AKALU AHIR AND OTHERS

v.

RAMDEO RAM

May 1, 1973

[K. K. MATHEW AND I. D. DUA, JJ.]

Code of Criminal Procedure (Act 5 of 1898), Ss. 417, 435, 439—High Court's power of revision in cases of acquittal by trial court—Scope of.

Weight of evidence—Enmity between parties of complaint and accused—Effect of.

The trial court, on a consideration of the evidence, acquitted the appellants of the offences under Ss. 307 and 307/109 I.P.C. The State did not file any appeal against the order of acquittal but the victim invoked the revisional jurisdiction of the High Court, under Ss. 435 and 439 Cr.P.C. The High Court allowed the revision, set aside the acquittal and remitted the case for retrial.

Allowing the appeal to this Court,

HELD : An unrestricted right of appeal from acquittal is specifically conferred only on the State and a private complainant is given the right of appeal only when the criminal prosecution was instituted on his complaint and then also subject to special leave by the High Court. A private complainant can only claim a right, in common with all aggrieved parties in a criminal proceeding, to invoke the revisional jurisdiction of the High Court for redress against miscarriage of justice arising from an erroneous order of acquittal; but the High Court's power in such cases is circumscribed by the provisions of Ss. 417 and 439, Cr.P.C. and also by the fundamental principles of criminal jurisprudence. It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court that the High Court is empowered to set aside the order of acquittal and direct a retrial of the acquitted accused. From the very nature of this power it should be exercised only in exceptional cases and with great care and caution. Trials are not to be lightly set aside when such orders expose the accused persons to a fresh trial with all its consequential harassment. The power of revision conferred on the High Court by Ss. 435 and 439 Cr.P.C. is an extraordinary discretionary power vested in the superior court to be exercised in aid of justice. The High Court has been invested with this power to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that the subordinate courts do not exceed their jurisdiction or abuse the power conferred on them by law. As a general rule, this power, in spite of the wide language of the sections does not contemplate interference with conclusions of fact in the absence of serious legal infirmity and failure of justice. This power is certainly not intended to be exercised as to make one portion of the Criminal Procedure Code conflict with another as would be the case when, in the garb of exercising revisional power, the High Court in effect exercises the power of appeal in face of statutory prohibition. In revision, the High Court is expressly prohibited from converting acquittal into a conviction. It makes it therefore 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 a retrial. The High Court when approached by a private party for exercising its power of revision in the case of an order of acquittal should therefore refrain from interfering except when there is a glaring legal defect of a serious nature which has resulted in grave failure of justice. The High Court is not expected to act as if it is hearing an appeal in spite of the wide language under s. 435 which empowers it to satisfy itself as to the correctness, legality or propriety of a finding, sentence or order and as to the regularity of any proceeding, and also in spite of the fact that under s. 439 it can exercise *inter alia* the power conferred on a court of appeal under s. 423, Cr.P.C. The power being discretionary, it is to be exercised judicially and not arbitrarily. Judicial discretion means a discretion which is informed by tradition, methodised by analogy and disciplined by system. [133F-G, H; 134A-D, E-H-135A-C]

A In the present case the High Court has re-weighed the evidence from its own point of view and though it noticed the correct legal position regarding the limits of its jurisdiction to interfere with an order of acquittal, it does not seem to have followed those rules. [136E-F]

D. Stenbens v. *Nosibolla*, [1951] S.C.R. 284, *Jogendranath Jha* v. *Polailal Biswas*, [1951] S.C.R. 676, *K. C. Reddy* v. *State of Andhra Pradesh*, [1963] 3 S.C.R. 412, *Mohendra Pratap Singh* v. *Sarju Singh & Another* [1968] 2 S.C.R. 287, *U. J. S. Chopra* v. *State of Bombay*, [1956] S.C.R. 94 and *Amar Chand* B *Aggarwal* v. *Shanti Bose*, 1973 A.I.R. S.C. 799, followed.

