

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 442 of 2001

**Deb Kumar Gupta
-vs.-**

Tatu Sk. @ Tajrul Sk. &Ors.

For the petitioner	:	Ms. Sutapa Sanyal, Mr. Gour Baran Sau, Mr. Dripamoy Talukdar
For the O.P. Nos. 1 to 9 & 11	:	Mr. Ayan Bhattacharyya, Mr. Sagar Saha
Amicus Curiae	:	Mr. Sourav Chatterjee
For the State	:	Mr. Arijit Ganguly, Mr. Sandip Chakraborty
Heard on:		20.09.2021, 01.10.2021, 24.12.2021, 14.01.2022, 20.01.2022, 28.01.2022, 04.02.2022 & 08.02.2022

Judgment on : 04.03.2022

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the judgment and order dated 18th January, 2001 passed by the learned Additional Sessions Judge, Malda in Sessions Trial No. 11/98 (Sessions Case No. 12/93) arising out of English Bazar P.S. Case No. 188/89 dated 21.06.89 in respect of

the accused persons who have been acquitted by the Learned Trial Court with regard to the charges framed against them under Sections 148, 149/302, 149/324, 149/323 and 149/379 of the Indian Penal Code.

On the basis of a letter of complaint addressed by Deb Kumar Gupta (hereinafter referred to as the 'petitioner') to the Officer-in-charge of English Bazar police station the present case being English Bazar Police Station case no. 188/89 dated 21.06.89 was registered for investigation under Sections 148, 149/302, 149/324, 149/323 and 149/379 of the Indian Penal Code.

The prosecution case in brief is that on 21.06.89 while the present petitioner's father namely, one Sukumar Gupta arrived at his village home at Chandipur at about 8.30 am he was informed by Doman Mondal and Harish Rajak (at about 9.00 am) that the accused persons and Manjur Sk were plucking mangoes from their garden and were armed with weapons like hasua, dao, ballam, lathi, bow, arrow etc. Hearing the same the petitioner's father accompanied by Doman Mondal, Harish Rajak and the petitioner proceeded to the said Aswina Garden, situated by the side of N.T.P.C. Bundh and on seeing his father the accused persons along with Manjur Sk started shouting with threats of finishing them. It has been alleged that Manjur Sk and the accused persons Tatu Sk, Baira Sk, Matu Sk and others attacked the petitioner's father namely, Sukumar Gupta by hasua, dao, lathi, bow and arrow when Harish Rajak tried to prevent the same he was assaulted with hasua on his right arm, Doman Mondal was also assaulted when he tried to prevent the accused

persons from assaulting the petitioner's father and as a result of the assault the deceased Sukumar Gupta fell down after sustaining serious injuries all over his body. Additionally it has been contended that the petitioner's father was carrying a revolver which was attached to his belt, one Raju Sk slit the belt of the revolver and Manjur Sk snatched away the same. Petitioner was standing on the bundh and began to shout that the accused persons were killing his father, Harish and Doman also shouted and hearing this many people from the local/surroundings gathered at the place of occurrence and the accused persons fled away after collecting some mangoes which they plucked and left rest of the mangoes scattered on the garden. Petitioner thereafter lifted his father with the aid of others in a rickshaw in a blood stained condition from the orchard and placed him on a rickshaw van and proceeded towards the hospital, but on the way petitioner's father succumbed to death. Petitioner thereafter requested the accompanying persons to take the body of his father to the hospital and he himself went to English Bazar Police station and lodged the written complaint. It has been additionally stated in the complaint that from Bagbari More petitioner's father was taken to the hospital by a taxi and Harish was also treated for the injury inflicted by hasua on his arm.

On completion of investigation, the Investigating Officer submitted his charge-sheet against the accused/opposite parties and one Manjur Sk disclosing the commission of offences punishable under Sections 148, 149/302, 149/324, 149/323 and 149/379 of the Indian Penal Code. Learned Magistrate on receipt of the said charge-sheet was pleased to take cognizance

of the offence and after compliance of the provisions of Section 207 of the Code of Criminal Procedure was pleased to commit the case to the Jurisdictional Sessions Court. The case was thereafter, registered as Sessions Case no. 12/93 and subsequently re-numbered as Sessions Trial No. 11/98. The learned Sessions Court after considering the materials placed on record framed charges against all the accused persons named in the charge-sheet for commission of offences punishable under Sections 148, 149/302, 149/324, 149/323 and 149/379 of the Indian Penal Code. The contents of the charges were read over to the accused persons to which they pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 15 witnesses and number of documents, while the defence examined one witness to rebut the prosecution case.

