

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.53 of 2015**

Arising Out of PS. Case No.-16 Year-2004 Thana- SAHPUR District- Bhojpur

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1. Rama Shankar Gond, Son of Late Doma Gond
 2. Tejan Gond, Son of Shivji Gond
 3. Manu Gond, Son of Enar Gond
 4. Upendra Gond, Son of Enar Gond
 5. Santosh Gond, Son of Rama Shankar Gond
 6. Mohan Gond, Son of Rama Shankar Gond
 7. Siya Ram Gond, Son of Late Doma Gond
 8. Kishun Gond@ Ram Kishun Gond Son of Ram Surat Gond
- All are Resident of Vill-Jawaenian, P.S-Shahpur, Distt.-Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellants	:	Mr. Ravindra Kumar, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP
For the Informant	:	Mr. Bimal Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 23-01-2023

We consider it apt to take note of certain facts which are essential for adjudicating upon the core issue involved in the present appeal filed under Section 374(2) of the Code of Criminal Procedure 1973 (CrPC in short).

2. Shahpur P.S. Case No. 16 of 2004 was registered on 08.02.2004 naming 12 persons as accused including these



appellants, alleging commission of the offences punishable under Sections 147, 148, 149, 323, 324, 307 and 302 of the Indian Penal Code and Section 27 of the Arms Act. We are not entering into the nature of accusation in view of the nature of order which we are going to pass in the present appeal, in the peculiar facts and circumstances of the case.

3. It is manifest from the records that initially, after the investigation, the Investigating Officer had submitted charge-sheet against six persons, namely, Rama Shankar Gond (Appellant No. 1), Mohan Gond (Appellant No. 6), Santosh Gond (Appellant No. 4), Tejan Gond (Appellant No. 2), Baban Gond, Upendra Gond (Appellant No. 4) for commission of the offences punishable under Sections 147, 148, 149, 323, 324, 307 and 302 of the I.P.C. and Section 27 of the Arms Act and kept the investigation against rest of the accused pending. Thereafter, a supplementary charge-sheet was filed against two persons named in the F.I.R., namely, Manu Gond (Appellant No. 3) and Kishun Gond (Appellant No. 8) for the offences punishable under Sections 147, 148, 149, 323, 324, 307 and 302 of the I.P.C. and Section 27 of the Arms Act. Based on both the charge-sheet and the case diary, the learned Chief Judicial Magistrate, Bhojpur at Ara took cognizance of the offences



against the aforesaid accused persons. The case was committed to the court of Sessions after separating the case of the absconding accused persons, namely, Manu Gond (Appellant No. 3) and Kishun Gond (Appellant No. 8). After receiving the case records on commitment, the learned Sessions Judge transferred the case records to the file of learned 3rd Additional Sessions Judge for trial and disposal. Subsequently, the case of the absconding accused persons was also committed to the court of Sessions and two separate sessions records, namely, Sessions Appeal No. 385A of 2004 and Sessions Trial No. 43 of 2008 were maintained. Sessions Trial No. 43 of 2008 was amalgamated in Sessions Trial No. 385A of 2004 vide order dated 09.05.2008 and the split up case record i.e. Sessions Trial No. 385A of 2004 has been amalgamated in original case record i.e. Sessions Trial No. 385 of 2004 vide an order dated 19.05.2010. The appellants have put to challenge in the present appeal, the judgment and order dated 21.10.2014/31.10.2014 passed by the learned Additional Sessions Judge-I, Bhojpur at Ara in Sessions Trial No. 385 of 2004 and 385A of 2004 which was subsequently amalgamated in original case records of Sessions Trial No. 385 of 2004 vide order dated 19.05.2010. By the said judgment and order of the trial court, the appellants



stand convicted of the offences punishable under Sections 148, 307/149 and 302/149 of the I.P.C.

