

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 01st JUNE, 2021

+ **CRL.REV.P. 12/2018 & CRL.M.A. 174/2018 (Delay)**

STATE, GNCT DELHI

..... Petitioner

Through Ms. Meenakshi Chauhan, APP
versus

YOGESH KOCHAR @ BABLOO

..... Respondent

Through Mr. Abhishek Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The present petition under Section 397/401 Cr.P.C is directed against the order dated 30.08.2017, passed by the Additional Session Judge/Special Judge (NDPS) (West), Tis Hazari Courts, Delhi in Criminal Appeal No. 67/2016 acquitting the accused/respondent herein and setting aside the judgment of conviction dated 05.08.2016 and order on sentence dated 02.09.2016 passed by the learned Metropolitan Magistrate-07 (West), Tis Hazari Courts, Delhi.

2. The facts, in brief, leading to the instant revision petition are as under:
a) It is the case of the prosecution that on 28.11.2006, at about 7.15 PM, the accused/respondent herein beat up the complainant, one Sandeep Dutta, and caused grievous hurt to him and had also caused damage to his Maruti car having registration No.HR-26H-4333. It is stated that the incident took place near house No. BG-6/344, Paschim Vihar. On the basis of the complaint, an FIR was lodged being FIR

No.73/2007 dated 24.01.2007 registered at Police Station Paschim Vihar for offences under Sections 325 & 427 IPC. After completion of investigation, charge sheet was filed against the accused/respondent herein. Charges under Sections 325/427 IPC were framed against the accused/respondent herein, to which the respondent pleaded not guilty and claimed trial.

b) In order to prove their case the prosecution examined 4 witnesses. The learned Trial Court found that the injured witness i.e. PW-1 was reliable and convicted the respondent herein for an offence under Section 325 IPC. 02.09.2016, the learned Metropolitan Magistrate sentenced the respondent herein to undergo rigorous imprisonment for six months and to pay fine of Rs.20,000/- (which was to be paid to the injured/complainant Sandeep Dutta), in default of payment of fine, the respondent was directed to undergo simple imprisonment for 15 days. The accused/respondent herein was granted benefit under Section 389(3) Cr.P.C on furnishing a personal bond in the sum of Rs.10,000/- along with one surety of the like amount.

c) Against the said order the accused/respondent herein filed an appeal before the Sessions Court. The learned Additional Session Judge held that no effort has been made on the part of the prosecution to contact independent public witnesses to join the investigation. It was found that notice under Section 160 Cr.P.C. was not served on any of the public persons. The learned Additional Session Judge held that there is nothing on record to show that after receiving the Notice under Section 160 Cr.P.C the public witnesses have refused to join

investigation and the names and addresses of the public witnesses have not been mentioned by the Investigating Officer. The learned Additional Session Judge relied on the judgment of the Supreme Court in Pawan Kumar v. The Delhi Administration, **1989 CRI.L.J. 127**, to hold that when there is no effort made by the Investigating Officer to contact the witnesses, even though a number of them were present, and no possible explanation is given by the prosecution for not calling independent witnesses, serious doubts are raised on the case of the prosecution. The learned Additional Sessions Judge also found that the date of incident is 28.11.2006 and FIR in the matter has been lodged on 24.01.2007 i.e. after about two months from the date of the incident. He also found that even though the MLC records that the complainant suffered grievous injuries, it is not stated that the complainant was unfit to give statement. No reason has been given by the prosecution as to why the IO had not recorded the statement of the injured/complainant on the same date. The learned Additional Session Judge also noted that the weapon of offence used in the crime was not produced in the Court. He also noted that the site plan was prepared at the instance of the complainant but the signatures of the complainant were not found on the site plan. The learned Additional Session Judge also found that the doctor who examined the injured/complainant was not examined by the prosecution to prove the MLC and injuries sustained by complainant/injured. The learned Additional Session Judge allowed the appeal and acquitted the respondent herein.

d) Against the said judgment of the Sessions Court the instant

revision petition is filed.

3. Heard Ms. Meenakshi Chauhan, learned APP for the State and Mr. Abhishek Kumar, learned counsel for the respondent and perused the material on record.

4. In the opinion of this Court the instant revision petition filed by the State is not maintainable.

5. Sections 378(1) and 378(3) Cr.P.C were brought in the Cr.P.C wide Code of Criminal Procedure (Amendment) Act, 2005. Section 378(1)(b) Cr.P.C. provides for an appeal filed by the State Government from an original or appellate order of acquittal passed by any Court other than High Court. The appeal is presented by the Public Prosecutor on the direction given by the State Government. Section 378(3) Cr.P.C provides that an appeal can be entertained only with the leave of the High Court. Sections 378 (1)(b), 378(3) and 401(4) Cr.P.C reads as under:

“ Section 378 Cr.P.C: Appeal in case of acquittal

Section 378(1)(b) Cr.P.C: *the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.*

Section 378(3) Cr.P.C: *No appeal under Sub-Section (1) or Sub-Section (2) shall be entertained except with the leave of the High Court.”*

“Section 401 Cr.P.C: High Court’s powers of revision”

Section 401(4) Cr.P.C: Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

The Supreme Court in Subhash Chand v. State (Delhi Admn.), (2013) 2 SCC 17, has succinctly analysed Sections 378 (1) and 378 (3) Cr.P.C, as amended by the 25th Amendment Act, 2005. The said judgment reads as under:

“17. At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court under Sections 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the Court of Session. Sub-section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-section (2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to sub-section (1) except that here the words “State Government” are

substituted by the words “Central Government”.

