(2009) 03 GAU CK 0027

Gauhati High Court

Case No: Criminal Revision No. 798 of 2003

Budul Ahmed		APPELLANT
	Vs	
Kutub Alimazumdar & Ors.		RESPONDENT

Date of Decision: March 1, 2009

Acts Referred:

- Criminal Procedure Code, 1973 - Section 397, 401
- Criminal Procedure Code, 1973 (CrPC) - Section 397, 401

Citation: (2009) 2 GLT 940

Hon'ble Judges: Amitava Roy, J and H.Baruah, J

Bench: Division Bench

Advocate: B.M.Choudhury, I.H.Laskar, J.M.Choudhury, Krishnatraiya, P.K.Deka, Advocates appearing for Parties

Judgement

H. Baruah, J.
In challenge is the judgment of acquittal dated 09.09.2003 rendered by the learned Sessions Judge, Hailakandi in Sessions Case No. 39 of 1999.

2. The brief facts involved in this revision can be encompassed as follows:

Revision petitioner herein, as first informant, lodged an FIR (Ext. 2) with the Officer incharge of Katlicherra Police Station on 10.05.1994 at about 10.45 am alleging inter alia that on the same day at about 8 am Kutub Ali, one of the respondents herein, along with eight others (all respondents except Moinul Mia) trespassed into his land and began to plough over the same. Noticing this, his brother Noor Ahmed raised protest whereby all of them attacked him (Noor Ahmed). Hearing hue and cry Noor Ahmed''s uncles Sofiqur Rahman, Jalal, Niaz and Mozaid came to the spot but they were also assaulted by the respondents along with Moinul with the help of lathi, lenga and dao resulting injuries on their person. On receipt of this information in writing, the Station House Officer of Katlicherra police station registered a case being KatlicherraP. S. Case No. 76of 1994 under Sections

147/148/149/324/447/325/327 IPC. Investigation commenced. During investigation injured Mozaid Ali expired, and for that, Section 302 IPC was incorporated. After due completion of the investigation a charge sheet was laid vide Charge Sheet No. 121 of 1997 dated 17.12.1997 against Kutub Ali and 7 (seven) others namely Ismail Ali, Innus Ali, Surman Ali, Ibrahim Ali, Babu Mia, Akalu Mia and Asab Ali showing Asab Ali as an absconder.

3. Case was committed to the court of Sessions at Hailakandi for trial of the accused (now respondents). The learned Sessions Judge, Hailakandi having found materials sufficient to frame charge against the accused/ respondents was pleased to frame charges under Section 148/324/302/149 IPC. The charges having been explained, each of the accused/respondents pleaded not guilty and claimed trial.

4. At this stage perhaps it would be pertinent for us to refer that the present case under Sessions Case No. 39 of 1999 is a cross case of Sessions Case No. 21 of 2000 which arose out of the same cause of action on lodging of an FIR by the adversary party. It would also be perhaps appropriate for us to refer that the Session Case No. 21 of 2000, after due trial, ended in conviction against which the convicts preferred Criminal Appeal No. 371 of 2003 before this Court challenging the legality and correctness of the judgment and order of conviction.

5. To prove the charges as described herein before, that framed by the learned Sessions Judge, Hailakandi against the respondents herein, prosecution brought 15 witnesses altogether unto the witness box and proved various documents. The Sessions Judge after due trial failed to hold the respondents guilty of the charges and accordingly recorded a judgment of acquittal. Hence this revision.

6. Heard Mr. J. M. Choudhury, learned Sr. counsel assisted by Sri B. M. Choudhury, learned counsel for the revision petitioner as well as Mr. P. K. Deka, learned counsel for the respondents, at length.

7. Mr. J. M. Choudhury, learned Sr. counsel at the very out set of his argument relying on the evidence on record, both oral and documentary submitted that the learned Sessions Judge, Hailakandi committed error and illegality in recording a judgment of acquittal of the respondents. It was argued that the evidence on record as available are aptly sufficient to record a conviction but the learned Sessions1 Judge failed to appreciate such evidence on record in its proper perspective and thus, erroneously recorded the judgment of acquittal. Mr. Choudhury while arguing also admitted that the Sessions Case No. 39 of 1999 being a cross case of Sessions Case No. 21 of 2000, the occurrence is admitted. During the occurrence, both parties sustained injuries as a result of marpit resulting death of one person from each side. When the occurrence is an admitted fact where both party resorted to assault against each other, acquittal of the respondents by the learned Sessions Judge cannot be sustained. It was further argued by Mr. J. M. Choudhury, learned Sr. counsel that the learned Sessions Judge superficially had gone through the evidence

on record without assessing its depth which resulted the judgment of acquittal. Had it been marshalled tooth and nail by the learned Sessions Judge, perhaps, it was argued by Mr. Choudhury, conviction of the respondents could certainly have been recorded without a shadow of doubt.