(1) The appraisal of the evidence by the trial judge in the instant case is not perfect or free from flaw and a *court of appeal* may well have felt justified in disagreeing with his conclusions. But it does not follow that *on revision by a private complainant* the High Court is entitled to reappraise the evidence for itself as if it is acting as a *court of appeal* and then order a retrial. [137A-B]

(2) The expression of opinion by the High Court on the present evidence C with respect to the commission of alleged offence would not be binding and would not be relevant in a retrial. But it may nevertheless leave an unconscious impression on the mind of the Court holding the fresh trial. [137C-D]

(3) Enmity between the complainant's party and the accused is usually a double-edged weapon providing motive both for the offence as well as for false implication. The evidence, in such cases, has to be scrutinised with care so that neither the guilty party escapes on the plea of enmity nor an innocent person gets wrongly convicted on that basis. [131G-H]

D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 40 of 1970.

Appeal by special leave from the judgment and order October 14, 1969 of the Patna High Court in Criminal Revision No. 190 of 1969.

E *B. P. Singh*, for the appellant.

D. Goburdhan, for the respondents.

The Judgment of the Court was delivered by

DUA, J : This is an appeal by special leave. The three appel- F lants and one Ramchander Kanu were tried in the court of the 2nd Assistant Sessions Judge, Chapra for offences under ss. 307 and 307/ 109, I.P.C. Akalu Ahir and Chandrika Singh were charged under s. 307 I.P.C. for firing pistol shots and gun shots at Ramdeo Ram at 11.00 p.m. on June 13, 1966, whereas Jagarnath and Ramchander Kanu were charged under ss. 307/109, I.P.C. for having abetted the commission of the aforesaid offence.

G The occurrence is stated to be an off-shoot of election rivalry arising out of the election for the office of Mukhia of village Arakpur. Indeed the enmity between the two rival groups was of long standing and is not denied. But enmity as usual is a double-edged weapon, providing motive both for the offence as well as for false implication. The evidence in such a case, has, therefore, to be scrutinised with care so that neither the guilty party wrongly escapes on the plea of H enmity, nor an innocent person gets wrongly convicted on that basis.

In this case there were three eye witnesses. Ramdeo Ram, the victim of the fire shots, appeared as P.W.1. Puljharia as P.W.9 and

Ploughman Bhuidhar Chamar as P.W. 10. The trial Judge after considering the evidence on the record felt no doubt about the fact that Ramdeo Ram had been injured by gun shots, but he did not feel impressed by the prosecution evidence with respect to the manner in which the occurrence had taken place, with the result that in his opinion, the prosecution had not been able to prove the charges against the accused persons beyond reasonable doubt.

The State did not file any appeal against the order of acquittal. Ramdeo Ram, the victim of the gun shots, however, presented in the High Court in January, 1969 a revision petition under ss. 435 and 439, Cr.P.C. from the order acquitting the four accused persons. From a note on the printed application for revision, it appears that the name of Jagarnath Kanu was expunged from the array of respondents in the revision : vide, court's order dated July 3, 1969. The High Court at the outset noticed that the scope of interference in revision at the instance of private parties in cases of acquittal is very limited. In this connection, it referred to the following four decisions of this Court :—

(i) *D. Stenbens* v. *Nosibolla*(1)

(ii) *Jogendranath Jha* v. *Polailal Biswas*(2)

(iii) *K. C. Reddy* v. *State of Andhra Pradesh*(3) and

(iv) *Mohendra Pratap Singh* v. *Sarju Singh & another*(4)

