

06.01.2026
Court No.13
Item No. 2
sp/pk

**CRA 590 of 2016
With
CRAN 2 of 2025**

In Re: An application for suspension of sentence under Section 389(2) of the Code of Criminal Procedure corresponding to Section 430(1) of the BharatiyaNagarik Suraksha Sanhita, 2023 filed on 10.12.2025:
And

In Re: Badan Das &Ors.

...Appellants.

Mr. SudiptoMoitra, ld. Sr. Adv.,
Mr. Vijay Verma,
Mr. Dwaipayan Biswas.

..for the appellants.

Ms. Amita Gaur, ld. Sr. Govt. Advocate,
Mrs. SoumyaBasu Roy Chowdhury.

..for the State.

Re: CRA 590 of 2016

1. This Court has heard the learned counsel for the State in extensio.
2. Challenging an original order of conviction and sentence dated 9th March, 1987 passed by the Additional Sessions Judge, 3rd Court at Midnapore, whereby the appellants were convicted under Sections 148, 149 and 326 of the IPC and were sentenced to suffer rigorous imprisonment for 2 years with fine of Rs. 5,000/- under Section 148 of the IPC and rigorous imprisonment for 5 years and to pay fine of Rs. 1,000/- for the offence punishable under Sections 326 and 149 of the IPC, CRA 102 of 1987 was filed.
3. By the order dated 30th March, 1987, a Co-ordinate Bench of this Court admitted the appeal but issued a suo motu Rule calling upon the appellants to show cause as to why the order of acquittal under Section 302 and 149 of the IPC should not be set aside. Admittedly, there was no appeal from either the State or the de facto complainant against such order of acquittal.

4. Pursuant thereto, CRA 102 of 1987 came to be heard before a Single Bench of this Court which made the Rule absolute in judgment and order dated 30th June, 2016. The Single Bench found that the conviction of the appellants under Sections 326 and 149 of the IPC to be inadequate. The matter was remanded back to the Trial Judge, for hearing from the stage of arguments, to decide as to why the appellants should not be convicted under Section 302 and Section 149 of the IPC afresh.
5. Admittedly, in the original FIR and charge sheet, as also in the charges framed by the Trial Judge, the appellants were charged inter alia Section 302 and Section 149 of the IPC.
6. Upon remand, the Trial Judge convicted the appellants under Sections 302 and 149 of the IPC for life imprisonment and fine of Rs 1000. The present appeal CRA 590 of 2016 has been filed by the appellants challenging the fresh sentence imposed upon them under Section 302 of the IPC.
7. As already recorded in the order dated December 18th, 2025, Mr Sudipto Moitra, learned Senior Counsel, had urged that the order dated 30th March, 1987 was a nullity. The said order was in conflict with and in violation of Section 386, Cr.P.C. Two decisions of the Hon'ble Supreme Court relied upon by Mr Moitra were referred to in the said order dated 18th December 2025, passed by this Court.
8. The learned counsel for the State, Ms Gaur, submits that the appellants are estopped from raising the infraction of Section 386 today after having participated in the appeal in the proceeding before the Co-ordinate Bench which issued the Suo motu Rule and before

the Single Bench at the time of hearing of CRA 102 of 1987 and the retrial before the Trial Judge,.

9. This Court has heard the arguments at length advanced by Mr. Sudipto Moitra, learned Senior Counsel for the appellants and Ms. Amita Gaur, learned counsel for the State.
10. The propriety of the order dated 30th March, 1987 as argued by Mr. Moitra requires serious consideration. The legality and propriety of the said order dated 30th March, 1987 has to be appreciated in light of section 386 of the Cr.P.C, which is set out below:-

386. Powers 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 of 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

I 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;

Emphasis Applied

11. Section 386 of the CRPC provides for the powers of the High Court in respect of three kinds of appeals. Sub-Section (a) of Section 386 of the Cr. P.C. deals with an appeal against an order of acquittal. Such an appeal is preferred either by the State or the de facto complainant. In such appeal, the High Court, under subsection (a) of Section 386, can order both retrial and a further enquiry. The State, therefore, ought to have filed an appeal against an order of acquittal under Section 302 if it was desirous of obtaining an order of retrial.