4. Paragraph 7 of the impugned judgment of the trial court depicts the manner in which the trial court has taken into consideration the evidence adduced in Sessions Trial No. 385 of 2004 for deciding the case of Sessions Trial No. 385A of 2004 which reads as under :-

*“The prosecution has examined 12 witnesses in support of its case and out of them PW-8 is the informant. PW-9 and PW-11 are the Surgeon, who conducted Postmortem on the dead body of deceased X Deo Muni Yadav and Naga Yadav, PW-10 is the I.O. of the case. On perusal of split up record of S.Tr. No. 385 A/ 2004 it transpires that 8 witnesses have been examined who are also examined in original Sessions Trial No. 385 of 2004 and rest two witnesses Dr. Abdul Qyum and Sabbir Ahmad have been examined as Court witness after allowing petition of the prosecution under Section 311 Cr.P.C. On perusal of the split up record of Sessions Trial No. 385 A/ 2004 it also transpires that CW-1 and CW-2 have been examined as PW-9 and PW-10 in original case record. Only one witness PW-12 is Additional witness examined in original case record as Sessions Trial No. 385/ 2004 and to avoid repetition or the testimony of the witnesses the statements of the witnesses recorded in original case record Sessions Trial No. 385 of 2004 are being discussed in this judgment without objection of the parties with vital facts of testimony of Sessions Trial No. 385 A of 2004.
(handwritten)*

5. It has been submitted by Mr. Ravindra Kumar,



learned counsel for the appellants that the procedure adopted by the learned trial court by delivering one judgment for two trials, in the present facts and circumstances of the case, is hit by Sections 273 and 276 of the Cr.P.C. He has submitted that it was impermissible for the trial court to have recorded finding of guilt based on the evidence adduced in Sessions Trial No. 385 of 2004 in respect of the appellants who were put to trial in Sessions Trial No. 385A of 2004 and *vice-versa*. He has submitted that the impugned judgment of the trial court is *per se* illegal as the trial court ought to have delivered two separate judgments based on the evidence of the witnesses recorded in respective trials in a manner that the right of an accused guaranteed under Sections 273 and 278 of the Cr.P.C. was not breached. He has placed reliance on the Supreme Court's decision in case of *A.T. Mydeen and another vs. Assistant Commissioner, Customs Department* reported in **2021 SCC OnLine SC 1017 : 2022 CRI.L.J. 1041**. Reliance in this connection has also been placed on a Supreme Court's decision in case of *Mitthulal and another vs. State of Madhya Pradesh* reported in **(1975) 3 SCC 529**.

6. He has submitted that the evidence recorded in a criminal trial against any accused is confined to the culpability of that accused. He has argued that before framing of charge in



Sessions Trial No. 385A of 2004 on 14.05.2008 against the appellants Santosh Gond (A4), Siyaram Gond (A7), Manu Gond (A3) and Kishun Gond (A8), eight prosecution's witnesses had already been examined in Sessions Trial No. 385 of 2004 in which the appellants Rama Shankar Gond (A1), Upendra Gond (A4), Mohan Gond (A6) and Tejan Gond (A2) were put to trial. Thereafter, PW-9 to PW-12 were examined from 04.09.2008 to 10.11.2009. Similarly, some of the witnesses were examined in Sessions Trial No. 385 of 2004 prior to its amalgamation with Sessions Trial No. 385 of 2004.

7. He has further argued that Kishun Gond (A8) was a minor as on the date of occurrence, which plea was not considered by the trial court. He has submitted that the age of appellant No. 8 has been recorded as 23 years as on 17.02.2014 while recording his statement under Section 313 of the CrPC. The occurrence is of 2004. Evidently, appellant No. 8 was minor as on the date of occurrence. In the present appeal, a plea of juvenility has been taken as regards appellant No. 8 based on the entry of his date of birth (11.01.1991) in the school leaving certificate. Appellant No. 8 was, thus, 13 years of age as on the date of occurrence, as is being claimed.

8. He has addressed this Court on the merits of the



findings recorded by the trial court based on the trial court's appreciation of evidence. However, since we find substance in submission made on behalf of the appellants that the learned trial court had committed an error by relying on the evidence adduced in one trial for deciding culpability of an accused charged of an offence in a different trial, though subsequently amalgamated. We have deemed it just and proper not to enter into the said aspect.