After quoting from *K. C. Reddy* (supra), the categories of cases attracting interference by a High Court on a private party's revision and the observation that the said list was not exhaustive of all the circumstances in which a High Court may interfere and that other defect in the judgment under revision must be analogous to those actually indicated, the High Court proceeded to consider the case, professedly keeping those limits in view. It then criticised the appraisal of the evidence by the trial court and found fault with several observations made by that court in such appraisal. The reasons recorded by the trial court for rejecting the evidence of P.W.1, Ramdeo Ram and of his wife Puljharia, P.W.9, were considered by the High Court to be "much too infirm". The High Court also felt that the evidence of Ramdeo Ram had been misread by the trial court when it observed that his statement to the police was not in conformity with his evidence in court. The result of this unfortunate misreading of the evidence, in the opinion of the High Court, was that the evidence of an important witness like Ramdeo Ram had not received proper consideration at the hands of the trial Judge. The contradictions found by the trial Court in the evidence of Puljharia, P.W. 9 was also not considered by the High Court to be material as in its view such contradictions had no bearing on the manner of the occurrence but could only have some relevance to the question of the identity of the culprits. Feeling dissatisfied with the manner in which the trial court had sought to explain away the evidence of two out of three eye witnesses, the High Court felt that the acquittal of the accused

(1) [1951] S.C.R. 284.
(2) [1951] S.C.R. 676.
(3) [1963] 3 S.C.R. 412.
(4) [1968] 2 S.C.R. 287.

A could not be allowed to stand. Considering this to be an exceptional case, the High Court allowed the revision and, setting aside the acquittal, sent the case back for re-trial.

On appeal in this Court, it was contended that the High Court had over-stepped the limits of its power in dealing with revisions against orders of acquittal at the instance of private parties It was B further contended that as a court of revision, the High Court was not justified in examining the evidence as if it was a court of appeal and was, as such, required to see if the evidence had been correctly appraised by the trial court. Finally it was strenuously pressed that order directing a re-trial on the facts and circumstances of this case was not only uncalled for but was calculated to result in grave injustice to the appellant.

C

Turning first to the legal position, it is necessary to bear in mind that an appeal is a creature of statute and there is no inherent right of appeal. Section 404, Cr.P.C. expressly so provides. In *U.J.S. Chopra* v. *State of Bombay*(1) while discussing the historical background of s. 439(6), Cr.P.C., S. R. Das, J., as then he was, pointed out that in England there is no provision for an appeal by the Crown against D an order of acquittal and in our country s. 407 of the Code of Criminal Procedure 1861 prohibited an appeal from acquittal. The Code of Criminal Procedure 1872 by s. 272 permitted the Government to file an appeal from acquittal and this was repeated in s. 417 of the Code of Criminal Procedure 1882 and again in 1898. The object of limiting the right of appeal against the orders of acquittal to the State Government was to ensure that such appeals are filed only when there has been E miscarriage of justice and not when inspired by vindictiveness. A private party had, therefore, no right of appeal. The aggrieved party could, however, move the authorities concerned to consider the question of presenting an appeal against acquittal. This indicates that punishment for offences is normally the responsibility of the State as the guardian of law and order. Thus, section 417, Cr.P.C. before its amendment by Act 36 of 1955 empowered only the State Government F to direct the Public Prosecutor to present an appeal from an order of acquittal. In 1955, however, this section was amended and it was provided, *inter alia,* that where an order of acquittal is passed in a case instituted upon complaint the complainant may present an appeal provided that the High Court on his application grants him special leave to do so. Even in case when the complainant has a right to present an appeal against acquittal, his failure in securing special leave would under G s. 417(5) bar the State Government also from appealing. This reflects the Parliament's anxiety not to expose the orders of acquittal to plurality of appeals by preserving to the State as guardian of law and order, a distinct right of appeal wholly unaffected by the result of the complainant's right to appeal.

Now adverting to the power of revision conferred on a High Court H by s. 439 read with s. 435, Cr. P.C. it is an extraordinary discretionary power vested in the superior court to be exercised in aid

(1) [1956] 2 S.C.R. 94.

of justice : in other words, to set right grave injustice. The High Court has been invested with this power to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that the subordinate courts do not exceed their jurisdiction or abuse the power conferred on them by law. As a general rule, this power, in spite of the wide language of ss. 435 and 439, Cr. P.C. does not contemplate interference with the conclusions of fact in the absence of serious legal infirmity and failure of justice. This power is certainly not intended to be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would seem to be the case when in the garb of exercising revisional power, the High Court in effect exercises the power of appeal in face of statutory prohibition.

