

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRR-3192-2016 (O&M)
Date of decision: 13.03.2019**

Dharminder Singh and another

....Petitioners

Versus

Kuldeep Kaur and another

....Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Jatinder Pal Singh, Advocate
for the petitioners.

Mr. Aman Dhir, Advocate
for respondent No.1.

Mr. Sidakmeet Sandhu, AAG, Punjab.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this revision petition is for setting aside the judgment dated 11.08.2016 passed by the Additional Sessions Judge, vide which while partly allowing the appeal filed by respondent No.1 Kuldeep Kaur, the case was remanded back to the trial Court and the judgment of acquittal dated 06.10.2015 passed by the trial Court was set aside.

Brief facts of the case are that on a complaint given by Mithu Singh, father of respondent No.1-Kuldeep Kaur, FIR No.3 dated 09.01.2011 under Sections 325, 323, 34 IPC was registered at Police Station Lambi,

with the allegations that his sons are residing abroad for their respective work and his elder daughter Kuldeep Kaur is residing with him along with her children. He is running a grocery shop and on 10.12.2010 at about 6.00 p.m., he had gone to his house for taking the meals after leaving his daughter at the shop. The shop of one Sukha Singh, who is selling eggs, is adjacent to his shop and he started passing urine near his shop and this was objected to by his daughter. In the meantime, complainant also reached there and asked Sukha Singh why he has passed urine near his shop, upon this, he called his nephew to come there and to teach a lesson to the complainant party. Then Goga Singh armed with stick, Chhinda Singh armed with dang and Rani wife of Naib Singh armed with Toki came there and they all caused injuries to the complainant and his daughter, as reflected in the FIR. After registration of the FIR, the trial Court framed charges under Sections 325, 323 read with Section 34 IPC.

The prosecution, in its evidence, recorded the statement of PW1 Kuldeep Kaur, who reiterated the version given in the FIR as well as the injuries caused by the accused persons. PW2 Dr. Bikramdeep Singh, MO, deposed about the medico-legal report of Kuldeep Kaur and gave the details of the injuries sustained by her and stated that she was referred to Civil Hospital, Badal for orthopedic opinion and X-rays. This witness duly proved on record the report Ex.PW2/A, X-ray Ex.PW2/B, orthopedic opinion Ex.PW2/C and X-ray films Ex.P1 to Ex.P4. This witness also proved carbon copy of the MLR Ex.PW2/D and pictorial diagram Ex.PW2/E. This witness also proved MLR of Mithu Singh as Ex.PW2/F

along with X-ray report and films as Ex.PW2/G & Ex.PW2/H and Ex.P5 & Ex.P6.

PW3 ASI Prem Chand, Investigating Officer, deposed about the investigation conducted by him and proved on record the complaint, FIR, site plan, arrest memo, personal search memo, recovery memo and recovery of case property as Ex.PW3/A to Ex.PW3/L.

PW4 HC Rajwinder Singh is recovery witness, who proved the aforesaid documents. PW5 ASI Parminder Kaur is also a recovery witness and she supported the prosecution version.

Thereafter, the trial Court, vide its judgment dated 06.10.2015, acquitted the petitioners-accused and respondent No.1 filed an appeal before the lower appellate Court. She also filed an application under Section 391 Cr.P.C. for summoning Dr. H.N. Singh, SMO, Civil Hospital, Sri Muktsar Sahib and Dr. Surinder Kumar, MO, Civil Hospital, Jalandhar to prove the X-ray report Ex.PW2/B, X-ray films Ex.P1 to Ex.P4 and orthopedic opinion Ex.PW2/C, by way of leading additional evidence. In the application, it was stated that both these doctors could not be examined by the prosecution and they are the material witnesses and their evidence goes to the root of the case and will enable the Court to come to just conclusion, it being the medical opinion, which supports the prosecution version. The application was contested by the petitioners on the ground that prosecution evidence was started on 15.07.2011 and the case remained pending for this purpose till 10.07.2015 and ultimately, the prosecution evidence was closed by order of the Court dated 10.07.2015. It is further stated that thereafter, the case

remained pending before the trial Court till the judgment of acquittal was passed on 06.10.2015 and this order, closing the evidence by the Court, was never challenged by respondent No.1 or the prosecution before any higher Court and therefore, the application is not maintainable.

While deciding the application under Section 391 Cr.P.C., the lower appellate Court allowed the main appeal and by setting aside the judgment of acquittal dated 06.10.2015, remanded the case back to the trial Court, to first conclude the remaining prosecution evidence, by examining two doctors and then pass a fresh judgment. The operative part of the judgment dated 11.08.2016 passed by the lower appellate Court reads as under: -