The learned trial Court after completion of the prosecution evidence, examination of the accused under Section 313 of the Code of Criminal Procedure, defence evidence and final arguments was pleased by the impugned judgment, to convict only one Manjur Sk and acquitted all the accused persons from the charges levelled against them.

Ms. Sanyal, learned advocate appearing for the petitioner submits that the conclusion arrived at by the learned trial Court is against the basic tenets of the settled principles of law and unnecessarily the learned trial Court emphasized on the identity of the accused persons, to that effect the learned

counsel drew the attention of this Court to the relevant portion of the judgment of the case which is set out as follows:

“In my view the argument as advanced by the ld. P.P.-in-charge is not tenable one in view of the fact that there is no substantive evidence to show that Tejarul was known as Tatu and Mortuja was known as Matu and accused Tejarul as Reju I like to add that on the relevant day Manjur accompanied by Tatu, Matu, Raiju, Baira attacked Sukumar Gupta but the fact remains that in this Court the witnesses did not specifically identify all these persons properly which required to be done in a case like this. But fact remains that all the witnesses have categorically identified the accused Manjur Sk.”

Learned counsel in order to justify the contention relied upon several authorities of the Hon’ble Supreme Court as well as the High Court which included Dana Yadav @ Dahu & Ors. –Vs. – State of Bihar, (2002) 7 SCC 295; Pramod Mandal –Vs. – State of Bihar, (2004) 13 SCC 150; Mallikarjun Kodagali –Vs. – State of Karnataka & Ors., (2019) 2 SCC 752; Ram Briksh Singh & Ors. –Vs. – Ambika Yadav & Anr., (2004) 7 SCC 665; State of Madhya Pradesh –Vs. – Jogendra & Anr., 2022 SCC OnLine SC 33; Joseph Stephen & Ors. –Vs. – Santhanasamy & Ors., 2022 SCC OnLine SC 90.

Mr. Ayan Bhattacharyya learned advocate appearing for the accused/respondents submitted that there is no manifest error in the judgment delivered by the learned trial Court for interference by this Court.

Learned Advocate also submitted that the evidence considered as a whole fails to make out a case for holding the petitioners guilty. Additionally he submitted that the incident is of 1989 and in the meantime almost 32 years have passed, further the judgment of acquittal was delivered in the year 2001 and as such this Court after 20 years may not interfere with an order of acquittal. Learned advocate in order to substantiate his contention relied upon number of judgments, being S. Guin & Ors. -Vs. - Grindlays Bank Ltd., (1986) 1 SCC 654; Pranab Kumar Mitra -Vs. - State of West Bengal & Anr., AIR 1959 SC 144 and 2007 SCC OnLine Cal 401, Sukumar Das -Vs. - Mrityunjoy Ghosh & Anr; Shyam Babu -Vs.- State of Uttar Pradesh, (2012) 8 SCC 651.

This Court took the assistance of learned advocate Mr. Sourav Chatterjee for addressing on the issue whether when the state has not preferred an appeal and a revisional application against an order of acquittal was preferred at the instance of the complainant would it be fit and proper and fair enough to interfere with an order of acquittal after 20 years. Mr. Chatterjee in his usual fairness relied upon number of authorities which included both orders of acquittal being reversed and order of acquittal because of delay which were not interfered with. The authorities so relied upon by the Learned Advocate with regard to order of acquittal being reversed, even though there was delay are: Union of India -Vs.- Sanwarmal Modi, (1992) 2 CHN 141; State of U.P. -Vs. - Dr. Ravindra Prakash Mittal, (1992) 3 SCC 300; The State of Punjab -Vs. - Hari Singh & Anr., (1974) 4 SCC 552; Mohd. Hussain alias Julfikar Ali -Vs.-

State (Govt. of NCT of Delhi), (2012) 9 SCC 408; Basayya Prabhayya Hallur – Vs. – State of Karnataka, (2009) 17 SCC 55.

The other set of judgments relied upon by the learned Advocate where no interference was made on ground of delay in cases of acquittal are: State of Punjab –Vs.-Ajaib Singh, (1995) 2 SCC 486; State of Madhya Pradesh & Anr. – Vs. – Gopalprasad Govindprasad Agarwal & Ors., (1998) 9 SCC 274.

