

A

MARY PAPPA JEBAMANI

v.

GANESAN & ORS.

(Criminal Appeal Nos.2061-62 of 2013)

DECEMBER 09, 2013

B

[G.S. SINGHVI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 294(b) and 323 – Prosecution under – Summary trial – Acquittal by trial court – Conviction by appellate court – High Court in exercise of its revisional jurisdiction set aside the order of conviction and revived the acquittal order – Held: Since the High Court in exercise of its revisional jurisdiction, set aside the order of first appellate court without assigning any reason, matter remanded to High Court for consideration afresh.

D

Code of Criminal Procedure, 1973 – s. 311 – Retrial – Held: Court can direct retrial, where prosecution lacks in bringing necessary evidence – Facts of the present case do not justify, parameters for retrial.

E

A summary trial was initiated by the Magistrate on the complaint of the appellant (PW1) u/s. 294(b) and 323 IPC. PWs 2 and 3 i.e. the other two eye-witnesses turned hostile. The trial court giving benefit of doubt to the accused, acquitted them. Appellant-complainant approached first appellate court challenging the order of trial court and also prayed for retrial of the accused. The first appellate court reversed the acquittal order of the trial court and convicted the accused. High Court in revision, revived the order of acquittal, but dismissed the application seeking retrial of the accused, as not maintainable. Hence the present appeals challenging the order of High Court acquitting the accused and the order refusing retrial of the accused.

H

Dismissing the appeal filed against refusal of retrial and allowing the appeal questioning acquittal of the accused and remitting the same to High Court, the Court

HELD: 1. Where prosecution lacks in bringing necessary evidence, the trial court ought to invoke its powers under Section 311 Cr.P.C. and can direct for retrial. In the present case, the appellant although has alleged that the order for retrial should have been passed, nothing specific has been pointed out why the matter should be sent for retrial specially when the two of the important witnesses had failed to support the prosecution/ complainant version. Apart from this, the complainant herself had failed to disclose as to what exactly was the genesis of the occurrence as also the contents of the abuse which could persuade this court that a *de novo* trial of the accused was essential. Thus the appeal seeking retrial of the complaint case is not fit to be entertained as it is not possible to take a view that the investigation was shoddy or suffered from grave lacunae which would justify the parameters for retrial at the instance of the complainant for the mere asking as it does not meet the legal requirements justifying a retrial. [Paras 10, 11 and 12] [1049-C-G]

Satyajit Banerjee and Ors. vs. State of W.B. and Ors. (2005) 1 SCC 115; 2004 (6) Suppl. SCR 294; *Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.* (2004) 4 SCC 158; 2004 (3) SCR 1050; *Ram Bihari Yadav vs. State of Bihar* (1998) 4 SCC 517; 1998 (2) SCR 1097 – relied on.

2. Since the High Court has failed to record any reason setting aside the order of the first appellate court, when it was exercising merely revisional jurisdiction, it is just and appropriate to remand the matter to the High Court to reconsider and assign reasons for setting aside the order of conviction and recording an order of

A **acquittal of the respondents, without specifying and ignoring the medical evidence although it was considering the matter only in exercise of its revisional jurisdiction which has limited ambit and scope. [Para 13] [1050-E-F]**

B

Case Law Reference:

2004 (6) Suppl. SCR 294 relied on **Para 9**

2004 (3) SCR 1050 relied on **Para 9**

C **1998 (2) SCR 1097** relied on **Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2061-2062 of 2013.

D From the Judgment & Order dated 25.02.2010 of the High Court of Madras in CRLRC No. 620 2008 and Order dated 07.01.2011 in MP SR No. 15619 of 2010 in CRLRC No. 620 of 2008.

Mary Pappa Jebamani appellant-in-person.

E

P.V. Yogeswaran, M.A. Chinnasamy, S. Muthu Krishnan, K. Krishna Kumar for the Respondents.

The Judgment of the Court was delivered by

F

GYAN SUDHA MISRA, J.1. Leave as prayed for was granted and hence the counsel for the contesting parties were finally heard.

G

2. The complainant/appellant (Mary Pappa Jebamani) herein has filed this appeal by way of special leave bearing SLP (Crl.) No.4149/11) against the judgment and order dated 25.2.2010 passed in Crl. R.C. (MD) No.620/2008 of Madurai Bench of the Madras High Court by which the learned single Judge while exercising his revisional jurisdiction was pleased to set aside the judgment and order dated 26.6.2008 passed by the Principal Sessions Court, Virudhunagar District at

H

Srivilliputhur being the first appellate court who had been pleased to set aside the order of acquittal passed by the trial court against the accused/respondents herein for the offences punishable under Sections 294(b) and 323 of the Indian Penal Code (for short 'IPC'). Thereafter, the appellants herein also filed an application bearing MP (MD) SR No. 15619/2010 in the aforesaid criminal revision for allowing the application by ordering retrial of the accused respondents which petition was dismissed as not maintainable vide order dated 7.1.2011 against which the complainant/appellant filed the analogous petition for Special Leave to Appeal (Crl.) No. 4150/2011. It is thus clear that the complainant has filed one special leave petition against the order by which the acquittal of the respondents/accused persons has been restored by the High Court by allowing their criminal revision and has dismissed the application of the complainant/appellant by which re-trial of the accused respondents had been sought.