9. It is the mandate of the CrPC that all evidence taken in course of the trial or other proceeding shall be taken in the presence of the accused. In case his personal attendance is dispensed with, apparently in accordance with Section 205 of the Cr.P.C., such evidence can be taken in presence of the pleader of an accused. Sub-section (1) of Section 276 deals with the record in trial before the court of Sessions and it ordains that in all trials before the court of Sessions, the evidence of each witness shall, as his examination proceeds, be taken down in writing. Section 278 of the CrPC requires that once the evidence of each witness taken under Section 275 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. The right of an accused to be present at the time of examination of



witness at a trial guaranteed under Section 273 of the CrPC is, thus, reinforced by making provision under Section 278 of the CrPC read with Section 276 thereof.

10. We consider it useful, for the benefit of quick reference, to reproduce the relevant statutory provisions i.e. Sections 273, 276 of the CrPC, which read as under :-

“273. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

276. Record in trial before Court of Session.

(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.]

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

278. Procedure in regard to such evidence when completed.

(1) As the evidence of each witness taken



under section 275 or section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands."

11. The right of an accused to watch the prosecution's witnesses deposing before a court of law, has been held by the Supreme Court to be a valuable right. While dealing with the requirement of Section 299 of the CrPC, which permits recording of evidence in the absence of accused, the Supreme Court, in case of ***Jayendra Vishnu Thakur vs. the State of Maharashtra and another*** reported in ***(2009) 7 SCC 104***, has laid down that an accused is always entitled to a fair trial. A right to cross-examine a witness, apart from being a natural right, is a statutory right, the Court has held referring to Section 137 of the Indian Evidence Act. It will be useful to reproduce paragraphs 23 to 25 of the



Supreme Court's decision in case of **Jayendra Vishnu Thakur**,
which read thus:-

"23. An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum. The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.

24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion. (See Sarabjit Rick Singh v. Union of India [(2008) 2 SCC 417 : (2008) 1 SCC (Cri) 449] .)

25. It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus,



scrupulous compliance therewith is imperative in character. It is a well-known principle of interpretation of statute that any word defined in the statutory provision should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character."

12. In case of **A.T. Mydeen** (supra), the Supreme Court had the occasion to deal with a situation where prosecution in both the trials arising out of the same criminal case had produced seven witnesses and filed 13 documents which were proved and exhibited. The Supreme Court held that merely because the seven witnesses produced by the prosecution were same in both the cases would not mean that the evidence was identical and similar because in the oral testimony, not only the examination-in-chief but also the cross-examination is equally important and relevant. Upon a threadbare discussion of the law in this regard, the supreme Court has ruled in paragraphs 38 to 42 in case of **A.T. Mydeen** (supra) as under:-

"38. We cannot proceed on presumption and assume that everything was identical word to



*word. We are therefore, not inclined to accept the submission of Mr. Banerjee and in fact both the judgments relied upon by Mr. Banerjee having similar facts as the present case lay down the same proposition of law that evidence of one trial can be read only for the purposes of the accused tried in that trial and cannot be used for any accused tried in a separate trial. The view taken by the Calcutta High Court in 1928, expressed by **Rankin, C.J.**, has been appropriately followed and accepted and is the correct view.*

39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.

40. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.

41. It is also an undisputed proposition of law that in a criminal appeal against conviction, the appellate court examines the evidence recorded by the trial court and



takes a call upon the issue of guilt and innocence of the accused. Hence, the scope of the appellate court's power does not go beyond the evidence available before it in the form of a trial court record of a particular case, unless section 367 or section 391 of Cr.P.C. comes into play in a given case, which are meant for further inquiry or additional evidence while dealing with any criminal appeal.

42. In the present controversy, two different criminal appeals were being heard and decided against two different judgments based upon evidence recorded in separate trials, though for the commission of the same offence. As such, the High Court fell into an error while passing a common judgment, based on evidence recorded in only one trial, against two sets of accused persons having been subjected to separate trials. The High Court ought to have distinctly considered and dealt with the evidence of both the trials and then to decide the culpability of the accused persons."