Mr. Sourav Chatterjee Learned amicus curie draws the attention of this Court to paragraph 11 of Union of India –Vs.- Sanwarmal Modi, 1991 SCC OnLine Cal 264 which is as follows:

“11. A question has arisen whether the order of acquittal of the respondent recorded by the learned Magistrate some time in 1981 should be upset at this stage. It is no doubt true that several years have elapsed since then for which, however, the prosecution was in no way responsible. Justice means justice not only to an accused but also to the State and to the community at large as an economic offence is involved in this case. In the State of Gujrat v. Mohan Lal AIR 1987, SC 1321 an order of acquittal of an accused who was charged with an offence under s. 85 of the Gold (Control) Act alleged to have been committed sometime in 1976 was affirmed by the High Court in November, 1976 which was set aside by the Supreme Court in 1987 with an opportunity to the prosecutor to adduce additional evidence and a direction to the High Court to proceed further in the matter. Their Lordships of the Supreme Court noted that the rejection of the prayer for adducing additional evidence by the High Court on the ground that six years had passed since the commission of the alleged offence was no good ground for refusing to act in order to promote the interest of

justice in an age when delays in the Court have become a part of life and order of the day. Their Lordships even observed that the ends of justice are not satisfied only when the accused in a criminal case is acquitted and the community acting through the State and the public prosecutor is also entitled to justice and its cause deserves equal treatment and cannot be treated with disdain, and further that the entire community is aggrieved if the economic offenders who ruin the economy are not brought to book. Thus upon such consideration, Their Lordships set aside an appellate order of acquittal after about 11 years relating to an alleged offence committed about 17 years back. Therefore, it does not appear to us that the passage of time stands in the way of reversing the order of acquittal in the instant case.”

Attention of the Court has been drawn to paragraph 42 of State of U.P. – Vs.- Ravindra Prakash Mittal (Dr), (1992) 3 SCC 300, wherein it has been observed:

“42. *Mr Kohli, the learned counsel finally made a fervent but inexorable plea, submitting that since the occurrence took place in the year 1971 and that more than 14 years have now elapsed since the delivery of the judgment by the High Court in October 1977, this Court be pleased not to disturb the finding of acquittal at this length of time. We gave our anxious consideration to the above submission, but we feel that this plea has to be summarily rejected when the facts and the impelling circumstances surrounding the present case cry for justice which in turn demands for awarding proper punishment according to law. In our view, if the impugned judgment of acquittal reversing the well reasoned judgment of the trial court, convicting the respondent is affirmed, it will be nothing but a mockery of justice and will also amount to perpetration of gross and irreparable injustice. Moreover, when a judgment appealed against suffers from illegality or manifest*

error or perversity, warranting an interference at the hands of an appellate court in the interest of justice on substantial and compelling reasons, the mere delay in the disposal of the said appeal will never serve as a ground for non-interference and on the other hand, the appellate court is duty bound to set at naught the miscarriage of justice.”

Learned Advocate also relied upon paragraph 18 of State of Punjab –Vs.- Hari Singh, (1974) 4 SCC 552 and submitted that in the reported case inspite of delay the Hon’ble Supreme Court was pleased to reverse an order of acquittal. The paragraph under reference is as follows:

“18. *We think that the High Court had missed the core of truth in the case and had unjustifiably rejected the prosecution case which was strong enough on the statement of Zora Singh alone corroborated by medical evidence. It had, we think, made the error of throwing away the prosecution case, without attempting to separate the chaff from the grain on the wrong assumption that the two were inseparable here. We, therefore, set aside the order of acquittal by the High Court and convict the respondents for the offences with which they were charged. As, however, the occurrence took place several years ago, we refrain from awarding a death sentence in this case. We sentence both Hari Singh respondent under Section 302 IPC and Gian Singh respondent son of Arjan Singh to life imprisonment under Sections 302/34 IPC. We also sentence each of them to six years rigorous imprisonment and to pay a fine of Rs 2000 each, and, in default of payment of fine, to rigorous imprisonment for a further period of two years under Sections 307/34 IPC. The sentences awarded shall run concurrently.”*

Reliance has also been placed upon paragraph 40 of Mohd. Hussain – Vs.- State (Govt. of NCT of Delhi), (2012) 9 SCC 408, wherein inspite of delay the order of acquittal was interfered with by the Hon'ble Supreme Court. The relevant paragraph is quoted below:

“40. *“Speedy trial” and “fair trial” to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.”*

On the other hand the learned amicus curie has also relied upon paragraph 7 and 8 of Basayya Prabhayya Hallur –Vs.- State of Karnataka, (2009) 17 SCC 55, to draw the attention of this Court that because of delay the Hon’ble Supreme Court has taken a lenient view. The relevant paragraphs are quoted below:

“7. Our attention has been drawn to a chart which indicates that the appellants have already undergone actual sentence of imprisonment for more than two months. While admitting the appeal, this Court released the appellants on bail on 17-6-2003. Now the crucial question which arises for consideration of this Court is whether the appellants should be sent back to jail to serve out the remaining sentence after a lapse of several years.

