

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

CRM-M-3040-2020 (O&M)
Date of decision: 02.09.2023

Ashu Shelly and Another

...Petitioners

Versus

State of Punjab and Another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. A.S. Gill, Advocate for the petitioners

Ms. Himani Arora, AAG Punjab

AMAN CHAUDHARY, J.

1. The present petition has been filed under Section 482 read with Section 461 CrPC for setting aside the impugned judgment dated 02.09.2019, whereby the petitioners have been convicted for the offences under Section 18(c), punishable under Section 27(b)(ii) and Section 18-A punishable under Section 28 of the Drugs and Cosmetics Act, 1940, pursuant to the Criminal Complaint No.215 dated 03.12.2012.

2. Facts briefly put, petitioner No.1, being in charge of M/s Dasmesh Medical Hall and petitioner No.2 being its proprietor, were found to be in possession of Habit Forming Allopathic Drugs during a raid conducted 08.09.2010, at their premises. They did not possess any valid licence on that particular date, as the same was obtained on 22.09.2010. A complaint under Sections 18(c) and 18-A punishable under Sections 27(b)(ii) and 28 of Drugs and Cosmetics Act, 1940 (hereinafter referred to 'the Act') and Rules, was instituted by the Drug Inspector, Ludhiana, before the Court of Chief Judicial Magistrate,

Ludhiana on 03.03.2012, wherein they were charged vide order dated 21.08.2018 and convicted vide judgment dated 02.09.2019, Annexure P-2, against which an appeal has been filed on 24.09.2019, which is pending adjudication before the Additional Sessions Judge, Ludhiana.

3. The solitary contention raised by the learned counsel for the petitioners was that the complaint was filed under Sections 18(c) and 18-A, punishable under Sections 27(b)(ii) and 28 of the Act, which fall under Chapter IV, of the Act and as per Sub Section 2 of Section 32, and 36AB, the Court of Sessions or Special Court are competent to try the said offences. However, the Chief Judicial Magistrate in contravention of the aforesaid provisions conducted the trial and convicted the petitioners.

4. Learned State counsel on the other hand opposes on the ground that Section 36AB relates to the adulterated and spurious drugs for which the petitioners was not being tried, as such the Chief Judicial Magistrate, was the competent Court, which has rightly tried the petitioners and that they did not take up this ground either before the trial Court or the lower Appellate Court, wherein the appeal is pending.

5. Heard.

6. Apropos the issue involved, it is apposite to advert to provision of Section 386 CrPC, which reads thus:

“386. Power of the Appellate Court.

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

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

(b) in an appeal from a conviction-

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

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

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

(c) in an appeal for enhancement of sentence-

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

(ii) alter the finding maintaining the sentence, or

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

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

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

7. Profitable reference can be made to **Narendra Narayan Kadu vs. State of Maharashtra**, 2001 SCC OnLine Bom 335, wherein the challenge before the High Court was to an order passed by the Sessions Judge in exercise of its power under section 386(b)(i), as an Appellate Court, whereby it had directed the

Magistrate to commit the case for trial to the Court of Session, by setting aside the sentence and conviction awarded by it, which was upheld by relying on the judgment of Hon'ble The Supreme Court in **State of Uttar Pradesh vs. Shankar** AIR 1962 SC 1154, and holding that the order of Additional Sessions Judge was well founded and does not call for any interference whatsoever. The relevant portion of the judgment reads thus:

“6. The judgment of the Apex Court in *State of Uttar Pradesh v. Shankar*, (supra) applies on all fours to the case under consideration. In that case, respondent Shankar wanted to have illicit intimacy with Mst. Mithana who was not agreeable to his advances. In order to take his revenge he cut off her nose. The other respondent helped Shankar in felling her down and caught her while Shankar cut off her nose. Both the respondents were tried for offence under section 326 read with section 34 of the Penal Code, 1860 and the Magistrate found them guilty and sentenced them to R.I. for 18 months each. The respondent filed appeal before the Sessions Court. The Sessions Judge set aside the conviction and directed the case to be committed to the Court of Session. The respondent filed revision to the High Court against the order of Sessions Judge. The High Court came to the conclusion that the Sessions Judge hearing an appeal against conviction had no power to direct commitment to the Court of Session and all that he could do was that to recommend enhancement of sentence, but it was not worthwhile enhancing the sentence because the enhancement could only be from 18 months to two years and, therefore, revision was allowed and order was set aside. State came in appeal before the Apex Court by Special Leave. While dealing with section 423(1)(b) of Criminal Procedure Code, 1988, the Apex Court held that the said provision gives the power to the Appellate Court to dismiss the appeal, to acquit or discharge the accused or order him to be retried or committed for trial. It was, therefore, held that section does empower the Appellate Court to order commitment for trial to the Court of Session. Accordingly, the order of the High Court was set aside and that of the Sessions Court restored.”

8. In context of Section 386 CrPC, the judgment in **Nasib Singh vs. State of Punjab** 2022(2) SCC 89, is imperative to be referred to wherein Hon'ble The Supreme Court observed that, the power of the Appellate Court to order a

retrial is recognized in clause (b)(i) of Section 386 in the context of an appeal from a conviction. Further, while placing reliance on the judgment of the Constitution Bench in **Ukha Kolhe vs. State of Maharashtra**, (1964) 1 SCR 926 and based on plethora of judgments, it was held thus:

“28. The principles that emerge from the decisions of this Court on retrial can be formulated as under:

- (i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;
- (ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;
- (iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;
- (iv) It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;
- (v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and
- (vi) The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice :
 - a) The trial court has proceeded with the trial in the absence of jurisdiction;
 - b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and
 - c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.”

9. Hon'ble The Supreme Court in **R.P. Kapur vs. State of Punjab**, 1960 SCC OnLine SC 21, had in no uncertain terms stated that the inherent power of the High Court cannot be exercised in regard to matters specifically covered by the other provisions of CrPC. In the said case, the magistrate before whom the

police report was filed under Section 173 CrPC had not yet applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at that stage. Furthermore, in the case of **Madhu Limaye vs. State of Maharashtra**, (1977) 4 SCC 551, it was held that the inherent jurisdiction of the High Court is not to be resorted to, if there is specific provision in the Code for redress of grievances of aggrieved party. In **Sushil Kumar Singh vs. State of U.P.**, 2023 SCC OnLine All 105, it was observed and held that, it is well settled that if an effective statutory alternative remedy is available, this Court should refrain from exercising its extraordinary power under Section 482 CrPC.

10. Evidently, the petitioners had already availed of the statutory remedy by filing an appeal before the lower Appellate Court on 24.09.2019, challenging the judgment of conviction passed against them, which is admittedly pending adjudication, still almost immediately thereafter, the present petition was filed, laying challenge to the same very judgment *albeit* on the ground that instead of the Magistrate, the jurisdiction to try the offences alleged against the petitioners was with the Court of Sessions/Special Court. However as explicated in the afore-referred pronouncements, it is well within the purview of the powers of Court of Sessions to even consider such a plea and take a decision thereon.

11. As a fallout and consequence of the aforesaid discussion, the present petition is accordingly disposed of, reserving the petitioners with a liberty to take up the said issue before the Lower Appellate Court, which would be considered, in accordance with law.

(AMAN CHAUDHARY)
JUDGE

September 02, 2023
M.Kamra

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No