

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.487 of 2016**

Arising Out of PS. Case No.-24 Year-2013 Thana- CHANDRAMANDI District- Jamui

Janki Mandal, son of Sukhdeo Mandal, Resident of village- Billi Gadi, P.S. -
Chakai, District- Jamui.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 492 of 2016

Arising Out of PS. Case No.-24 Year-2013 Thana- CHANDRAMANDI District- Jamui

Sujit Khaira @ Sujit Kr. Khaira @ Jagdish Kora, Son of Mangra Khaira @
Charku Kora, resident of village - Baratanr, P.S. Chandramandih, Distt. Jamui
at Present village - Pasraha, P.S. Dharhara, Distt. - Munger

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 487 of 2016)

For the Appellant/s : Mr. Prabhat Ranjan Singh, Adv.

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

(In CRIMINAL APPEAL (SJ) No. 492 of 2016)

For the Appellant/s : Mr. Prabhat Ranjan Singh, Adv.

For the Respondent/s : Ms. Abha Singh, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 17-10-2019

Criminal Appeal (SJ) No.487 of 2016, wherein Janki Mandal is the appellant and Criminal Appeal (SJ) No.492 of 2016, wherein Sujit Khaira @ Sujit Kumar Khaira @ Jagdish Kora is the appellant have been heard analogously and are being disposed of by a common judgment as, both the appeals arise out of common judgment of conviction and order of sentence.



2. Both the appeals originated from the judgment of conviction dated 29.04.2016 and order of sentence dated 02.05.2016 passed in Sessions Trial No.449 of 2013/UAP Case No.37 of 2015 arising out of Chandramaandih P.S. Case No.24 of 2013 whereby both the appellants have been found guilty for the offences punishable under Section 395 of the IPC and each one has been sentenced to undergo R.I. for 10 years as well as to pay fine of Rs.20,000/-, in default thereof to undergo S.I. for one year additionally, under Section 427 of the IPC and each one has been sentenced to undergo R.I. for 2 years, under Section 27 of the Arms Act and each one has been sentenced to undergo R.I. for 7 years as well as to pay fine of Rs. 10,000/- and in default thereof to undergo S.I. for one year additionally with further direction that the sentences shall run concurrently by the learned Sessions Judge, Jamui.

3. Pravin Kumar (PW-1) Branch Manager of State Bank of India, Nawadih Silphari Branch, filed a written report on 09.03.2013 addressed to the Officer Incharge, Chandramandih Police Station disclosing therein that today that means to say, on 09.03.2013 at about 12.00 Noon 7-8 unknown criminals armed with sophisticated weapon came and began to fire indiscriminately and during course thereof, damaged the CCTV camera, computer



etc. Then thereafter, by introducing themselves as Maovadi and further, they have come to loot the bank, they also threatened that in case of obstruction having at their end they will be murdered, they forced to open the vault, strong room and then, looted Rs.16,32,500/-. They have further claimed identification of the accused, on the basis thereof, Chandramandih P.S. Case No.24 of 2013 has been registered.

4. Here, it is pertinent to note that Chandramandih P.S. Case No.25 of 2013 has been registered at the instance of Officer Incharge of Chandramandih Police Station who, after coming to know about the dacoity being committed at the State Bank of India, Nawadih Silphari Branch proceeded and during midst of way found 9 persons over 5 motorcycles having armed with sophisticated weapon who, seeing the police began to fire. The police also retaliated but, during midst thereof, the miscreants diverted their direction and, the police succeeded only in chasing one motorcycle and the occupants thereof Sujit Khaira @ Sujit Kumar Khaira @ Jagdish Kora as well as Janki Mandal were apprehended on hot chase and further, there happens to be the version of the prosecution that Rs.5,22,000/- along with A.K. 47 rifle, cartridges, wireless set were seized from the possession of Sujit Khaira @ Sujit Kumar Khaira @ Jagdish Kora while from



the possession of Janki Mandal carbine and cartridges, wireless set were recovered. It is further evident that at an earlier occasion the prayer of the appellants were rejected by the High Court for amalgamation so that chapter is found finally closed.