8. On scrutiny of the judgment rendered by the learned Sessions Judge, Hailakandi we notice that on two grounds in particular, the learned Sessions Judge recorded judgment of acquittal. First, failure on the part of the prosecution to prove the possession of the land in dispute by producing cogent and sufficient evidence. It is true that both the party claimed possession over the plot of land, ploughing over which by the respondent party, a ''marpit'' took place resulting injuries as well as death. So, in order to rope the respondents, it was the duty of the prosecution to prove beyond all reasonable doubt that the land at the relevant point of time was under the possession of revision petitioner''s party and for defence of the property, they resorted to assault on the adversary party. This aspect, according to learned Sessions Judge was not proved by the prosecution by producing cogent evidence. Learned Sessions Judge, therefore, held that when possession was not proved, the adversary party, the respondents cannot however, be branded as aggressors. From the discussions made by the learned Sessions Judge, it appears to our view that Noor Ahmed along with others namely Safiqur, Jalal, Niyaz seeing ploughing over the land by the party (respondents herein); went together where ''marpit'' took place. The learned Sessions Judge, therefore, rejected the claim of the revision petitioner and his party that the land over which the ''marpit'' took place belonged to Noor Ahmed.

9. The second aspect on which the learned Sessions Judge laid much stress is in regard to the injuries sustained mostly by Mozaid AH, the deceased. According to learned Sessions Judge evidence of P. W1, P. W2 and P. W3 appear to be in total conflict in the context of injuries sustained by Mozaid Ali. Learned trial court very cautiously appreciated evidence of P. W1, P. W2 and P. W3 in the context of receipt of the injury (s) by Mozaid Ali and, therefore, the finding of the Sessions Judge, to our view, cannot be said ''to be perverse. P. W1 and P. W2 are the doctors who examined Mozaid Ali and three others on 10.05.1994. P. W1 examined all the injured including Mozaid Ali at Katlieherra PHC while P. W2 examined all of them at Hailakandi Civil Hospital referred by Katlichera PHC. P. W3 is another doctor who conducted autopsy on the dead body of Mozaid Ali on 21.5.1994. P. W1 while examined Mozaid Ali, discovered an incised wound over the right parietal region about 10 cm x ''/2 cm x skin deep, which was simple and caused by sharp object. But when the injured Mozaid Ali was examined at Hailakandi Civil Hospital by P. W2, he found one lacerated injury of size 1 cm x 1A cm x bone deep over the vertex and an abrasion of size 1 cm x 1 cm over the left elbow joint. P. W2 opined that injuries were simple and fresh and caused by blunt weapon. P. W1 while under crossexamination stated that injury sustained by Mozaid Ali was superficial in nature which would not endanger human life. On the other hand P. W2 in his crossexamination stated in all

fairness in respect of injury (s) sustained by Mozaid Ali that, he (Mozaid Ali) was discharged after giving first aid.

10. Having considered the evidence of P. W1 and P. W2, the learned trial court came to a finding that injuries sustained by Mozaid Ali was simple in nature and he was not hospitalized at all. He was discharged after giving first aid per evidence of P. W2, P. W3 who conducted autopsy on the dead body of the deceased Mozaid Ali on 21.5.1994, discovered one 7.5 cm long healed wound vertically placed over the middle of frontal area of scalp and also found skull fractured under the injury described above of size 3 cm x 3 cm. Presence of pus in the frontal lobe of brain was also detected. His opinion as to the cause of death was due to brain abscess.

11. The learned trial court while dealing with the evidence of PW1, PW2 and PW3 conjointly, came to a finding that injury (s) sustained by the deceased which was discovered by P. W3 might not be the result of the ''marpit'' ensued on the day of occurrence i.e. on 10.5.1994. The injury sustained by Mozaid Ali being superficial in nature who was discharged on the same day after giving first aid, discovery of fracture of the skull during post mortem examination according to the learned Sessions Judge raised suspicion about the truth in the context of receipt of the injuries so discovered by P. W3. Occurrence took place as per records on 10.5.1994 at about 8 am and on the same day Mozaid Ali and other injured persons were examined by P. W1 and P. W2 and superficial injury(s) were found on the person Mozaid Ali who, according to the prosecution, succumbed to the injuries received during ''marpit'' ensued on 10.5.1994. According to learned Sessions Judge during the intervening period Mozaid Ali might have received the injury as discovered by P. W3.

