

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRR No. 786 of 2018**Order Reserved on : 05.08.2019Order Delivered on : 24.10.2019

1. Kairi @ Kushi S/o Dharamdas Teli, aged about 60 years.
2. Dhanmati W/o Narayan Singh Gond, aged about 50 years.
3. Bachha S/o Deenbandhu Pradhan, aged about 66 years.
4. Pahad Singh S/o Rajendra Singh Diwan, aged about 67 years.
5. Suklal S/o Ratilal Rawat, aged about 65 years.
6. Purnachand S/o Sita Ram yadav, aged about 55 years.
7. Tirtharaj S/o Uttam Kumar Kolta, aged about 64 years.
8. Harishanker S/o Pahad Singh Diwan, aged about 48 years.
9. Chunnilal S/o Anjordas Rawat, aged about 52 years.
10. Jagananath S/o Aatma Ram Kenwat, aged about 42 years.
11. Bhagwan Singh S/o Rajendra Singh Gond, aged about 43 years.
12. Bhagwan Singh S/o Hem Singh Diwan, aged about 42 years.
13. Bodh Singh S/o Vasudeo Rawat, aged about 44 years.
14. Dayanidhi S/o Tikeshwar, aged about 52 years.
15. Sukhmati @ Sukho W/o Basant Teli, aged about 41 years.
16. Sandhya W/o Sudan Sounra, aged about 28 years.
17. Mandaro S/o Dharamdas Teli, aged about 28 years.
18. Bhumisuta W/o Bachha Pradhan, aged about 55 years.
19. Biso W/o Gupteshwar Sounra, aged about 60 years.
20. Bindalati W/o Dayanidhi Sahu, aged about 46 years.
21. Padmani W/o Pritam Singh Sounra, aged about 63 years.

All are resident of village Khokhepur, Police Station
Saraipali, District Mahasamung (C.G.)

----Applicants**Versus**

1. Nuradhan Surjal S/o Premasagar Surjal, aged about 48 years, R/o village Khokhepur, Police Station : Saraipali, District Mahasamund (C.G.)
2. State of Chhattisgarh Through : Station House Officer, Police Station : Saraipali, District Mahasamund (C.G.)

---- Respondents

For Applicants	:	Shri G.I. Sharan, Advocate.
For Respondent No.1	:	Ms. Shikha Pandey, Advocate
For Respondent No.2	:	Shri Wasim Miyan, P.L.

Hon'ble Smt. Justice Rajani Dubey

C A V Order

24/10/2019

01. Challenge in this petition is to the order dated 18.06.2018 passed by the learned Additional Sessions Judge, Saraipali, District Mahasamund, in Criminal Appeal No.15/2017 whereby, the learned appellate Court set aside the order dated 17.05.2017 passed by Judicial Magistrate First Class, Saraipali in Criminal Case No.411/2011 and remanded the matter to the trial Court for deciding the case afresh on merit after affording opportunity of examination of remaining witnesses.

02. Brief facts of the case are that the applicants are facing trial before the Judicial Magistrate First Class, Saraipali, District Mahasamund, in Criminal Case No.411/2011 for the offence under Sections 147, 148, 149, 427, 452, 323, 294 and 506 IPC. The learned trial Magistrate on 17.05.2017 passed the judgment acquitting all the accused/applicants herein from the offence under Sections 147, 148, 149, 427, 452, 323,

294 and 506 IPC. Against the order of acquittal, complainant/respondent No.1 Nuradhan Surjal filed criminal appeal before the Court of Sessions and the learned Additional Sessions Judge, Saraipali, partly allowing the appeal set aside the order dated 17.05.2017 of learned trial Magistrate and remanded the matter to the trial Court. Hence, this revision by the applicants.

