

CRR-1414-2018 (O & M)

::1::

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRR-1414-2018 (O& M)
Date of Decision:09.05.2023

Gulbaz Singh

... Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Vipin Mahajan, Advocate for the petitioner.

Ms. Ramta K Chaudhary, DAG, Punjab.

JASJIT SINGH BEDI, J.

The present revision petition has been preferred against the judgment dated 05.03.2018 vide which the Additional Sessions Judge, Gurdaspur has accepted the appeal filed by the State and remanded the case back to the Trial Court, Gurdaspur for a fresh decision by giving an opportunity to the prosecution for proving certain documents.

2. The brief facts of the case are that FIR No.42 dated 08.03.2011 under Sections 465, 466, 468 and 471 IPC, Police Station City, Gurdaspur, came to be registered against the petitioner-Gulbaz Singh son of Amrik Singh with the allegations that he had procured a forged SC Certificate and had used the same. Pursuant to the conclusion of the investigation, a report under

CRR-1414-2018 (O & M)

::2::

Section 173 Cr.P.C. was submitted. The Trial commenced and the petitioner came to be acquitted by the Court of the Chief Judicial Magistrate, Gurdaspur vide judgment dated 01.10.2016.

3. Against the aforementioned judgment of acquittal, the State preferred an appeal and while accepting the appeal, the impugned order of acquittal was set aside and the case was remanded to the Trial Court with a direction to examine witnesses for proving certain documents. The relevant extract of the judgment dated 05.03.2018 passed by the Additional Sessions Judge, Gurdaspur is as under:-

“18. Perusal of record shows that copy of form submitted by accused to Government College of Education, Patiala for seeking admission in B.Ed. Course in scheduled caste category bearing his photograph is lying on record which is marked as PA. It is attested by Principal, Government College of Education, Patiala. It has got annexures Mark PB to PH comprised of photostat copies of secondary school examination, detail marks card, character certificate etc. All have been attested by Principal, Government College of Education, Patiala, but no effort has been made to prove these documents which is material evidence in this case. It appears that due to some inadvertence on behalf of prosecution this material document could not be proved and interest of justice demands that prosecution should be given an opportunity to prove this document which goes to roots of the case. Resultantly, appeal is accepted. Impugned order is set aside. Case is remanded to trial court with a direction to examine the witness for proving

CRR-1414-2018 (O & M)

::3::

admission from, original record might be available with the College and then decide the matter afresh on merits”.

4. The instant revision petition has been preferred against the aforementioned judgment dated 05.03.2018 passed by the Additional Sessions Judge, Gurdaspur.

5. The learned counsel for the petitioner contends that the re-trial as has been ordered can only be done so in exceptional cases. Nothing exceptional has been pointed out in the present case so as to warrant the passing of the impugned judgment. If the Appellate Court had required the taking off /proving off certain documents, it could have resorted to the procedure envisaged under Section 391 Cr.P.C. and could have, thereafter, heard the appeal on merits and passed an appropriate order. He, therefore, contends that the judgment dated 05.03.2018 passed by the Additional Sessions Judge, Gurdaspur, was liable to be set aside. Reliance is placed on ***‘Ukhe Kolhe versus State of Maharashtra, 1963 AIR (Supreme Court) 1531, Satyajit Banerjee versus State of West Bengal 2005(1) RCR (Criminal) 723, Pashori Lal versus Punjab State 1980(1) ILR(Punjab) 75, M/s Chennakesha Bandage and ors. versus State of A.P. 2011(8) RCR (Criminal) 1477 and Bhupendera Singh Thakur versus State of Chhattisgarh (CRMP No.172 of 2022 decided on 01.04.2022)’.***

6. The learned counsel for the State, on the other hand contends that on account of fault of the prosecution, certain documents were not proved in

CRR-1414-2018 (O & M)

::4::

accordance with law, and therefore, the impugned order/judgment had rightly been passed and ought not to be interfered with.

7. Before proceedings further, it would be apposite to refer to the provisions of Section 386 Cr.P.C. and Section 391 Cr.P.C. The same are reproduced hereinbelow:-

“Section 386 in The Code Of Criminal Procedure, 1973

386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

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

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

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

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

(c) in an appeal for enhancement of sentence-

CRR-1414-2018 (O & M)

::5::

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

(ii) alter the finding maintaining the sentence, or

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

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

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal”.