8. We have heard the learned counsel for the parties. On consideration of the totality of the facts and circumstances of the case, in our considered view, ends of justice would be met if, while maintaining the conviction of Accused 2, 4, 6 and 7, their sentence is reduced to the period already undergone by them, provided they pay a fine of Rs. 25,000 each within a period of one month from the date of communication of this order, which shall be deposited in the trial court. In case the fine is not paid or deposited they would undergo the remaining period of sentence. The trial court concerned is directed to ensure that the amount of fine so deposited by the appellants is paid to the wife of the deceased Shivappa within eight weeks.”

Learned Advocate also relied upon paragraph 6 of State of Punjab –Vs.- Ajaib Singh, (1995) 2 SCC 486 and submitted that the order of acquittal was not interfered with because of the long delay. The relevant paragraph is set out as follows:

“6. Prior to adjudicating on the rival submissions, it appears necessary to preface it with few observations general in nature but vital according to us. Although crime never dies nor there should be any sympathy for the criminal, yet human factors play an important role and reflect advertently or inadvertently in the decision-making process. In this appeal there is a time-lag of more than eighteen years from the date of the incident and nearly fifteen years from the date of acquittal and its hearing. By any standard it is shocking. And this has been aggravated by still more shocking behaviour of the Government which shall be adverted to later. Speedy trial, early hearing and quick disposal are sine qua non of criminal jurisprudence. In some countries like England days are fixed statutorily for trial of cases. Keeping an accused in custody for a day more than it is necessary is constitutionally impermissible and violative of human dignity, freedom of life and liberty. The overcrowded court dockets, the phenomenal rise of public interest litigation, duty to ensure enforcement of fundamental rights undoubtedly keeps this Court under stress and strain. But that cannot be an excuse for keeping the sword of Damocles hanging on the accused for an indefinite period of time. It does not do any credit rather makes one sad. If the accused is not granted bail and serves out the sentence then the appeal is rendered academic for all practical purposes. And the right to establish innocence fades away in lack of enthusiasm and interest. If he is granted bail then long delay may give rise to humane considerations. Time heals the gravest scar and mitigates deepest injury suffered physically, mentally and emotionally. Therefore, if the courts have been rendered helpless and the exasperating delay is threatening to eat away the system then the Government may consider either to increase the strength to clear the backlog or devise some mechanism by which criminal appeals pending for more than reasonable time in higher courts should stand disposed of.”

The attention of this Court has also been drawn to paragraph 5 of State of Maharashtra –Vs.– Gopalprasad Govindprasad Agarwal, (1998) 9 SCC 274, where the Hon'ble Supreme Court refused to interfere with an order of acquittal because of delay. The relevant paragraph is as follows:

“5. Ordinarily, after recording the above findings we are required to set aside the impugned acquittal and remand the matter for disposal of the appeals on their merits but having regard to the fact that since the offences were allegedly committed almost 20 years have elapsed we do not feel inclined to take such a course of action. We, therefore, dismiss the appeals with the above observations.”

Mr. Bhattacharyya learned Advocate appearing for the opposite parties relied upon the following paragraphs of S. Guin –Vs.– Grindlays Bank Ltd., (1986) 1 SCC 654:

“3. After going through the judgment of the magistrate and of the High Court we feel that whatever might have been the error committed by the Magistrate, in the circumstances of the case, it was not just and proper for the High Court to have remanded the case for fresh trial, when the order of acquittal had been passed nearly six years before the judgment of the High Court. The pendency of the criminal appeal for six years before the High Court is itself a regrettable feature of this case. In addition to it, the order directing retrial has resulted in serious prejudice to the appellants. We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High

Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 42 of the Criminal Procedure Code even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process. We may at this stage refer to the decision of this Court in S. Veerabadran Chettiar v. E.V. Ramaswami Naicker [AIR 1958 SC 1032 : 1958 Cri LJ 1565 : 1959 SCR 1211] . In that case this Court disagreed with the High Court on the interpretation of Section 295 of the Penal Code, 1860 and the order of dismissal of complaint by the courts below, but it proceeded to observe at p. 1218 thus:

“But the question still remains whether, even after expressing our strong disagreement with the interpretation of the section by the courts below, this Court should direct a further inquiry into the complaint, which has stood dismissed for the last about 5 years. The action complained of against the accused persons, if true, was foolish, to put it mildly, but as the case has become stale, we do not direct further inquiry into this complaint. If there is a recurrence of such a foolish behaviour on the part of any section of the community, we have no doubt that those charged with the duty of maintaining law and order, will apply the law in the sense in which we have interpreted the law. The appeal is, therefore, dismissed.”