3. In order to examine the correctness of the impugned orders of the High Court, it appears essential to relate the facts of the case giving rise to these two appeals which disclose that a criminal complaint bearing crime No. 152/2005 was registered by the Sub Inspector of Police wherein it was stated that at about 7.30 p.m. on 24.6.2005, the appellant/complainant and her father while walking down the street to their residence were way laid by the respondents who verbally abused them and beaten them with wooden logs. Hence a case was registered for offences under Section 294(b) and 323 IPC. After investigation and submission of chargesheet, a summary trial bearing case No. 1/2007 was conducted by the Chief Judicial Magistrate, Virudhunagar District wherein the complainant/PW-1 and her father PW-4 deposed not only against the accused respondents herein but also against three other female members of the accused party. However, PW-2 and PW-3 who were cited as eye-witnesses turned hostile and the deposition of PW-1, PW-4 and PW-9 who is the daughter of PW-1 complainant were not relied upon as the trial court being the

A

B

C

D

E

F

G

H

A Chief Judicial Magistrate, Virudhunagar District held that the complaint did not disclose the nature of abusive language used by the accused as also the fact that the eye-witnesses had turned hostile. The trial court, therefore, vide its order dated 20.4.2007 was pleased to give benefit of doubt to the accused persons and they were held not guilty for offences under Sections 294(b) and 323 IPC.

C 4. The appellant/complainant felt seriously aggrieved of the acquittal of the accused respondents and hence filed CrI. R.P.No.25/2008 before the Principal Sessions Court, Srivilliputhur, District Virudhunagar against the trial court/Chief Judicial Magistrate's Order dated 20.4.2007 and also prayed for retrial of the accused respondents. The Principal Sessions Court, Virudhunagar vide order dated 26.6.2008 allowed the revision filed by the complainant/appellant and set aside the order of acquittal dated 20.4.2007 of the accused respondents passed by the Chief Judicial Magistrate.

E 5. Obviously, it was now the turn of the accused respondents to move the High Court against the order setting aside their acquittal and hence they filed criminal revision in the High Court which was allowed by the High Court vide the impugned order. The complainant/appellant, therefore, has moved this Court by way of this special leave petition challenging the order of acquittal and further filed a CrI. Misc. F Petition bearing SR No. 15619/2010 praying for retrial of the accused respondents which was dismissed as not maintainable as already referred to hereinbefore. The analogous special leave petition is directed against this order.

G 6. The complainant/appellant who appeared in person has challenged the judgment and order of the High Court and submitted that the order of the High Court acquitting the accused respondents is fit to be quashed and set aside as the clinching evidence on record adduced by the complainant and their witnesses were illegally ignored by the trial court as H also the High Court specially the medical evidence indicating

that the appellant's father had taken treatment as an in-patient in the Government Hospital Virudhunagar from 24.6.2005 to 1.7.2005 and had taken treatment as in-patient in the Government Hospital, Madurai, from 2.7.2005 to 16.7.2005 which was for 23 days continuously as a consequence of the injury sustained in the incident which has been totally ignored by the trial court while recording an order of acquittal of the accused respondents. The appellant-in-person relying upon Section 323 of the IPC has further urged that any hurt which endangers life or which can put the sufferer in severe bodily pain for 20 days or render him unable to follow his ordinary daily pursuit, could not have been taken lightly by the trial court so as to acquit the accused respondents even for the offence under Section 323 IPC. The appellant has further relied upon other discrepancies in appreciation of the evidence of the prosecution/complainant while acquitting the accused respondents.

7. In addition to the above, the appellant has also contended that the trial court as also the High Court failed to consider that fair trial had not been conducted by the trial court as all the witnesses could not depose freely and state what exactly had happened. It has been contended that the accused respondents are rough and rowdy persons of disrepute and this scared the complainant as also the witnesses so much so that no one dares to complain against them. It was still further urged that one Rajakani who is the wife of the first accused respondent Ganesan has illicit relation with one BT Selvam who is the appellant's divorced husband. The trial court also overlooked the incidents caused by the accused respondents against whom several cases are pending in various courts.

8. The appellant has further contended that the offence committed by the accused respondents was a pre-planned crime and all the accused persons shared common intention and common object to assault and commit other offences against the complainant. The trial court, therefore, committed

A error in acquitting the accused respondents which had been set
 aside by the first appellate court/the Court of Sessions which
 in turn set aside the acquittal of the respondents but the High
 Court wrongly interfered with the same and set it aside. The
 appellant has further submitted that the investigation conducted
 B in the matter was also full of legal and procedural infirmities and
 hence it was a fit case for sending the matter for retrial.