“After giving my anxious thought to the above rival submissions raised by both the learned counsel for parties and perusal of record, it has revealed that the case was fixed for evidence of prosecution for 26.02.2015, when Dr. Surinder Kumar was summoned by the learned trial Court, but he has sent his request that he may be permitted to appear through VC, which is clear from his request on the back of summon itself. Afterwards, Court has passed the order for summoning throughailable warrants and hisailable warrants was also issued for 08.04.2015, but again he has furnished the bonds and also sent request again to the Court for recording his evidence through VC. Unfortunately, the Court of learned SDJM, Gidderbaha has neither intimated to the concerned

doctor to appear through VC and nor any such letter or summon or bailable warrant has been sent to the concerned witness. If the Court does not want to record the evidence of concerned doctor through VC and it was not possible, even then it was duty casted on the Court that the witness must be intimated that he should appear in person and further his warrant was required to be issued. The Court has neither seen these requests and nor sent any intimation to the witness, which is clear from the perusal of record, because neither any such letter has been lying and nor any such warrants was further issued. On the other hand, the Court has closed the evidence on 10.07.2015 by order, which is clearly an abuse and misuse of process of law, when no proper procedure has been followed by the Court.

Learned counsel for the appellant also rightly contended that in the back ground of above factual position, the evidence of complainant has not been properly appreciated. On this account, perusal of judgment revealed the fact that on one hand, the Court has closed evidence by order, but the at the same time, it was held that the injury declared as grievous is based upon X-ray report, which has not been proved in accordance with mandatory legal requirement. As such the above observation of the learned trial Court is apparently wrong and against the record, because the duty was casted

upon that very Court to uphold the rule of law by summoning other witnesses. It is the duty of the Court to do justice by punishing the real culprit and Court is also condemned, when the guilty is acquitted. In the light of these legal principles, this Court is of considered view that if both these doctors mentioned in the application under Section 391 of Cr.P.C. moved by the appellant has been recorded, then it does not going to affect upon the rights of respondent-accused, because they would also got an equal opportunity of cross-examination as well as to produce evidence by way of defence. Moreover when the learned trial Court has closed the evidence without following the due procedure prescribed under the Cr.P.C. and scuttled the entire Criminal proceedings, then closing of evidence by order is neither legal and nor justifiable as per record. In the light of these facts and circumstances, the justice demands that the proper opportunity of hearing should be given to the prosecution as well as complainant and they must examine both these doctors namely Dr. Surinder Kumar and Dr. H. N. Singh, who are material witnesses. Moreover no prejudice has been caused upon the rights of respondents, then equity and justice also demands that for proper and just decision of the case, both these witnesses have to be examined by the learned trial Court.

Keeping in view of these facts and circumstances, the

judgment passed by the learned trial Court is neither legal and nor sustainable, when the other evidence has yet to be recorded and then matter is required to be determined in the light of complete evidence. However, every accused have also right to speedy trial, therefore in such circumstances, prosecution as well as complainant would make strenuous efforts to produce both these witnesses i.e. Dr. Surinder Kumar and Dr. H.N. Singh within a period of three months and to assist the Court for serving upon these witnesses for recording their evidence by way of V.C., in the first instance, if feasible or by other modes prescribed under Cr. P. C.

In the light of above discussion, without expressing any opinion on other merits of the case, when the judgment is neither legal and nor sustainable and against the record, then the appeal is hereby partly allowed with the further directions that both the parties and prosecution shall appear before the Court of learned SDJM, Gidderbaha on 23.08.2016 and the previous judgment dated 06.10.2015 is hereby set-aside. Consequently, prosecution as well as complainant shall make strenuous efforts to serve upon both these doctors for the date, which has to be fixed by the Court of learned SDJM. However, the learned trial Court is directed to try to conclude the evidence of both these doctors as early as possible and also make efforts to record the evidence by way of VC, if feasible,

failing which the witnesses must be intimated specifically in this regard. However, evidence of both the witnesses and trial be concluded again within a period of three months. However any expression given in this judgment shall not effect the main case on merits. Record of learned trial Court be returned alongwith a copy of this judgment, whereas, file of this Court be consigned to Record Room after due compilation.”

Present revision petition has been filed challenging the judgment dated 11.08.2016 passed by the lower appellate Court, vide which the case was remanded back to the trial Court.

It is argued on behalf of the petitioners that the lower appellate Court has not adopted the legal procedure in setting aside the judgment of acquittal by partly allowing the appeal, while allowing an application under Section 391 Cr.P.C. and by further directing the trial Court to record the statement of two witnesses. Learned counsel has further argued that in fact the lower appellate Court until and unless set aside the judgment of acquittal on merits, it could not pass an order of remand as per Section 386 Cr.P.C. It is further argued that only in exceptional circumstances, first appellate Court can remand the case to the trial Court. Section 386 Cr.P.C. is reproduced as under: -

“Section 386. Power of the Appellate Court. *After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if*

he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) 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, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

Learned counsel for the petitioners has further submitted that the trial Court has acquitted the petitioners on various counts, as detailed in the grounds of revision i.e. non-examination of complainant Mithu Singh, father of respondent No.1-complainant, is fatal and there is no independent witness to corroborate the statement of Kuldeep Kaur PW1, who explained the weapon used by main accused Sukha Singh and this weapon was not produced in the Court; there is no specific attribution as to which accused caused injuries to her father Mithu Singh; PW5 ASI Parminder Kaur could not identify the accused persons in the Court; there is delay in registration of the FIR, as the incident is of 11.12.2010, whereas the FIR was registered on 09.01.2011 i.e. after a delay of 01 month; there are discrepancies in the statement of the prosecution witnesses.