12. Sub-Section (b) of Section 386 of the Cr.P.C. deals with an appeal from an order of conviction, which in most cases is preferred by the convict. In such an appeal, the Appellate Court is entitled to reverse the finding of sentence and acquit or discharge the accused or order a retrial. The Appellate Court is also entitled to alter the finding and maintain the sentence, or alter the sentence, but is not empowered to enhance the sentence. .

13. At this stage, one should juxtapose Subsection (a) of section 386 with subsection (b) of section 386, both of which inter alia enable the High Court to order a retrial. The said juxtaposition is called for since one may argue that in an appeal against conviction as well as against an acquittal, the High Court is empowered to order a retrial. Thus, the order dated March 30th, 1987 ordering a retrial in an appeal against an order of conviction is valid. The absence of an appeal on behalf of the State may be argued to be of no consequence to the order of retrial dated March 30th, 1987. However the retrial is confined to the punishment under the sections under which the accused has already been convicted.

14. The retrial that may be ordered by the High Court in an appeal against an order of acquittal under subsection (a) is when the State itself is aggrieved with the process and procedure adopted in the trial in question. Whereas under subsection (b) in an appeal against an order of conviction, a retrial may be ordered by the High Court when the convict is aggrieved for the same reason. Thus, the considerations involved in an order of retrial passed in an appeal against an order of conviction are different from an appeal against an order of acquittal.

15. The Legislature, therefore, has clearly compartmentalised two sets of appeals where retrial can be ordered. The Legislature has provided for a specific provision under which the State could file an appeal and obtain an order of retrial.

16. In the present case, in the absence of an appeal on behalf of the State against the order of acquittal under Section 302, the coordinate Bench could not have ordered a retrial since the appellant has never asked for a retrial. Retrial in an appeal against an order of conviction can only be ordered when the accused/ appellant has sought for it. The accused has not done so.

17. It was for the State to file an appeal against the order of acquittal of the appellant for the charge under Section 302, IPC, read with Section 149 of the IPC, and obtain an order of retrial. The State was willing to have the appellant retried. This is evident from the conduct of the State, which accepted the order for a retrial and proceeded with the retrial. Reference in this regard may be made to the decision of the honourable Supreme Court in the case of ***Nagarajan Vs. State of Tamil Nadu*** reported in **(2025) 8 SCC 331** which is quoted below;

“Para 32. In the instant case, we find that the appellant-accused herein had filed the appeal against the conviction and sentence imposed by the trial court for the offences punishable under Sections 354 and 448 of the IPC. Insofar as Section 306 IPC is concerned, the trial court had acquitted the appellant. Being aggrieved by the said conviction under Sections 354 and 448 IPC, the appellant had filed the appeal before the High Court. Neither the State, nor the victim or complainant had sought for enhancement of sentence, or sought for conviction and sentence under Section 306 IPC before the High Court when the appellant had filed this appeal seeking setting aside of his conviction and sentence.

Para 33. The High Court, instead of considering the said appeal filed by the appellant on merits, sought to exercise *suomotu* revisional powers for convicting the appellant under Section 306 IPC also and thereby sentencing the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5000 and in default, to undergo simple imprisonment for three months. The sentence under Sections 354 and 448 IPC has also resulted in a conviction under Section 306 IPC and an enhanced sentence, that too, in an appeal filed by none other than the appellant.

Para 34. **We are of the view that in an appeal filed by the accused/convict and in the absence of any appeal filed by the victim, complainant or the State, the High Court cannot exercise *suomotu* revision either to enhance the sentence or to convict the appellant on any other charge. The reasons for coming to such a conclusion have been discussed above.**

Emphasis applied

18. It is clear and explicit from the aforesaid decision as also the earlier decision of the Supreme Court in the case of **State of Andhra Pradesh vs. Thadi Narayana** reported in **1961 SCC Online SC 333** that the powers to be exercised under Section 386 of the Cr. P.C. can only be done in the event of an appeal being preferred by any of the parties concerned. Paragraph no. 10 of **Thadi Narayana decision (supra)** is set out below:-