The unrestricted right of appeal from acquittal is specifically conferred only on the State and a private complainant is given this right only when the criminal prosecution was instituted on his complaint and then also subject to special leave by the High Court. It is further provided in s. 439(5), Cr. P.C. that where no appeal is brought in a case in which an appeal is provided, no proceedings by way of revision would be entertained at the instance of the party who could have appealed. The State Government, therefore, having failed to appeal, cannot apply for revision of an order of acquittal. Again on revision, the High Court is expressly prohibited from converting an acquittal into a conviction. Considering the problem facing the Court in this case in the background of this scheme, the High Court when approached by a private party for exercising its power of revision from an order of acquittal, should appropriately refrain from interfering except when there is a glaring legal defect of a serious nature which has resulted in grave failure of justice. It is not expected to act under ss. 435/439, Cr. P.C. as if it is a hearing on appeal in spite of the wide language under s. 435 which empowers it to satisfy itself as to the correctness, legality or propriety of a finding, sentence or order and as to the regularity of any proceeding and also in spite of the fact that under s. 439 it can exercise *inter alia* the power conferred on a court of appeal under s. 423, Cr.P.C. The power being discretionary, it has to be exercised judiciously, and not arbitrarily. Judicial discretion, as has often been said, means a discretion which is informed by tradition, methodised by analogy and disciplined by system. In *Amar Chand Aggarwal* v. *Shanti Bose*(1), this Court said that normally the jurisdiction of the High Court under s. 439, Cr.P.C. is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on point of law and there has consequently been flagrant miscarriage of justice. In the background of the position just stated a private complainant can only claim a right, in common with all aggrieved parties in a criminal proceedings, to invoke the revisional jurisdiction of the High Court for redress against miscarriage of justice arising from an erroneous order of acquittal. The High Court's power in such cases is circumscribed by the provisions of ss. 417 and 439, Cr.P.C. and also by the fundamental principles of our criminal juris-

(1) A.I.R. 1973 S.C. 799.

A prudence. It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court in the course of trial, that the High Court is empowered to set aside the order of acquittal and direct the re-trial of the acquitted accused persons. From the very nature of this power, it should be exercised in exceptional cases and with great care and caution. Trials are not to be lightly set aside whom such orders expose the accused persons B to a fresh trial with all its consequential harassment. This matter is not *res integra* and has indeed been dealt with by this Court at least in the four cases noticed by the High Court. In *K. C. Reddy* (supra), this Court examined two of its earlier decisions in D. *Stenbens* (supra) and *Jogendranath Jha* (supra) and after quoting certain passages from those decisions observed as follows :—

C

> "These two cases clearly lay down the limits of the High Court's jurisdiction to interfere with an order of acquittal in revision; in particular, *Jogendranath Jha's* case stresses that it is not open to a High Court to convert a finding of acquittal into one of conviction in view of the provisions of s. 439(4) and that the High Court cannot do this even in- D directly by ordering re-trial. What had happened in that case was that the High Court reversed pure findings of facts based on the trial court's appreciation of evidence but formally complied with sub-s. (4) by directing only a re-trial of the appellants without convicting them, and warned that the court retrying the case should not be influenced by any expression of opinion contained in the judgment of the High E Court. In that connection this Court observed that there could be little doubt that the dice was loaded against the appellants of that case and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to the credibility of the prosecution witnesses and the circumstances of the case in general."