Section 391 in The Code Of Criminal Procedure, 1973

“391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the

CRR-1414-2018 (O & M)

::6::

Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

8. In the case of '**Ukhe Kolhe versus State of Maharashtra, 1963**

AIR (Supreme Court) 1531', the Hon'ble Supreme Court held as under:-

"11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C. J., in Ramanlal Rathi v. The State, AIR 1951 Calcutta 305 observed :

CRR-1414-2018 (O & M)

::7::

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case".

In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions Judge thought that in the interests of justice and for a just and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceeding, resorted to the procedure prescribed by section 428 (1) of the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellate Court should exercise its power under the said section".

It would be relevant to mention here that Section 423 of the Criminal Procedure Code, 1898 corresponds to Section 386 of the Criminal Procedure Code, 1973 and Section 428 of the Criminal Procedure Code, 1898 corresponds to Section 391 of the Criminal Procedure Code, 1973.

CRR-1414-2018 (O & M)

::8::

In the case of '**Satyajit Banerjee versus State of West Bengal**
2005(1) RCR (Criminal) 723', the Hon'ble Supreme Court held as under:-

"25. The law laid down in the 'Best Bakery case' in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case, the first trial was found to be a farce and is described as 'mock trial.' Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in the Best Bakery case (supra).

26. So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial".

This Court in the case of '**Pashori Lal versus Punjab State**
1980(1) ILR(Punjab) 75', held as under:-

"6. The learned counsel for the petitioners has urged that under the Code of Criminal Procedure, a remand of the kind ordered by the learned Additional Sessions Judge is unknown in my opinion, there is substance in the contention of the learned counsel. Powers of the Appellate Court have been prescribed under Section 423 of the old Code. The Court hearing an appeal against a judgment of conviction can order a retrial of the

CRR-1414-2018 (O & M)

::9::

accused by a Court of competent jurisdiction. The relevant clause (b) of Section 423(1) of the old Code of Criminal Procedure is as follows :-

"The Appellate Court shall then send for the record of the case if such record is not already in Court. After perusing record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 411-A, sub-section (2) or Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

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(b) in an appeal from a conviction;

(1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction, subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, the sentence, of, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of Section 106, sub-section (3), not so as to enhance the same;

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7. This type of order is not permissible under the Code of Criminal Procedure because once retrial is ordered by the Appellate Court, the evidence already on record is deemed to be wiped out from the records. Moreover, this power of retrial

should be exercised only in exceptional cases where the Court of Appeal finds that the Court trying the case had no jurisdiction or the trial had been vitiated due to some serious illegality. This power cannot be exercised for allowing the prosecution to fill up the lacuna in its case. The facts in case State of Punjab vs Jaswant Singh (supra) relied upon by the learned counsel for the State are entirely different and have no application to the facts of our case. That was a case where the two affidavits of the link witnesses were duly filed and accepted by the trial Court. It was only at the appellate stage that the defects were pointed out which were purely technical and the Hon'ble Judges of the Division Bench allowed such defects to be removed by producing fresh affidavits of the very same witnesses. The case was remitted to the trial Magistrate for affording an opportunity to the prosecution either to file fresh affidavits of the link witnesses including the affidavits in place of Exs. PH and PI or to adduce witnesses in lieu thereof with opportunity to the defence to cross-examine such deponent or witnesses. The trial Magistrate was directed to decide the case afresh on merits. The observations in that case, therefore, have no application to the facts of our case.

8. In case Ukha Kolha v. The State of Maharashtra, AIR 1963 Supreme Court 1531, the Hon'ble Judges of the Supreme Court observed :

"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in

CRR-1414-2018 (O & M)

::11::

substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

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9. In my opinion, the impugned order cannot be construed to be an order for retrial and even if it is to be so construed no sufficient reasons have been given by the learned Additional Sessions Judge for ordering a retrial. Under Section 428 of the old Code if the Court of Appeal thinks that additional evidence is necessary to be taken, it may either take such evidence itself or direct it to be taken by the Magistrate concerned. The relevant portion of Section 428 of the Code reads as under :-

"428 (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it

CRR-1414-2018 (O & M)

::12::

to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal."