13. After having held as above, the Supreme Court considered the controversy from another perspective i.e. whether to remand one case to the High Court for a fresh decision i.e. the case in which the evidence was not considered and proceed to decide the other case before the Supreme Court and concluded that if such procedure was adopted then no fruitful purpose would be served and, in fact, it would be an exercise resulting in complications and contradictions and even conflicts. The Supreme Court observed in paragraph 43 as under:-

"43. There is one more angle to be



considered i.e. whether to remand one case to the High Court for fresh decision i.e. the case in which the evidence was not considered and we may proceed to decide the other case here. We find, if we adopt such a procedure, then no fruitful purpose would be served and in fact, it would be an exercise resulting in complications and contradictions and even conflicts. If we proceed to hear one appeal wherein the evidence has been considered by the High Court and we agree with the same, then it would influence the High Court in deciding the other matter on remand. Further, even if we could hold back this appeal and await decision of the High Court in the matter which we remand, then also the High Court would not be able to take an independent decision and would be influenced by the judgment as we would be entertaining one appeal. Moreover, if we allow one of the appeals which we are holding back, then, nothing may remain for the High Court to decide.

14. The Supreme court in case of **A.T. Mydeen** (supra) further observed in paragraph 44 as under:-

44. There is another reason why we are inclined to send back both the matters to the High Court which is fundamental. We find that the learned single Judge of the High Court has apparently not adopted the correct procedure prescribed under law and therefore, the judgment of the High Court needs to be set aside. Once a common judgment is set aside for one appeal, it cannot be upheld for another appeal. There cannot be a severance of the judgment particularly when it arises in a criminal case, where the rights of the accused are as important as the rights of a victim. Therefore, it would be in the fitness of things and in the interest of the parties that the matters are remanded to the High Court for



*a fresh decision in accordance with law and
in light of the discussion and observations
made above.*

15. In case of **Mitthulal** (supra), the Supreme Court was confronted with a situation where the High Court had based its conclusion not only on the evidence recorded in the case against the appellants and four other accused but had also taken into account the evidence recorded in the cross case. The Supreme Court, dealing with the order, which was under challenge before it, has observed that it is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. The Supreme Court observed that it was doubtful whether the evidence recorded in one criminal case could be treated as evidence in the other, even with the consent of the accused.

16. We are of the view, considering the language of Sections 273 and 278 of the Cr.P.C. that it is impermissible even with the consent of the parties, for the trial court to consider the evidence of one trial for determining culpability or otherwise of an accused in another trial even when both the trials arise out of the same criminal case.

17. In such view of the matter, taking guidance from the Supreme Court's decision in case of **A.T. Mydeen** (supra),



we set aside the impugned judgment and order of the trial court and remand the matter back to the learned trial court for fresh decision in accordance with law. As done in case of **A.T. Mydeen** (supra) by the Supreme Court, we observe that the parties would be free to address the learned trial court on all issues, both on law and on the fact necessary for reaching a definite conclusion.

18. Before concluding, we must point out that it is settled legal position that plea of juvenility can be issued at any stage of a criminal proceeding. As the matter is being remanded back to the trial court after setting aside the impugned judgment and order, we have not gone into the claim of juvenility of appellant No. 8 in the present appeal. It will be open for the said appellant to raise such plea before the trial court upon remand of the matter back to the trial court by the present order.

19. Before we part with the present judgment, we deem it just and proper to take note of the fact that the appellant No. 1, Rama Shankar Gond is in custody right from the date of his conviction. In the aforesaid background, we observe that it will be open for him to apply for his release on bail before the learned trial court. If he applies for bail during the pendency of trial upon remand made under the present order of this court, it is



expected that the trial court shall pass appropriate order on such application, keeping in mind, *inter alia*, his prolonged incarceration and his criminal appeal against conviction not having been decided on merits.

20. This appeal is disposed of with the aforesaid observation.

(Chakradhari Sharan Singh, J)

**I agree
Rajesh Kumar Verma, J**

(Rajesh Kumar Verma, J)

Rajesh/gauravkr-

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