18. If we analyse Sections 378(1)(a) and (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is, appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words “in any case” but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

19. Sub-section (4) of Section 378 makes provision for appeal against an order of acquittal passed in a case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of “special leave” as against sub-section (3) relating to other appeals which speaks of “leave”. Thus, the complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for “special leave” by the complainant. It grants six months' period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-section (6) is important. It states that if in any case the complainant's

application for “special leave” under sub-section (4) is refused no appeal from the order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if “special leave” is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.” (emphasis added)

6. Section 401(4) Cr.P.C mandates that if the Code of Criminal Procedure provides for an appeal and no appeal is brought then no proceedings, by revision, shall be entertained at the instance of the parties who could have appealed. The scheme under Sections 378 Cr.P.C and 401 Cr.P.C therefore postulates that when there is a right of appeal against any order of acquittal by any Court to the High Court, a revision petition cannot be entertained. The procedure for filing an appeal is that the State Government has to direct the Public Prosecutor to prefer an appeal. The appeal so preferred by the Public Prosecutor at the direction of the State Government can be entertained by the High Court only if the High Court grants leave. The Public Prosecutor therefore cannot file a revision petition and get over the provisions of Sections 378(1)(b) and 378(3) Cr.P.C. It is well settled that what cannot be achieved directly, cannot be achieved indirectly by resorting to a power of revision and that too while there is a specific provision barring entertaining a revision petition when a remedy of appeal is available to the State. The purpose of Section 378(3) Cr.P.C, which postulates that the State Government can file an appeal on an order of acquittal passed by any Court after getting leave of the High Court, is to prevent the Government from filing frivolous appeals and give quietus to the

case because the presumption of innocence gets fortified by acquittal. The scheme clearly distinguishes between an appeal against acquittal and an appeal against conviction.

7. It is well settled that if there is a power coupled with duty mandating that an act has to be done in a particular way, it has to be done only in that way or not at all and all other modes are forbidden. The said principle has been laid down in Taylor v. Taylor, (1876) 1 Ch.D 426, where it was observed that where a statutory power is conferred for the first time upon a Court and the mode of exercising it is pointed out, it means that no other mode has to be adopted. This judgment has been followed by the Privy Council in another celebrated judgment: Nazir Ahmad v. King Emperor, AIR 1936 PC 253, wherein it has been observed as under:

“11.where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”

This principle has been consistently followed by the Supreme Court in a number of judgments (refer: State of Rajasthan v. Mohinuddin Jamal Alvi & ANR., (2016) 12 SCC 608; State v. Sanjeev Nanda, (2012) 8 SCC 450); Nika Ram v. State of H.P., (1972) 2 SCC 80; Delhi Airtech Services (P) Ltd. v. State of U.P., (2011) 9 SCC 354)

8. In the instant case the Trial Court has acquitted the respondent herein. The State Government had to direct the Public Prosecutor to present an appeal to the High Court. No such direction has been filed. There is no averment in the revision petition that this revision petition has been filed by the Public Prosecutor at the direction of the State Government. In view of

the above, this revision petition, as framed, cannot be entertained.

9. Section 401(5) Cr.P.C reads as under:

“Section 401 Cr.P.C: High Court’s powers of revision”

Section 401(5) Cr.P.C: *Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.”*

Section 401(5) Cr.P.C provides that when an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly. The word person has not been defined in the Cr.P.C but has been defined in Section 11 of the Indian Penal Code. Section 11 IPC reads as under:

“11. “Person”.—The word “person” includes any Company or Associa-tion or body of persons, whether incorporated or not.”

Section 401(5) Cr.P.C cannot apply to the State. It cannot be stated/argued that the State was under erroneous belief that no appeal would lie from the order passed by the Sessions Court.

10. No doubt, Section 397 Cr.P.C gives power to the High Court to *suo*

moto call for and examine the records of any proceeding before any inferior criminal Court situated within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding. Sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. The High Court can look into the records of the case, *suo moto*, but it is equally well settled that such interference has to be used very sparingly. The Sessions Court has taken a view and it cannot be said that the view taken by the Sessions Court is so perverse that this Court should call for the records of the case for exercising its jurisdiction under Section 397(1) Cr.P.C. A reading of the judgment of the Sessions Court and the grounds raised in the revision petition does not persuade this Court to call for the records of this case for further examination. The Sessions Court after looking into the material on record has acquitted the respondent herein and as stated earlier it cannot be said that the findings and reasoning of the Appellate Court are so perverse that no Court could have come to such a conclusion while acquitting the respondent.

11. In view of the above, this revision petition is not maintainable and the same is dismissed on the ground of maintainability along with the pending application.

SUBRAMONIUM PRASAD, J

JUNE 01, 2021

Rahul