Under this Section if the Court of Appeal directs the trial Court to take additional evidence then the trial Court has to record the evidence as directed by the Appellate Court and then to send such evidence to the Appellate Court which shall proceed to dispose of the appeal taking into consideration such additional evidence. From the order of the learned Additional Sessions Judge it does not appear that he has exercised his power under Section 428, Criminal Procedure Code, 1973 , because in that case there was no question of setting aside the judgment passed by the trial Court and directing it to deliver a fresh judgment after examining the witness and after hearing arguments on merits. In my opinion, the learned Additional Sessions Judge has adopted a hybrid procedure which is foreign to the scheme of the Code.

10. For the reasons given above,I am of the opinion the orders of the learned Additional Sessions Judge are bad in law and have to be set aside.

11. In the result, the petitions are allowed, the orders of remand passed by the learned Additional Sessions Judge, Rupnagar are set aside and Cr. Appeals No. 33/1978 and 32/1978 are restored to their respective files. The learned Additional Sessions Judge

CRR-1414-2018 (O & M)

::13::

will dispose of the appeals in accordance with law in the light of the observations made above. The parties through their Counsel are directed to appear in the said Court on 17th May, 1979. As the appeals appear to be old ones the learned Additional Sessions Judge will see that these are disposed of at an early date”.

The Andhra Pradesh High Court in the case of ‘***M/s Chennakesha Bandage and ors. versus State of A.P. 2011(8) RCR (Criminal) 1477***’, held as under:-

“7. The point that arises for consideration is whether the order of the learned Sessions Judge, directing retrial is justified in the circumstances of the case?

8. Section 386 of the Criminal Procedure Code, 1973 deals with the powers of the Appellate Court and empowers the Appellate Court to order retrial while passing judgment in Appeal from the order of acquittal or in an appeal from conviction.

9. Section 386 (a) and (b) of the of Criminal Procedure Code, 1973 is read as follows :

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

(b) In an appeal from a conviction : -

(i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial ; or

(ii) Alter the finding, maintaining the sentence ; or

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

10. The question under what circumstances retrial can be ordered came up for consideration before the Honourable Apex Court in a case between Ukha Kolhe versus State of Maharashtra, 1963 AIR (Supreme Court) 1531. Section 391 of the Criminal Procedure Code empowers the Appellate Court to take additional evidence. However, it is also settled law that additional evidence cannot be taken to fill up the lacunae in prosecution case. Where the Court comes to a conclusion that the additional evidence is necessary and if additional evidence is not taken there would be failure of justice then the Appellate Court is empowered to take additional evidence. However, it is also settled law that the power has to be exercised sparingly and only in suitable cases. In this case the Appellate Court has not adopted the procedure prescribed under Section 391 of Criminal Procedure Code but remanded the case for retrial. When only certain G.Os. have to be marked ordering of retrial appears to be not justified. Retrial cannot be ordered to fill up the gaps in prosecution case.

11. Even, in case of taking additional evidence the Court must see whether the prosecution or the accused had no opportunity to produce such additional evidence before the trial Court. When the prosecution or the accused having in possession of the additional evidence failed to produce such additional evidence then they cannot be permitted to fill up the gaps in their case. Only in exceptional cases where the prosecution or the accused for compelling reasons could not produce the evidence before the Trial Court or where they had no knowledge about the existence of such additional evidence and when they had come to know about additional evidence after the closure of the prosecution evidence then only in such exceptional circumstances the Court

CRR-1414-2018 (O & M)

::15::

may permit the prosecution or the accused to adduce additional evidence”.

The Chhattisgarh High Court in the case of '***Bhupendera Singh Thakur versus State of Chhattisgarh (CRMP No.172 of 2022 decided on 01.04.2022)***', held as under:-

“7. Learned Additional Sessions Judge, Kabirdham while hearing the appeal of the accused/petitioner without entering into the merits of the case found that the trial court has not acted properly and prosecution has not examined the hand writing expert. Learned appellate court also held that the impugned judgment is not a speaking judgment, trial court had not appreciated the evidence of the prosecution and the learned appellate court vide its judgment dated 30.12.2021, remitted the matter back to the trial court after setting aside the judgment of conviction and order of sentence dated 27.02.2017 with direction to afford appropriate opportunity to the prosecution to examine the hand writing expert and on being examined by the prosecution, opportunity of cross-examination is given to the defence and thereafter passed the judgment considering the evidence adduced by the prosecution and evidence as well.