5. It is further evident that after registration of the present FIR as Chandramandih P.S. Case No.24 of 2013 against unknown, investigation commenced and during course thereof, both the appellants being accused relating to Chandramandih P.S. Case No.25 of 2013, were remanded in this case, booty recovered from them have been the subject matter of instant case for which T.I. parade was conducted, and the bank official identified the same. On a prayer made by the bank official the amount was returned back to them but the reason best known to the investigating officer, charge-sheet was not submitted under Section 412 of the IPC and, the prosecution as well as the learned lower court pursued the matter mechanically as, during the course of framing of charge, subsequently thereof as is evident did not care to frame charge even under Section 412, or could have taken recourse of Sections 216, 217 of the Cr.P.C. irrespective of recovery duly acknowledged.

6. The defence case, as is evident from the cross-examination as well as the statement recorded under Section 313



of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

7. Altogether 4 witnesses have been examined in this case who are PW-1, Pravin Kumar, PW-2, Bholi Paswan, PW-3, Chandra Shekhar Sudhansu and PW-4, Durgesh Ram (I.O.). Side by side has also exhibited Ext.1 (written report), Ext. 2 (Charge-sheet) and Ext. 3 (formal FIR). Nothing has been adduced on behalf of the defence.

8. From the evidence available on record, it is apparent that none of the material witnesses that means of say, PW-1, PW-2 and PW-3 who are bank officials as well as informant though substantiated the factum of dacoity but failed to identify both the appellants (accused) in dock. PW-4 is the investigating officer. He was also I.O. Chandramandih P.S. Case No.25 of 2013 and from his evidence same fact happens to be properly exposed. Then it has been submitted at his end at paragraph 4 that on the same day Sujit Khaira @ Jagdish Kora @ Abhay Da and Janki Mandal were apprehended along with the prohibited arms and ammunition as well as cash and, they were forwarded to custody on that very score. They were subsequently requisitioned and remanded in this case. Whereupon charge-sheet has been submitted against them keeping the investigation pending against others.



9. It is evident that prosecution has during the course of examination of PW-4 failed to draw his attention towards the subsequent event that means to say the booty having been properly connected with the present subject matter, conduction of T.I. parade, identification of money during course thereof, the money having been returned to the Bank on a prayer made by the bank and, in likewise manner, though from the judgment impugned it is evident more particularly from paragraph 13 that the learned lower court has taken into consideration those facts but did not care to amend the charge in accordance with Section 216 of the Cr.P.C.

10. Because of the fact that from paragraph 13 of the judgment impugned it is evident that the learned lower court was not conscious towards, illustration (a) of section 114 of the Evidence Act inferring as an accused of dacoity on account of possession of booty which has been recovered soon after the occurrence but paragraph 13 speaks like so whereupon inference of guilt against the appellants has been drawn up under the garb thereof and so, only two options are found left for at the present moment, it could be observed that due to non-framing of charge under Section 412 of the IPC, the prosecution in terms of Section 114(a) of the Evidence Act, could not be inferred and so, irrespective of presence of ample material the non-consideration of



same has caused miscarriage of justice, which requires to be corrected by remitting the matter to the lower court.

11. At the present moment two options would be seen. The first one, as argued on behalf of learned counsel for the appellants that for the same occurrence the appellants have been prosecuted and convicted concerning Chndramandih P.S. Case No.25 of 2013 and so the prosecution could not be allowed to proceed as is found properly barricaded in accordance with Article 20(2) of the Constitution of India as well as Section 300 of the Cr.P.C.

12. It has also been argued at the end of learned counsel for the appellants that remitting the matter would tantamount to giving an opportunity to the prosecution to fill up lacuna which is found not permissible in the eye of law. Hence, being it a case of no evidence, appellants be acquitted.

13. The learned Additional P.P. while repelling the submission has submitted that remanding the matter to the lower court would not be filling of lacuna, rather irrespective of the fact that lower court perceived all the materials having on record since before, could not be applied its judicial mind and in likewise manner, the prosecutor also got effected. It would not cause prejudice as they knew since before nor recovery of booty.