Learned counsel for the petitioners has relied upon **Rambhau**

Vs. State of Maharashtra, 2001 (2) RCR (Criminal) 721, wherein in similar circumstances, against a judgment of acquittal, during pendency of an appeal, an application was filed under Section 391 Cr.P.C., the High Court allowed the application and by taking the additional evidence at the appellate stage, decided the case, the Hon'ble Supreme Court has held that the findings recorded by the High Court that the accused persons are guilty of the offence, cannot be set aside. In this judgment, it is held that the powers under Section 391 Cr.P.C. can be exercised to rectify an irregularity committed by the prosecution and not to rectify a defect or lacuna in the prosecution.

Learned counsel has also relied upon a judgment of the Hon'ble Supreme Court in **Satyajit Banerjee Vs. State of West Bengal, 2005 (1) RCR (Criminal) 723**, wherein it has been held that while deciding a revision petition against an order of acquittal, a direction to re-trial should not be issued by the High Court in all or every case, where acquittal of accused is on account of inadequate evidence and a direction for de-novo trial can be given in extraordinary cases, where the Court is convinced that the entire trial is farce. In this case also, the Hon'ble Supreme Court has upheld the order of remand.

In reply, learned counsel for respondent No.1 has argued that it has come on record that both the aforesaid doctors were summoned by the trial Court on various dates and a request was made that their statements be recorded through video conferencing, as is apparent from the summons itself, however, the trial Court opted to issue bailable and non-bailable

warrants instead of recording the statements through video conferencing and thereafter, closed the evidence. The lower appellate Court has also recorded a finding that the statements of these two witnesses are necessary to prove the X-ray report, X-ray films and the orthopedic opinion given by the these doctors, though the same stand exhibited by the other witnesses but were not considered by the trial Court.

Learned counsel for respondent No.1 has relied upon a judgment in **Chamkaur Singh Vs. Amritbir Singh and another, 2014 (3) RCR (CrI.) 777**, wherein a Division Bench of this Court, while dealing with the powers of the appellate Court under Section 386 Cr.P.C., has held that in an appeal from the order of acquittal, the appellate Court has powers to reverse such order and direct further enquiry or the accused can be retried or committed for trial.

After hearing learned counsel for the parties, I find merit in the present petition filed against the order of remand/re-trial, however, I do not find any merit in the prayer that the lower appellate Court has wrongly allowed the application under Section 391 Cr.P.C.

A perusal of the impugned judgment passed by the lower appellate Court shows that after recording a finding that the application under Section 391 Cr.P.C. needs to be allowed in view of the fact that the trial Court, when issued summons to aforesaid two doctors, they had made a request to record their statements through video conferencing, however, issued bailable/non-bailable warrants and thereafter, closed the prosecution evidence, without granting them opportunity to record their statements

through video conferencing and therefore, I find that the prosecution or respondent No.1 were not at fault in not producing their evidence. It has been held by the Hon'ble Supreme Court in **Brig. Sukhjeet Singh (retd.) MVC Vs. The State of Uttar Pradesh and others, decided on 24.01.2019 in Criminal Appeal No.148 of 2019 (arising out of SLP (Crl.) No.1120/2017)** that the powers under Section 391 Cr.P.C. can be exercised by the appellate Court to achieve the ends of justice to the parties, however, a careful perusal of the lower Courts record shows that the lower appellate Court, while remanding the case back, passed a judgment without reversing the findings recorded by the trial Court on various points raised by the petitioners.

The lower appellate Court remanded the case back only on the premise that since the application under Section 391 Cr.P.C. was allowed and statements of two doctors to prove the MLR/X-ray/films, which have already exhibited on record, need to be recorded. However, the lower appellate Court should have proceeded to record the statements of these two witnesses at the appellate stage and thereafter, by recording the statements of the accused under Section 313 Cr.P.C. and then affording them an opportunity to lead the defence evidence, should have decided the appeal. Therefore, in view of the well settled principle of law that order of remand should not be made in a casual manner, I find that this part of the impugned judgment, remanding the case back, is not legally sustainable.

Accordingly, this appeal is partly allowed, while upholding the findings of the lower appellate Court, allowing the application under

Section 391 Cr.P.C. and this part of the impugned judgment, qua setting aside the judgment of acquittal passed by the trial Court, is set aside and it is directed that the lower appellate Court will receive the additional evidence and thereafter, allow the petitioners/accused to record their statements under Section 313 Cr.P.C. and then by affording them an opportunity to lead defence evidence, will pass a fresh order, in accordance with law.

The parties are directed to appear before the lower appellate Court on 11.04.2019.

With the observations made above, present revision petition stands disposed of.

[ARVIND SINGH SANGWAN]
JUDGE

13.03.2019
vishnu

Whether speaking/reasoned Yes/No

Whether reportable Yes/No