BISWANATH GHOSH

v.

STATE OF WEST BENGAL & ORS.

FEBRUARY 16, 1987

[A.P. SEN AND V. BALAKRISHNA ERADI, JJ.]

Constitution of India, 1950, Article 136—Interference by Supreme Court with an order of acquittal recorded by the High Court at the instance of a private complaint, permissiblity.

Code of Criminal Procedure, 1973, section 385, scope—Appeal disposed of in the absence of the records from the Sessions Judge and when even notices for the grant of bail were not issued, solely relying on the concession made by the Public Prosecutor as to the discrepancy in the number of injuries found on the deceased and the witnesses' deposition is vitiated and bad in law.

Respondents 2 to 9 preferred an appeal to the Calcutta High Court against their conviction and sentence dated 19.3.1984. On 22.3.1984 a Division Bench of the High Court admitted the appeal but did not grant bail on that date. Within a fortnight thereafter, i.e. on 12.4.1984, the application for bail moved by the Respondents came up before the Bench for consideration. The appeal was not set for hearing on that day. The records which had been requisitioned from the Court of the Additional Sessions Judge had not been received and notices of the bail had not been issued. Acting on an alleged concession made by the Public Prosecutor, the Bench allowed the appeal itself and acquitted the respondents. The appellant-complainant's Special Leave Petition No. 2025/84 dated 15.10.1984 against the said orders of acquittal was allowed to be withdrawn to move the High Court for review. The appellants' review petition dated 5.12.1984 having been dismissed on the ground that the High Court had no power to review its judgment under the Code of Criminal Procedure, 1973, the appellant has now come in appeal by special leave.

Allowing the appeal, the Court,

HELD: 1. Normally, the Supreme Court, as a matter of practice, is reluctant to interfere with an order of acquittal recorded by the High Court at the instance of a private complainant, but the circumstances of the case are such that there is no other alternative but to interfere in this

case. The procedure adopted by the High Court was not in consonance with the procedure established by law and has resulted in flagrant miscarriage of justice. [306H; 307A]

Under Section 385 of the Code of Criminal Procedure, 1973 it was obligatory for the High Court to have fixed a date for the hearing of the appeal and sent for the records of the Court of Sessions and thereafter hear the parties on merits. It does no credit to any branch of administration of justice that an appeal against conviction or acquittal should be allowed without the Appellate Court having the records before it and without persuing the evidence adduced by the prosecution. Assuming that the learned Public Prosecutor conceded that there was no evidence, the High Court had time to satisfy itself upon perusal of the record that there was no reliable and credible evidence to warrant the conviction of the accused under s. 148 and s.302 read with s. 149 of the Indian Penal Code. [308B-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 94 Of 1987.

From the Judgment and Order dated 8.2.1985 of the Calcutta High Court in Crl. A.No. 112 of 1984.

Parijat Sinha and B.D. Ahmed for the Appellant.

K.C. Aggarwala and P.K. Chakravarthy for the Respondents.

The Order of the Court was delivered:

ORDER

Special leave granted. Arguments heard.

The short question involved in this appeal is whether the High Court was justified in allowing the appeal preferred by the accused persons against their conviction under s.148 and s.302 reads with s.149 of the Indian Penal Code, 1860 without having the records of the Court of Sessions before it and without perusal of the evidence adduced by the prosecution.

Normally, this Court, as a matter of practice, is reluctant to interfere with an order of acquittal recorded by the High Court at the instance of a private complainant, but the circumstances of the case

are such that there is no other alternative for us but to interfere. We wish to mention that earlier the Court had in Special Leave Petition (Crl.) No. 2025/84 dated 15.10.1984 allowed the petitioner-complainant to withdraw the petition to move the High Court for review. The petitioner on 5.12.1984 filed an application for review but the High Court dismissed the same by its order dated 8.2.1985 on the ground that it had no power to review its judgment under the Code of Criminal Procedure, 1973. The complainant has accordingly applied for special leave. The application is much belated but we have no other alternative but to interfere.

The facts. Aggrieved by their conviction and sentence under s.148 and s.302 read with s.149 of the Indian Penal Code by the Additional Sessions Judge, Ist Court, Burdwan by his judgment and sentence dated 19.3.1984, the respondents preferred an appeal to the Calcutta High Court. On 22.3.1984 a Division Bench of the High Court (P.C. Barooah and S. Chakravarty, JJ) admitted the appeal but did not grant bail to the respondents on that date and reserved them liberty to apply for bail later. It directed that the records be requisitioned from the Court of Sessions. Within a fortnight thereafter i.e. on 12.4.1984, the application for bail moved by the respondents came up for consideration. On that day the appeal was not listed for hearing. The records which had been requisitioned from the Court of the Additional Sessions Judge had not been received and notices of the bail had not been issued. Instead of dealing with the application for bail, the learned Judges appeared to have acted on an alleged concession made by the learned Public Prosecutor and acquitted the respondents.

The learned Judges during the course of their order observed that the contention on behalf of the respondents in support of their bail application was that the alleged dying declaration made by the deceased Jagannath Ghose having been disbelieved by the learned Additional Sessions Judge, no reliance could be placed on the testimony of the eye-witnesses as the place of incident was not visible from where they are alleged to have seen the occurrence and also that about 100 persons had surrounded the victim and as such it was not possible to definitely state that only the 8 accused i.e. the respondents were involved. After stating this, the learned Judge observed:

> "The learned Public Prosecutor in his usual fairness has pointed out that although the witnesses spoke of 4/5 injuries, the deceased had actually 27."

A and added that this was a fit case where benefit of doubt should be given to the accused and accordingly said that no useful purpose would be served in having a paper-book prepared and keeping the accused in further agony. In that view, the learned Judges allowed the appeal, set aside the conviction and sentence passed on the respondents on their conviction under s.148 and s.302 read s.149 of the Indian Penal Code.

B

We are constrained to observe that the procedure adopted by the High Court was no in consonance with the procedure established by law. Under s.385 of the Code of Criminal Procedure, it was obligatory for the High Court to fix a date for the hearing of the appeal and then send for the records of the Court of Sessions and hear the parties on

C merits. There was no warrant for the procedure adopted by the learned Judges in disposing of the appeal in this chavaller manner. It does no credit to any branch of administration of justice that an appeal against conviction should be allowed without the Appellate Court having the records before it and without perusing the evidence adduced by the prosecution. To say the least, there has been a flagrant

D carriage of justice. It may be, as the High Court records in order, that the learned Public Prosecutor conceded that there was no evidence but then the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused under s.148 and s.302 read with s.149 of the Indian Penal Code.

E

The result therfore is that the appeal succeeds and is allowed. The order of acquittal recorded by the High Court is set aside and we direct the High Court to admit the appeal to its file and dispose of it afresh notice to the parties and after the records requisitioned are

F received by it. After the respondents nos. 2-9 are taken into custody, they may apply to the High Court for being enlarged on bail. The High Court will deal with the application on its merits.

S.R. Appeal allowed.