragraph 1 of the judgment, it is evident that all the appellants were charged for an offence punishable under section 395 I.P.C. as well as 120B of the I.P.C., and Kanhaiya Bind @ Kanhaiya Chaudhary has independently been charged for an offence punishable under section 412 I.P.C. on account of recovery of the looted idol from his possession. The most devastating feature visible from the judgment impugned is the finding so recorded by the learned lower court under paragraph 20 of the judgment whereunder he concluded that after discussing the evidence as well as materials available on record, the prosecution has succeeded in substantiating case against the accused for committing dacoity at the Thakurbari, whereunder they have looted away three idols and those idols were recovered from the house of the accused persons. In the background of the aforesaid finding, the offence under section 395 I.P.C. as well 120B of the I.P.C., as has been found duly substantiated. In likewise manner, the learned lower court would have recorded the concerned appellant guilty for the offence



punishable under section 412 I.P.C. and sentence should have also been inflicted with regard thereto. Contrary to it, it is evident that the learned lower court did not speak with regard to conviction or acquittal relating to Section 412 I.P.C. which, in the facts and circumstances of the case, as referred above, whereunder the learned lower court had found the prosecution case proved for commission of dacoity, conspiring to commit dacoity, looting of the idol during course of commission of dacoity followed with recovery of idol and so subsequent activity of the learned lower court is found contrary to its own finding. Further more, recovery of idol has been made on inculpatory confessional statement of co-accused Sushil Ram but that has not been alleged u/s 412 I.P.C.

In **P. Ramesh vs. State**, reported in AIR 2019 SC 3559 it has been held:

“18. A three judge Bench decision of this Court in Mohd Hussain v. State (Govt of NCT of Delhi), while dealing with the powers of the Appellate Court to order a retrial under Section 386(b) of the CrPC, held thus:

“41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or



retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

A similar position was adopted by this Court in *Ajay Kumar Ghoshal v. State of Bihar*, where it was held thus:

“11. Though the word “retrial” is used under Section 386(b)(i) CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or



irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard.”

(emphasis supplied)

19. The power of an Appellate Court to order a retrial on the limited point of re-recording statements of witnesses was recently discussed in Atma Ram v. State of Rajasthan, where the Trial Court had convicted the accused persons of offences under Section 302, 307, 452, 447, 323, 147, 148 and 149 IPC and sentenced them to death. During the trial, the court had recorded the evidence of twelve witnesses in absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court exercised its powers under Section 386(b) of CrPC to quash and set aside the judgment of the Trial Court and remanded the matter back to Trial Court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court. The High Court held in the following terms:

“In view of the discussion made hereinabove and looking to the glaring facts of the case at hand, we feel that in order to do complete justice to the accused as well as to the victims, the entire case cannot be thrown out by holding the proceedings to



be vitiated on account of the mistakes committed by the trial Judge or the prison authorities concerned. A fresh trial/de-novo has to be ordered by directing the trial court to lawfully re-record statements of the witnesses indicated above whose evidence was recorded in the first round without ensuring presence of the accused in the court.”

The accused persons preferred a Special Leave Petition before this Court, challenging the High Court's order of a de-novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, this Court held thus:

“22. ... Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to “reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial”. The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.”



“25. ... If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the concerned witnesses, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.”

(emphasis supplied)



That being so, it suggests non-application of judicial mind, whereupon, the judgment impugned is set aside. The appeal is allowed.

However, the matter is remitted back to the learned lower court with a direction to hear the parties and then pass judgment afresh in accordance with law. The whole exercise must be completed within two months.

Office is directed to transmit the record to the learned lower court at once. Side by side the District and Sessions Judge, Buxar is directed to have proper surveillance and if desirable, the matter be heard by him and dispose it of within the aforesaid stipulated period and will submit report with regard to proper compliance of the direction.

The appellants, who are under custody, are directed to be produced to the learned lower court so that, the trial be concluded within the aforesaid stipulated time.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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