8. In Criminal Revision No. 94 of 2014 (Harishankar Prasad Sahu & others v. State of Chhattisgarh) vide order dated 04.04.2014, the High Court in paras 11, 12, 13 and 14 has held as under:-

11. It is worthwhile at this juncture to refer a decision of Hon'ble Supreme Court made in this case Satyajit Banerjee and others v. State of W.B. and others [2005 (1) SCC 115], wherein the Hon'ble Supreme Court relying upon its earlier decision in Zahira Habibulla H. Sheikh v.

State of Gujarat (commonly known as the "Best Bakery case"), reported in 2004 (4) SCC 158, has held in para 26, that direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence.

12. When the said judgment of Hon'ble Supreme Court is compared with the facts of the instant case, it would reveal that the present is a case where it was an appeal against the judgment of conviction and order of sentence which was under challenge at the behest of the convicted persons and that the appellate Court i.e. the Sessions Judge, Korba, ought to have considered the merits of the appeal in the light of the evidences which have come before the trial court. The appellate court could not have assumed a role of a trial court.

13. From the said judgment of Hon'ble Supreme Court, it is evidently clear that that Court could have remanded the matter only in very exceptional case where it is found that there is a defect of procedure or a manifest error of law resulting a flagrant miscarriage of justice is taken place in the course of the trial Court deciding the case. However, in the instant case, the trial Court in spite of the said alleged deficiency of not examining the Doctor, yet, has reached to the conclusion that the case of the prosecution has been proved and the charge against the applicants for the offence under Section 498-A read with Section 34 of IPC has been established. Thus, it cannot be said that there was a defect of procedure on the part of the trial court while conducting the trial or that there has been a manifest error of law in the course of conducting the trial

court on the part of the prosecution as well as the trial court.

14. Recently also the Hon'ble Supreme Court in the case of Mary Pappa Jebamani v. Ganesan and others [AIR 2014 SCW 417] has reiterated the fact that only in an extraordinary situation when the first trial is found to be a farce and mock trial could justify the direction of the appellate court for retrial.

9. The learned appellate court remanded the case for examination of hand writing expert but from the light of the above dismissal by Hon'ble Apex Court and this Court, it is clear that the appellate court could not have and does not have the power to remand the case for retrial so as to fill up the lacunae on the part of the prosecution and the trial court more particularly, when the judgment under-challenge before the appellate court was against the conviction and sentence. Moreover, the prosecution has also not agreed with the decision of the trial court in any manner as the decision of the trial court has not been challenged by the prosecution.

10. Thus, for the foregoing reasons, the present petition is allowed and the impugned judgment dated 30.12.2021 passed by the learned Additional Sessions Judge, Kabirdham in Criminal Appeal No. 14/2017 is set aside and the matter is remitted back to the appellate court for deciding the petition preferred by the accused/petitioner on its own merits. The learned appellate court is also directed to decide the matter as early as possible preferably within a period of six months from the date of production of the copy of this order”.

CRR-1414-2018 (O & M)

::18::

9. A reading of Section 386 Cr.P.C. alongwith Section 391 Cr.P.C. as also the interpretation of these provisions in the judgments (supra) would establish that a re-trial is to be ordered only in exceptional circumstances where the Court is satisfied that the trial Court had no jurisdiction to try the case or that the Trial was vitiated by serious illegalities or irregularities or where the prosecutor or an accused for reasons beyond their control were prevented from tendering material evidence. Therefore, the proper course open for the Appellate Court in such circumstances where additional evidence is required to be taken is to resort to the provisions of Section 391 Cr.P.C.

10. Coming back to the facts of the present case, a perusal of the impugned judgment would show that no exceptional circumstances have been pointed out by the Court so as to warrant a remand and consequential re-trial. However, the Appellate Court, if it deems necessary, is at liberty to resort to Section 391 Cr.P.C. to take additional evidence itself or remand it to the Trial Court for that limited purpose and then proceed to decide the Appeal on merits in accordance with law.

11. In view of the above, I find merit in the present petition and the order/judgment of remand dated 05.03.2018 passed by the Additional Sessions Judge, Gurdaspur is set-aside. The Sessions Court is directed to hear and decide the Appeal on merits subject to the resorting to taking of additional evidence, if so required, in terms of Section 391 Cr.P.C.

CRR-1414-2018 (O & M)

::19::

12. As the FIR pertains to the year 2011, the Appellate Court is directed to decide the matter not later than six months from the date of receipt of copy of this judgment.

13. The present petition is disposed in the above terms.

(JASJIT SINGH BEDI)
JUDGE

May 09, 2023
sukhpreet

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No