14. The aforesaid submission is not at all found appreciable because of the fact that Chandramandih P.S. Case No.25 of 2013 was with regard to subsequent event. That means to say when seeing the police, the miscreants fired dispersed in further direction but the appellants were apprehended on hot chase having in possession of prohibited arms and ammunition along with cash appertaining to Rs.5,22,000/-, the subject matter of Chandramandih P.S. Case No.24 of 2013 and so, the subsequent prosecution would have been punishable only for the purpose of possession of prohibited arms and ammunition and the activity having so alleged relating thereto. That means to say, indulging in cross firing with the police. So far the present scenario is concerned, that has got independent identity with regard to commission of dacoity and even if there has been recovery of Rs.5,22,000/- but happens to be part of the booty and so, to that extent only there would be proper recognition. So, the contention of learned counsel for the appellants that the present prosecution is found barred under Section 300 of the Cr.P.C. read with Article 20(2) of the Constitution of India is not at all found tenable. Apart from this, it is also evident that during course of consideration of Cr. Appeal relating to Chandramandih P.S. Case No.25 of 2013, the conviction and sentence relating to Sections 395, 412 I.P.C. has



been set aside. In **State of Mizoram vs. Dr. C. Sangnghina**, reported in **2019 Cri.L.J. 393**, it has been held:”

“15. Under Article 20(2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. Section 300 Cr.P.C. lays down that a person once convicted or acquitted, cannot be tried for the same offence. In order to bar the trial of any person already tried, it must be shown- (i) that he has been tried by a competent court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts; (ii) that he has been convicted or acquitted at the trial; and (iii) that such conviction or acquittal is in force. Where the accused has not been tried at all and convicted or acquitted, the principles of “double jeopardy” cannot be invoked at all.”

In **State (NCT of Delhi) vs. Sanjay**, reported in **(2014)**

9 SCC 772, it has been held as follows:

“26. In exercise of powers conferred by Section 23-C(1) of the MMDR Act, the Government of Gujarat made rules called the Gujarat Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2005. The said Rules, inter alia, made provisions to search, seizure and confiscation of the property in the manner provided under the Act as and when a person violates the provisions of the Act and the Rules made thereunder in doing mining activities.

27. Looking into the provisions the Code of Criminal Procedure, 1973 the relevant provisions need to be referred hereunder. Section 2(c), 2(d) and 2(h) define “cognizable offence”, “complaint” and “investigation” which read as under:

“2. (c) ‘cognizable offence’ means an offence for which, and ‘cognizable case’ means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

2.(d) ‘complaint’ means any allegation made orally or in writing to a Magistrate, with a view to his



taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

* * *

2.(h) ‘investigation’ includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.”

13. Now coming to other aspect, in **Atma Ram vs. State of Rajasthan** reported in **2019(3) BLJ 326 (SC)** it has been held as follows:

“22. According to [Section 366](#) when a Court of Sessions passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. [Section 367](#) then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. [Section 368](#), thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under [Section 368 \(c\) of the Code](#) and that is to “acquit the accused person”. Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with “submission of death sentences for confirmation” is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with “Appeals”. Section 391 also entitles the Appellate Court to take further evidence or direct such further evidence to be taken. 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.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in [Pandit Ukha Kolhe vs State of Maharashtra](#) (supra), as under:-

"15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi vs. The State*²⁴

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not



guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."

15. Because of the fact that during the course of trial there happens to be complete failure at the end of the prosecutor as well as the court itself, as not only they failed to appreciate properly the implication of Section 228 of the Cr.P.C. rather the lower court also failed to exercise its power under section 216 of the Cr.P.C. having no hindrance, whereupon almost charge would have been framed under Section 412 of the IPC also and further, even at the present stage, considering the applicability of Section 221(2) read with Section 464 of the Cr.P.C. will not serve the purpose because of the fact that for the purpose of Section 412 of the IPC the ingredients are different and further, an opportunity to the appellants must be provided in order to avoid violation of principles of natural justice.

16. Consequent thereupon, the judgment impugned suffers from inherent defect and is set aside. The appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh in accordance with law. However, taking into account the period of custody, the learned lower court is directed to conclude



the same within six months positively and for that, the Superintendent of Police, Jamui is directed to procure attendance of the witnesses positively.

17. Office to serve a copy of the judgment to the Superintendent of Police, Jamui personally for its strict compliance. Appellants who are under custody are directed to be produced before the lower court.

(Aditya Kumar Trivedi, J)

skpathak/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30-10-2019
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