4. *We are of the view that following the above principle the High Court should have dismissed the appeal before it even if it disagreed with the view taken by the trial court with regard to the gist of the offence punishable under Section 341 of the Penal Code, 1860, having regard to the inordinate delay of nearly six years that had ensued after the judgment of acquittal, the nature and magnitude of the offences alleged to have been committed by the appellants and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly 7 years after the incident. The termination of the criminal proceedings in that way would secure the ends of justice as it would bring about reconciliation between the management and the employees and also put an end to a stale criminal proceeding in which the public had no longer sufficient interest. We accordingly set aside the judgment of the High Court and restore the order of acquittal passed in this case by the Metropolitan Magistrate without however expressing any opinion on the issues of fact and law involved in the case.”*

Learned Advocate for the opposite parties also relied upon Shyam Babu – Vs.– State of U.P., (2012) 8 SCC 651:

“25. *It was argued by the learned counsel for the appellant that considering the fact that though the appeal was filed before the High Court at Allahabad in the year 1981, the same was disposed of by the High Court only on 13-1-2006 [Govt. Appeal No. 159 of 1981, decided*

on 13-1-2006 (All)] i.e. after a gap of 25 years and, the sole appellant be discharged from the commission of offence on the ground of delay. We are unable to accept the said contention. This Court, in a series of decisions, held that the Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the society even though it is committed against an individual. After considering various decisions including the decision of the Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] and Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] and a decision rendered by the seven learned Judges of this Court in P. Ramachandra Rao v. State of Karnataka [(2002) 4 SCC 578 : 2002 SCC (Cri) 830] recently on 17-8-2012, a Bench of two Judges of this Court in Ranjan Dwivedi v. CBI [(2012) 8 SCC 495] rejected the similar argument based on delay either at the stage of trial or thereafter.”

On an analysis of the judgments referred to above over the issue whether belatedly an order of acquittal can be interfered with, this Court is of the opinion that if there is manifest error in the records and the same glaringly points to the reasons assigned by the Learned Trial Court in acquitting accused persons, passage of time will not deter a Court from interfering with an order of acquittal.

The issue which requires to be addressed now on merits are the submission of the rival parties. The Learned Advocate for the petitioner in support of her contention submitted that the manner in which identification of the accused persons have been diluted by the learned Trial Court in order to arrive at a finding of acquittal, is against the settled proposition of law. To this effect learned Advocate relied upon the following paragraphs of Dana Yadav – Vs.– State of Bihar, (2002) 7 SCC 295:

“15. *In Awadh Singh [AIR 1954 Pat 483 : 55 Cri LJ 1546] it was held that the accused person may or may not have legal right to claim for test identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence. Test identification parade should be held especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held.*

19. *The Court further noticed the observations in the case of Amar Singh v. Emperor [AIR 1943 Lah 303 : 45 Cri LJ 98] where Blacker, J. held thus : (AIR p. 303h)*

“[W]henever an accused person disputes the ability of the prosecution witnesses to identify him, the court should direct an identification parade to be held save in the most exceptional circumstances.”

38. *In view of the law analysed above, we conclude thus:*

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by

him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini-inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case the court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same ipso facto cannot be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification

parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of the accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.”

Additionally the learned Advocate has also relied upon Pramod Mandal – Vs.– State of Bihar, (2004) 13 SCC 150 :

“23. We find considerable force in the submission advanced by the learned counsel for the State. This is not a case where the testimony of PW 4 in court is not corroborated by an earlier identification in test identification proceeding. Since we have found no irregularity or unfairness in the holding of the test identification parade, it must be held that the evidence of PW 4 is amply corroborated by the result of the test identification proceeding. Moreover, we have found that the occurrence did take place in the house of PW 5. PW 4 is an eyewitness, being a relative of PW 5, residing with him. There was sufficient light to enable the witnesses to identify the dacoits. The presence of PW 4 cannot be disputed because he bore the brunt of the attack by the dacoits having suffered three incised wounds and two other injuries. No reason has been suggested why this witness should have falsely implicated the appellant. The dacoity took place for about 25 minutes and PW 4, being in the forefront of the defence, had ample opportunity to notice the appearance and physical features of the culprits. So far as the appellant is concerned, PW 4 categorically stated that he had attempted to hit him with an iron rod. This fact he also stated before the Magistrate who conducted the test identification proceeding. We, therefore, find no reason to suspect the truthfulness and credibility of this witness. He appears to be a witness on whom the Court can place implicit reliance. The courts below have found his evidence to be reliable after critical scrutiny of his testimony. The traumatic experience of that fateful day in which a young girl lost her life within his view, must have left the faces of the assailants imprinted in his memory which certainly would not have diminished or got erased within a

period of only 30 days. There is, therefore, no reason to doubt either the genuineness of the test identification proceeding or the veracity of the witness.”