F

This Court then proceeded to observe that the High Court is certainly entitled in revision to set aside the order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal, but it was emphasised that this jurisdiction should be exer- G cised 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." In face of prohibition in s. 439(4) Cr.P.C. for the High Court to convert a finding of acquittal into one of conviction, it makes 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 H ordering re-trial. No doubt, in the opinion of this Court, no criteria for determining such exceptional cases which would cover all contingencies for attracting the High Court's power of ordering re-trial can be laid down. This Court, however, by way of illustration, indicated

the following categories of cases which would justify the High Court in interfering with a finding of acquittal in revision :— A

(i) Where the trial court has no jurisdiction to try the case, but has still acquitted the accused;

(ii) Where the trial court has wrongly shut out evidence which the prosecution wished to produce;

(iii) Where the appellate court has wrongly held the evidence which was admitted by the trial court to be inadmissible; B

(iv) Where the material evidence has been over-looked either by the trial court or by the appellate court; and

(v) Where the acquittal is based on a compounding of the offence which is invalid under the law. C

These categories were however, merely illustrative and it was clarified that other cases of similar nature can also be properly held to be of exceptional nature where the High Court can justifiably interfere with the order of acquittal. In *Mohendra Pratap Singh* (supra) the position was again reviewed and the rule laid down in the three earlier cases reaffirmed. In that case the reading of the judgment of D the High Court made it plain that it had re-weighed the evidence from its own point of view and reached inferences contrary to those of the Sessions Judge on almost every point. This Court pointed out that it was not the duty of the High Court to do so while dealing with an acquittal on revision, when the Government had not chosen to file an appeal against it. "In other words" said this Court, "the learned Judge in the High Court has not attended to the rules laid E down by this Court and has acted in breach of them"

In the present case also we feel that the High Court has reweighed the evidence from its own point of view and though at the outset it noticed the correct legal position and expressly acknowledged the limits within which it was called upon to decide whether or not to interfere with the order of acquittal, in actual practice, it does not F seem to have attended to the rules laid down by this Court in the four decisions noticed by it. As observed in *D. Stenben's* case (supra), the revisional jurisdiction under s. 439, Cr.P.C. is not to be lightly exercised when invoked by a private party against an order of acquittal against which the Government has a right of appeal under s. 417. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or mis- G appreciated the evidence on record. Again, as pointed out in *Jogendranath Jha's* case (supra), when s. 439(4) specifically excludes the power to "convert a finding of acquittal into one of conviction", the High Court cannot, when dealing with a revision petition by a private party against an order of acquittal, in the absence of any error on a point of law, re-appraise the evidence and reverse the findings of fact on which the acquittal was based by resorting to the H device of stopping short of finding the accused guilty and passing sentence on him. This would be a subterfuge impermissible in our judicial process.

A No doubt, the appraisal of evidence by the trial Judge in the case in hand is not perfect or free from flaw and a court of appeal may well have felt justified in disagreeing with its conclusion, but from this it does not follow that on revision by a private complainant, the High Court is entitled to re-appraise the evidence for itself as if it is acting as a court of appeal and then order a re-trial. It is unfortunate that a serious offence inspired by rivalry and jealousy B in the matter of election to the office of village Mukhia, should go unpunished. But that can scarcely be a valid ground for ignoring or for not strictly following the law as enunciated by this Court.

There is also another aspect of the matter. The High Court has evaluated the evidence on the existing record. On re-trial the trial court will have to consider the evidence led at the re-trial and arrive C at its conclusion on that record. The expression of opinion on the present evidence with respect to the commission of the alleged offence would not be binding and would, therefore, hardly be relevant. But it may nevertheless leave an unconscious impression on the mind of the court holding the fresh trial. This aspect also seems to lend some support to the view that normally re-trial should not be ordered unless there is some infirmity rendering the trial defective.

D In view of the foregoing discussions, in our opinion, the High Court had committed a serious error in directing re-trial on the basis of its re-assessment of the oral evidence on the record, while exercising its power of revision at the instance of a private complainant. We are, therefore, constrained to allow this appeal, quash the impugned order of the High Court and restore that of the trial court.

V.P.S. *Appeal allowed.*