10. The scheme of Section 423 itself clearly shows that when appeals against conviction are brought before the appellate

court by the convicted person it is only with the orders of conviction and matters incidental thereto that fall to be decided by the appellate court. An order of acquittal passed in favour of an accused person can be challenged by an appeal as provided by Section 417 of the Code, and Section 423(1)(a) therefore expressly deals with the powers of the High Court in dealing with such appeals against orders of acquittals. **Prima facie, if an order of acquittal is not challenged by an appeal as contemplated by Section 417 and if no action is taken by the High Court under Section 439 the said order of acquittal becomes final and cannot be impugned indirectly by the State in resisting an appeal filed by a convicted person against his conviction.** In a case where several offences are charged against an accused person the trial is no doubt one; **but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the appellate court.....** Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the appellate court and not the order of acquittal. **Therefore, the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well founded and as such it cannot be pressed into service in construing the expression "alter the finding".**

(Emphasis applied)

19. We are conscious that the High Court under Section 397, CrPC read with Section 401, CrPC exercises revisional jurisdiction over any order passed by the Court below. The said power can be exercised *suomotu* in view of the clear language of Section 401. The High Court is empowered to order a retrial in exercise of its revisional jurisdiction. Thus, it may be argued that the order dated March 30th, 1987 was passed in exercise of the revisional jurisdiction of the High Court. Section 401, CrPC is set out below:-

401. High Court's powers of revision.—(1) In the case of any proceeding the record of **which has been called for by itself or which otherwise comes to its knowledge**, the High Court **may, in its discretion**, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307, and, when the Judges composing the Court

of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

Emphasis applied

20. The Honourable Supreme Court in ***Sachin versus State Of Maharashtra, reported in 2025 INSC 716*** has held that the High Court cannot suo moto exercise its power of revision in an appeal against an order of conviction and proceed to pass orders prejudicial to the convict. The said conclusion was premised on the principle that the High Court is to consider the convict's appeal from the perspective of the accused/convict. Therefore there is no scope for the High Court to pass any order in an appeal against conviction, which will be prejudicial to the accused, notwithstanding that the accused has been put on notice that orders against him may be passed. Paragraph nos. 24, 26, 27 and 29 of ***Sachin decision (supra)*** may be set out below:-

24. Thus, in an appeal filed by the appellant-accused against the judgment of the conviction and sentence, **can the accused be left worse-off while the conviction is affirmed by the appellate court exercising appellate jurisdiction by enhancing the sentence? In such an event, the appellant-accused would be better off, if he either withdraws his appeal or, not to file an appeal at all !**

26.....***It then becomes the duty of the appellate court to consider the appeal from the perspective of the accused-appellant to see if he has a good case on merits*** and to set aside the judgment of the trial court and acquit the accused or to remand the matter for a retrial in accordance with law or reduce the sentence while maintaining the conviction or, in the alternative, to dismiss the appeal.

27. In our considered view, the appellate court, in an appeal filed by the accused cannot, while maintaining the conviction, enhance the sentence. ***While exercising its appellate jurisdiction at the instance of the convict, the High Court cannot act as a revisional court, particularly, when no appeal or revision has been filed either by the State, victim or complainant for seeking enhancement of sentence against accused.***

29.1.....In other words, when an accused is seeking setting-aside of a judgment of conviction and sentence, ***can the High***.

Court, in the absence of there being any challenge to the same from any other quarter, suomotu exercise its revisional power and thereby condemn the accused by awarding an enhancement in his sentence. Even if an opportunity of hearing is given to such an accused/convict, we do not think that the High Court can exercise its revisional jurisdiction under Section 401 CrPC while exercising its appellate jurisdiction in an appeal filed by the accused/convict in the High Court. All that the High Court can do is to set-aside the judgment of conviction and sentence and acquit the accused, or while doing so, order for a retrial or, in the alternative, while maintaining the conviction, reduce the sentence. **In other words, in an appeal filed by the accused/convict, the High Court cannot suomotu exercise its revisional jurisdiction and enhance the sentence against the accused while maintaining the conviction.**

Emphasis Applied

21. In ***Nagarajan decision (supra)***, the Court discussed the rationale as to why in an appeal against an order of conviction, the Court cannot pass an order which it could have passed in an appeal preferred by the state. Para no. 13 of ***Nagarajan decision (supra)***, is set out below:-

13. The above distinction can be explained by way of a latin maxim which has been discussed by UjjalBhuyan, J., while in Bombay High Court, in *Jyoti Plastic Works Pvt. Ltd. vs. Union of India and Ors.*, 2020 OnLineBom 2276, in the following words:

“40. In this connection we may refer to the maxim reformatio in peius. It is a latin phrase meaning a change towards the worse i.e., a change for the worse. As a legal expression it means that a lower court judgment is amended by a higher court into a worse one for those appealing it. In many jurisdictions, this practice is forbidden ensuring ***that an appellant cannot be placed in a worse position as a result of filing an appeal.*** When the above phrase is prefixed by the words ‘no’ or ‘prohibition’, which would render the maxim as no reformatio in peius or prohibition of reformatio in peius, ***it would denote a principle of procedure as per which using a remedy available in law should not aggravate the situation of the person who avails the remedy.*** In other words, a person should not be placed in a worse position as a result of filing an appeal. No reformatio in peius or prohibition of reformatio in peius is a part of fair procedure and thus by extension can also be construed as part of natural justice. It is not only a procedural guarantee but is also a principle of equity.” (underlining by us)

14. The rationale of the above can be explained in simple language by stating that **no appellant by filing an appeal can be worse-off than what he was. That is exactly what we are seeking to reiterate in our judgment having regard to the facts of the present case.**

(Emphasis applied)

22. The Court is therefore prohibited to order a retrial in an appeal against conviction when the convict has not prayed for a retrial. The same is based on the principle that when the statute has provided a right to a convict to file an appeal, the filing thereof should not be used against him. The conferment of a right and the consequent exercise thereof shall not operate against the person who has availed the said right.

23. The order of retrial against the accused for the charge under Section 302 read with Sec.149 was clearly was an order which prejudiced appellants. They was retried for a charge of which they were initially acquitted by the Trial Court. The appellants were further subject to the trial illegally.

24. Thus, having regard to the plain reading of Section 386 of the CrPC and the dicta in the decisions in **Nagarajan (supra)**, **Thadi Narayana (supra)**, and **Sachin (supra)** , this Court finds that the order dated 30th March, 1987 of a Co-ordinate Bench, which is the genesis of the present appeal whereby the suo motu Rule was issued to the appellants to show cause as to why the order of acquittal under

Section 302 read with Section 149 of the IPC could not be set aside, appears to be clearly without jurisdiction and a nullity.

25. Such order could only have been passed in an appeal by the State or the de facto complainant or the next of kin of the victim, against the Trial Court's order. The Trial Court had originally sentenced the appellants only under Sections 326, 148 and 149 of the IPC. It is pursuant to such rule issued on 30th March, 1987 albeit without jurisdiction, that the appeal came to be heard by the Single Bench since the punishment was less than 7 years and judgment and order dated 30th June, 2016 was passed.

26. Having regard to the discussions made herein above that the original order dated 30.03.1987 which was the genesis of hearing afresh by the Trial Judge and passing of the impugned judgment and sentence and such order dated 30.03.1987 being a nullity for the infraction of Section 386 of the Cr. P. C., the decision dated 30th June, 2016 passed by the Single Bench of this Court in CRA 102 of 1987 and the impugned order of conviction of the appellants under Section 302 of the IPC are all null and void and are liable to be set aside.

27. The argument of Ld Counsel for the State that the appellants are estopped from raising the issue at this stage after participating in the hearing of the CRA 102 of 1987 and the retrial cannot be accepted in view of the settled principle that, there is no estoppel against the law.

28. What is therefore revived now is the original order of conviction and sentencing dated 9.03.1987 passed by the learned Additional Sessions Judge, Third Court at Midnapore, whereby the appellant was sentenced for two years and fine of Rs.1,000/- for offence under Section 148 of the IPC and for five years and fine of Rs.1,000/- for

offence committed under Sections 326/149 of the IPC. The sentences were directed to run concurrently.

29. It is submitted by the learned counsel for the parties that the appellants as on date have served more than 10 years. This is well beyond the original sentence of five years and imprisonment in default of payment of fine. Consequently, the appellants are set at liberty.

30. Mr. Moitra, learned senior counsel, on instructions, submits that his clients do not wish to challenge the original conviction dated 19.03.1987.

31. CRA 102 of 1987 as revived shall stand dismissed.

32. The appellants shall be released forthwith unless they are wanted in connection with any other offence.

33. With the aforesaid directions, CRA 590 of 2016 is disposed of. Consequently, connected pending application is also disposed of

34. Parties may act on the server copy of this order duly downloaded from the official website of this Court.

35. Let Trial Court Records be sent back.

(RajasekharMantha, J.)

(Ajay Kumar Gupta, J.)