03. Learned counsel for the applicants submits that the learned Court below, while allowing the appeal preferred by the complainant/respondent No.1, has taken ground of order sheet dated 27.05.2013, 18.02.2014 and 11.05.2017, which is bad and without application of mind. He further submits that it is the duty of the prosecution to produce the witnesses for recording of evidence before the trial Court. In the present case, it has to be taken into consideration that in order sheet dated 27.05.2013, time was sought for cross-examination of respondent No.1 against which no objection was raised by the prosecution and, thereafter, respondent No.1 was not examined till the passing of the judgment by learned trial Magistrate, though, he was having knowledge that his statement is to be recorded. He also submits that the applicants regularly appeared before the trial Court during entire proceeding and no fault was committed on their behalf. If the witnesses do not turn up for recording their evidence then it is not the fault on the part of the applicants/accused but on the prosecution, who have not produced their

witnesses in time, therefore, the accused person should not be suffered for re-trial. Learned counsel also submits that the appellate Court has taken the ground of order sheet dated 18.04.2014, whereby PW/2 has not been cross-examined. It is the duty of the prosecution to produce him. Likewise, order sheet dated 11.05.2017 also shows that the prosecution requested the Court for closing evidence of prosecution witnesses and the same request has been taken into consideration by the learned trial Court, in accordance with law. Next submission of learned counsel for the applicants is that the learned appellate Court overlooked the fact that the prosecution, who is duty bound to produce the witnesses properly before the Court below, has itself requested for closing the recording of evidence. The prosecution did not prefer any State appeal against the judgment dated 17.05.2017. In these circumstances, the impugned order is liable to be set aside.

04. On the other hand, learned counsel for the State and respondent No.1 supporting the impugned order submits that there is legal embargo on the rights of the victim to file an appeal. The respondent No.1 acted within his right by filing the appeal against the vitiated, perverse and unfair trial and judgment under Section 372 Cr.P.C. In support of his submission, he placed reliance on the decision of Hon'ble Supreme Court in the matter of **Zahira Habibulla H. Sheikh**

and Ors. Vs. State of Gujarat and Ors¹, this Court's order dated **12.12.2013** in **CRR No.752/2013 (Govind Chauhan V. Sriram Sonboir)**, order dated **22.01.2003** in **M.Cr.C.No.1530/2002 (Deenanath Singh V. Omprakash and Anr.)**.

05. Heard learned counsel for the parties and perused the material on record.

06. Before the trial Court, respondent No.1 appeared on 27.05.2013 but on that day accused/applicants sought adjournment for cross-examination of this witness. Again on 18.02.2014, witness Biharilal was present before the trial Court and his cross-examination was also postponed. On 27.05.2013 and 18.02.2014, the witnesses were present but the learned trial Court did not examine them and in further proceeding summons were issued. It is not clear from the order sheet that what endeavour has been taken by the trial Court and the prosecution to make the witnesses present and, on 11.05.2017, the prosecution itself has requested the trial Court for closure of recording of evidence and the case was fixed for recording of statements of the accused persons.

07. Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine

1 AIR 2004 SC 346

of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a denovo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code. This High Court in the matter of **Govind** (supra) has dealt with the provision of Section 391 Cr.P.C., para 47 thereof is as under:-

***“47.** Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the*

nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

08. In the instant case, complainant/respondent No.1- Nuradhan and prosecution witness Biharilal are important witnesses and their examination is necessary for proper adjudication of the case, but the learned trial Court and the prosecution proceeded in a very mechanical manner. The learned appellate Court has rightly observed in order sheets that these witnesses appeared before the trial Court but for some or other reason their examination could not be done and they never summoned for evidence by the prosecution and the trial Court. It is worth mentioning here that fair trial is a right of accused persons as well as the victim. The finding of the learned appellate Court is based on proper appreciation of the material on record which does not call for any interference by this Court.

09. Accordingly, the criminal revision has no substance and

the same is liable to be and is hereby dismissed. However, the trial Court is directed to complete the trial within three months from the date of receipt of copy of this order. Complainant/respondent No.1-Nuradhan is directed to appear before the trial Court without delay.

Sd/-

(Rajani Dubey)
JUDGE

vijay