Learned Advocate for the petitioner has also relied upon *Mallikarjun Kodagali –Vs.– State of Karnataka*, (2019) 2 SCC 752; *Ram Briksh Singh –Vs.– Ambika Yadav*, (2004) 7 SCC 665; *Joseph Stephen and Ors. –Vs.– Santhanasamy and Ors.*, 2022 SCC OnLine SC 90 for emphasising on the issue of the appellate and revisional powers of the High Court in cases of acquittal.

The opposite parties referred to the following paragraphs of *Pranab Kumar Mitra –Vs.– State of W.B.*, AIR 1959 SC 144:

“6. In our opinion, in the absence of statutory provisions, in terms applying to an application in revision, as there are those in Section 431 in respect of criminal appeals, the High Court has the power to pass such orders as to it may seem fit and proper, in exercise of its revisional jurisdiction vested in it by Section 439 of the Code. Indeed, it is a discretionary power which has to be exercised in aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by Section 439 of the Code, read with Section 435, do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognized rules of criminal

jurisprudence, and that subordinate Criminal Courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code. On the other hand, as already indicated, a right of appeal is a statutory right which has got to be recognized by the courts, and the right to appeal, where one exists, cannot be denied in exercise of the discretionary power even of the High Court. The legislature has, therefore, specifically provided, by Section 431 of the Code, the rules governing the right of substitution in case of death of an appellant, but there is no corresponding provision in Chapter XXXII, dealing with the question of abatement and the right of substitution in a criminal revision. We may assume that the legislature was aware of the decision of the Bombay High Court, referred to above, when it enacted Section 431 for the first time in the Code of 1882. If the legislature intended that an application in revision pending in a High Court, should be dealt with on the same footing as a pending appeal, it would have enacted accordingly. But in the absence of any such enactment, we may infer that the power of revision vested in the High Court under Chapter XXXII of the Code, was left untouched — to be exercised according to the exigencies of each case. The High Court is not bound to entertain an application in revision, or having entertained one, to order substitution in every case. It is not bound the other way, namely, to treat a pending application in revision as having abated by reason of the fact that there was a composite sentence of imprisonment and fine,

as some of the Single Judge decisions placed before us, would seem to indicate. The High Court has been left complete discretion to deal with a pending matter on the death of the petitioner in accordance with the requirements of justice. The petitioner in the High Court may have been an accused person who has been convicted and sentenced, or he may have been a complainant who may have been directed under Section 250 of the Code to pay compensation to an accused person upon his discharge or acquittal. Whether it was an accused person or it was a complainant who has moved the High Court in its revisional jurisdiction, if the High Court has issued a rule, that rule has to be heard and determined in accordance with law, whether or not the petitioner in the High Court is alive or dead, or whether he is represented in court by a legal practitioner. In hearing and determining cases under Section 439 of the Code, the High Court discharges its statutory function of supervising the administration of justice on the criminal side. Hence, the considerations applying to abatement of an appeal, may not apply to the case of revisional applications. In our opinion, therefore, the Bombay majority decision, in the absence of any statutory provisions in respect of criminal revisional cases, lays down the correct approach.

7. *There are a number of decisions in the books, mostly of Judges sitting singly, that though Section 431, in terms, does not apply to revisional applications, the principle of that section applied to such*

cases. It is not necessary to refer to those cases specifically. In view of the fact that even in the absence of any statutory provisions, we have held, in agreement with the decision aforesaid of the Bombay High Court, that the High Court has the power to determine the case even after the death of the convicted person, if there was a sentence of fine also imposed on him, because that sentence affects the property of the deceased in the hands of his legal representative, it now remains to consider whether the High Court was right in limiting its power of revision to the question of fine only — whether it was proper or excessive — without going into the merits of the order of conviction. Once it is held that the High Court's revisional jurisdiction is attracted to such a case, it is difficult to limit the exercise of such a power in the way the High Court has done. Under Section 439 of the Code, the discretion is vested in the High Court to exercise such of the powers of an appellate court, as may be attracted to the case, and it has also the power to enhance a sentence subject to the proviso that no order to the prejudice of an accused person, shall be made unless he has had the opportunity of being heard. In the instant case, we are not concerned with the question of enhancement of sentence; we are concerned with the question whether there is any provision in the Code, which limits the discretionary power of the High Court to examine the “correctness, legality or propriety of any finding, sentence or order” — (Section 435), passed by any inferior court. On the death of the convicted person, the