9. Learned counsel, representing the respondents' case,
 however, has supported the impugned judgment and order of
 the High Court and the trial court and first of all submitted that
 C the order seeking retrial of the accused respondents is wholly
 unwarranted as the plea for retrial cannot be ordered on a flimsy
 ground at the instance of the prosecution. To reinforce their
 submission, reliance has been placed on the ratio of the
 judgment of this Court delivered in the matter of *Satyajit*
 D *Banerjee & Ors. Vs. State of W.B. & Ors.*, (2005) 1 SCC 115,
 wherein this Court has held 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. It is only when an extra-
 ordinary situation in regard to the first trial is found so as to treat
 E it a farce or a 'mock trial', which would justify directions for
 retrial. It was further held therein that the trial Judge has to
 decide the case on the basis of available evidence recorded
 at the initial stage of the trial and the additional evidence
 recorded on retrial in the event a retrial had been permitted.
 F This Court has laid down the law on this in the *Best Bakery*
case (2004) 4 SCC 158, holding therein that the order for retrial
 cannot be applied to all cases as that would be against the
 established principle of criminal jurisprudence. In the *Best*
 G *Bakery Case*, the first trial was found to be a farce and was
 described as a 'mock trial'. Therefore, the direction for retrial
 was, in fact, for a real trial and such an extra-ordinary situation
 alone could justify the directions for retrial of a case as made
 by the Supreme Court in *Best Bakery Case*.

H 10. In yet another case of *Ram Bihari Yadav vs. State of*

Bihar, (1998) 4 SCC 517, this Court held that the High Court ought not to have directed the trial court to hold the *de novo* trial and take a decision on the basis of the so-called 'suggested formula'. But the Supreme Court in this matter had refused to set aside the order of retrial since retrial as directed by the High Court had already commenced and further evidence had already been recorded in view of which the Supreme Court declined to set aside retrial and upheld the judgment of the High Court permitting retrial. Thus, it cannot be overlooked that where prosecution lacks in bringing necessary evidence, the trial court ought to invoke its powers under Section 311 of the Criminal Procedure Code and can direct for retrial.

11. In the light of the aforesaid legal position when the facts of the instant matter are examined, it emerges that the appellant although has alleged that the order for retrial should have been passed by the trial court and the High Court, nothing specific has been pointed out why the matter should be sent for retrial specially when the two of the important witnesses had failed to support the prosecution/complainant version. Apart from this, the complainant herself had failed to disclose as to what exactly was the genesis of the occurrence as also the contents of the abuse which could persuade this court that a *de novo* trial of the accused was essential.

12. Having thus considered and analyzed the facts and the evidence that were brought to the notice of this Court, we are of the view that SLP (Crl.) No.4150/2011 seeking retrial of the complaint case bearing Summary Trial case No. 1/2007 is not fit to be entertained as it is not possible to take a view that the investigation was shoddy or suffered from grave lacunae which would justify the parameters for retrial at the instance of the complainant for the mere asking as it does not meet the legal requirements justifying a retrial. However, it so far as SLP (Crl.) No. 4149/2011 is concerned, it is clearly reflected from the impugned order of the High Court allowing the revision petition

- A at the instance of the accused respondents that it has failed to record any reason whatsoever while exercising revisional jurisdiction for setting aside the order of conviction passed by the Sessions Court which had set aside the order of acquittal of the respondents without examining any evidence more particularly the medical evidence led by the complainant which disclosed that the complainant's father had sustained injuries and was treated at a Government Hospital for several days. Hence, even though we endorse the view of the High Court to the effect that the instant matter might not have been a fit case for referring it for retrial, the High Court certainly had the legal obligation to assign reasons while allowing the revision of the accused respondents stating why it has set aside the judgment and order of the First Appellate Court/Sessions Court while exercising revisional jurisdiction specially when the Sessions Court found sufficient evidence on record to set aside the acquittal of the respondents and upheld their conviction under Section 294 (b) and 323 IPC.

13. Since the High Court has failed to record any reason setting aside the order of the First Appellate Court, when it was exercising merely revisional jurisdiction, we deem it just and appropriate to remand the matter arising out of Criminal Revision No. 620/2008 to the High Court to reconsider and assign reasons for setting aside the order of conviction and recording an order of acquittal of the respondents passed by the First Appellate Court convicting the respondents without specifying and ignoring the medical evidence although it was considering the matter only in exercise of its revisional jurisdiction which has limited ambit and scope. In view of the above discussion, the appeal arising out of SLP (Crl.) 4149/2011 shall be treated as allowed in view of the order of remand of the matter to the High Court for fresh consideration. As already stated, appeal arising out of SLP (Crl.) No. 4150/2011 stands dismissed.

K.K.T.

Appeal disposed of &
remitted back to High Court.

H