question of his serving the whole or a portion of his sentence of imprisonment, does not arise. But the sentence of fine still remains to be examined — whether it was well founded in law. This question cannot be effectively gone into unless the order of conviction itself is examined on its merits. If the fact that the fine will have to be paid out of the estate of the deceased appellant or petitioner in revision, is the ground for giving the heir or legal representative a right to continue the appeal or a privilege of maintaining or continuing a revision, the same principle should entitle him to question the correctness of the conviction itself, for, if the conviction remains, at least some fine, however nominal, will have to be paid by the heir or the legal representative out of the estate of the deceased. In our opinion, therefore, where the High Court thinks it fit and proper to entertain an application in revision or calls for the record suomotu, it has the power to examine the whole question of the correctness, propriety or legality of the sentence of fine, which necessarily involves examining the order of conviction itself from that point of view.”

Lastly, the learned Advocate for the opposite parties relied upon Sukumar Das –Vs.– Mrityunjoy Ghosh, 2007 SCC OnLine Cal 401:

“6. *In C.R.R. No. 855 of 2001 it has been contended by the learned Lawyer for the petitioner that learned Magistrate misappreciated the law and acquitted accused for non-production of the permission of the*

Registrar of Co-operative Societies for launching the prosecution and as this is not a case under the Co-operative Societies Act so the question of obtaining sanction for prosecution of the accused under Sections 406/408 I.P.C. does not arise. The question of sanction arises in a case under the penal provision of the Co-operative Societies Act, Moreover, the case was instituted as per the resolution taken by the Managing Committee at its meeting and as such the prior permission of the Registrar of the Co-operative Societies need not be taken. It has further been contended by the learned Counsel for the petitioner that the order of acquittal was passed against the accused without appreciation of the evidence-on-record and confession and the same cannot stand. Learned Counsel for the petitioner has placed his reliance upon the ruling reported in 1998 (2) CLJ at page 355 and also 1998 Calcutta Criminal Law Reporter at page 335.

8. *It has been contended by the learned Counsel on behalf of the private respondent in case C.R.R. No. 855 of 2001 that the prosecution case has not been proved, the confessional statement is not legal and the same cannot be relied. High Court's power to set aside the order of acquittal could be sparingly exercised and High Court cannot re-appreciate the evidence. The Revisional Court cannot arrive at a different conclusion on re-appreciating the evidence.*

28. *In this case, there is no glaring defect in procedure or there is no manifest error in a point of law resulting in flagrant miscarriage of*

justice. There is no violation of fundamental principle of law. So the question of exercising power of revision or the power under Section 482 Cr. P.C. does not arise.

29. *The alleged mis-appropriation was detected on 16.4.82 we are in the year 2007 so from the date of occurrence period of 25 years has already lapsed and it will be sheer abuse of process and contrary to the principles of speedy justice as guaranteed in Article 21 of the Constitution of India to remand the cases to the learned Trial Court for fresh trial on further evidence. In this regard reference may be made to the ruling reported in AIR 2007 Supreme Court at page 56 where it has been held that the purpose of right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the Courts and on the prosecution an obligation to proceed with reasonable dispatch. In order to make the administration of criminal justice effective, vibrant and meaningful, the Union of India, the State Government and all concerned authorities must take necessary steps immediately so that the important constitutional right of the accused of a speedy trial does not remain only on papers or is a mere formality. In the case before the Apex Court not a single witness was examined by the prosecution in the last twenty six years without there being any lapse on behalf of the appellant, accused. Apex Court observed that permitting the State to continue with the prosecution and trial any further would be total abuse of the process of law.*

30. *Under the circumstances, there is nothing to interfere with the judgment of acquittal passed by the learned Magistrate in both the cases. Consequently, both the applications must fail. Both the C.R.R. No. 855 of 2001 and C.R.R. No. 1038 of 2001 stand dismissed accordingly. This judgment will govern both the cases.”*

In this case the Learned Trial Court assigned a number of reasons in favour of the accused/opposite parties who were acquitted of the charges. According to the Learned Trial Court, the prosecution witness No.2 who happens to be the son of the deceased in the Court specifically mentioned the names of Manjur Sk., Baira Sk., Raiju Sk., Tatu Sk., Matu Sk., Bhaglu Mahaldar, Afo, Afroza, Sayeda and Nasima, but did not name rest of the persons whose names were incorporated in the complaint and as such 15 accused persons were charged in the instant case. Additionally PW4, PW7 and PW9 also did not state a single word against Munna Sk., Baisi Sk., Reju, Jahangir and Yasin. Thus, according to the Learned Trial Court, all these accused persons were in no way concerned with the alleged charges. Another issue which was emphasised by the Learned Trial Court was derived from the evidence adduced by the prosecution by way of PW15, who happened to be the J.L.R.O, who in his deposition categorically stated that the accused Manjur Sk and 5 others were also in possession of the disputed land and there was no demarcation. The Learned Trial Court, thereafter, answered the issue that when a person along with his associates were standing on his own land, the charge under Section 149 of the Indian Penal Code cannot be sustained

against him/them. Although in the same breath the Learned Trial Court was of the opinion that the plea of right of private of defence relating to property which has been taken by the accused persons is not sustainable because there has been a consistent version of the prosecution witnesses regarding the assault inflicted with sharp weapons by the accused persons upon Sukumar Gupta. The Learned Trial Court, thereafter, assessed the medical evidence as well as the version of PW2, PW4, PW7 and PW9 and submitted that all these witnesses did not name all the accused persons but there was a consistent version which was corroborated by all the witnesses that is Manjur Sk was accompanied by Bhaglu, Tatu, Matu and female members of their family who attacked Sukumar Gupta while Manjur Sk first assaulted Sukumar Babu on the right leg, Baira also assaulted Sukumar Babu on the left hand, Bhaglu assaulted Sukumar Babu by hasua on the hip and others also assaulted indiscriminately with lathis, as a result of which Sukumar Babu fell down and subsequently, succumbed to his injuries. The other issue which was dealt with by the Learned Trial Court was relating to the identification of the accused persons in the Court, the Learned Court was of the opinion that the manner in which the accused persons were identified in Court cannot be said to be consistent with the settled principles of law as the orders dated 01.11.1995 and 13.04.1998 only point that Manjur Sk has been identified and in case of rest of the persons only a vague statement has been made that all these accused persons were present. The Learned Trial Court, thereafter, was of the opinion that this was not sufficient to identify Titu as Tejarul or Mortuja as Matu.

The contention of the petitioner that the accused persons were acquitted only on the reasons that they were not identified in Court is not correct. There were additional grounds which were narrated earlier and reveals that the Learned Court has scanned the evidence and analysed the same. The Court thereafter framed an opinion regarding the involvement of rest of the accused persons and their complicity in the offence. To that effect, Learned Trial Court has assessed the consistent version of names which were narrated by eye witnesses, the absence of name of number of accused persons who were earlier named in the complaint, the Court has, also, assessed the version of the doctor as well as the J.L.R.O and additionally the identification of few of the accused persons whose relationship was not established by the names which were appearing in the records, on this point the Learned Trial Court was also dissatisfied by the generalised version which was specifically relating to the individual accused and the name in the orders mentioned therein, but a vague assertion to the fact that all these accused persons were present. The Learned Trial Court on the aforesaid points gave a benefit of doubt to the accused/opposite parties. On the other hand, in the same judgment the Learned Trial Court convicted one Manjur Sk for life imprisonment.

In K. ChinnaSwamy Reddy –Vs.– State of A.P., AIR 1962 SC 1788, the scope of interference in revision against an order of acquittal has been elaborately dealt with in paragraph 7 of the said judgment, which is relevant for consideration for deciding instant case and is set out as follows:-

“7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4). We have therefore to see whether the order of the High

Court setting aside the order of acquittal in this case can be upheld on these principles.”

In Babu –Vs.- State of Kerala, (2010) 9 SCC 189, the Hon’ble Supreme Court has been pleased to hold that in cases of acquittal if two views are possible and the view of the Appellate Court is a probable one, based on the entire evidence on record, the Appellate Court is also obliged to take into consideration whether the views of the Trial Court were perverse or otherwise unsustainable.

The Learned Trial Court has assessed the evidence which were available on record and considered the oral depositions in respect of the eye witnesses who were present, assigned number of reasons for arriving at its conclusion and on an overall appreciation of the judgment, which has been delivered, it is not found that there has been any glaring defect in the procedure or any manifest error on a point of law resulting in miscarriage of justice and as such there is no scope for interference with the order of acquittal which has been passed.

Thus the revisional application fails and accordingly, CRR 442 of 2001 is dismissed.

Pending application, if any, is consequently disposed of.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)