12. The learned Sessions Judge broadly depending on these two aspects as described hereinbefore came to a finding that the prosecution was unsuccessful in the proof of charges against respondents and accordingly recorded a judgment of acquittal.

13. Section 397 of the Code of Criminal Procedure deals with the provision for ..for records of the inferior courts to exercise powers of revision while Section 401 of the Code deals with High Court''s power of revision. Ordinarily, while exercising revisional jurisdiction, the High Court will not substitute its views in place of the views of the trial court or the appellate court. If the views adopted by the courts below can be held to be reasonable and does not suffer from perversity, revisional court does not have the jurisdiction to interfere with the finding of the courts be low. Hon''ble Supreme Court while dealing with the case of T. N. Dhakkal Vs. James Basnett & Anr; reported in (2001) 10SCC 419 discussed the revisional power of the High Court while dealing with the case. In that case also the Supreme Court, of course, has not gone into the question of exercise of revisional jurisdiction at the instance of 3rd party and not the State. In paragraph 9 of the judgment the Supreme Court held as under:

"9. We are in agreement with the above exposition of law. We are of the opinion that though the High Court has revisional jurisdiction under Section 41 of the Code and can exercise its discretionary jurisdiction to correct miscarriage of justice, but whether or not, there is justification fur the exercise of that discretionary jurisdiction would depend upon the facts and circumstances of each case. The controlling power of the High Court under Section 401 of the Code being discretionary is required to be exercised only in the interest of justice, having regard to all the facts and circumstances of each particular case and not mechanically."

14. In the case of T. N. Dhakkal (supra) the Supreme Court held that the revisional power being discretionary has to be exercised to correct miscarriage of justice and exercise of such power would depend upon facts and circumstances of each case. It also held that when the judgment rendered by inferior court does not suffer from perversity or unreasonablenej sional jurisdiction of the High Couri under Section 401 has been circumscribed and in that view of the matter it would be unjustified for the High Court to interfere with the trial court order. The same view has been adopted by the Supreme Court while dealing with the case in between Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U. P; reported in (2006) 2 SCC 450. In the case between Allaudin Vs. State of Assam; reported in (2003) 2 GLR 263:2003 (2) GLT394 this High Court also adopted the same view.

15. Admittedly, this revision is not preferred by the State rather it has been preferred by Budul Ahmed, the first informant of the Sessions Case No. 39 of 1999 corresponding to G. R. Case No. 374 of 1994. The Supreme Court while dealing with the case between Thakkappan Nadar & Ors. Vs. Gopala Krishnan & Anr; reported in (2002) 9 SCC 393 discussed High Court''s power of revision in an application filed by defacto complainant against acquittal order. The Supreme Court while dealing with the subject in para 6, 7 and 10 held as under:

"6. In a revision application filed by the de facto complainant against the acquittal order, the Court''s jurisdiction under Section 397 read with Section 401 Cr. P. C. is limited. The law on the subject is well settled. Instead of referring to various judgments, we would only refer to a few decisions rendered by this Court. In Akalu Ahir Vs. Ramdeo Ram this Court has (in SCC pp 58788, para 8) observed thus: "This Court, however, by way of illustration, indicating the following categories of cases which would justify the High Court in interfering with a finding of acquittal in revision:

(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 appeal trial court has wrongly held the evidence whih as admitted by the trial court to be inadmissible;

(iv) Where the material evidence has been overlooked only (either) by the trial court or by the appellate court; and

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

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 justifiable interfere with the order of acquittal."

The Court further observed (SCC p. 588, para 10)

10. No doubt, the appraisal of evidence by the trial Judge in the case in hand is not prefect 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 reappraise the evidence for itself as it is acting as a court of appeal and then order a retrial. It is unfortunate that a serious offence inspired by rivalry and jealousy 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.

7. In our view, the emphasized portion of the aforesaid judgment is applicable in the present case. It is unfortunate that such a serious offence inspired by rivalry in the matter of election should go unpunished. However, that would not be a valid ground for ignoring or for not strictly following the law as enunciated by this Court, which does not empower the court exercising the revisional jurisdiction to reappreciate the evidence.

10. In the present case also, the High Court has not found any procedural illegality or manifest error of law in the order passed by the Sessions Judge. The High Court has merely reappreciated the evidence and arrived at the conclusion that there was no reason not to rely upon the injured witnesses P. W1, P. W2 and P. W4 and that when there is an attack by a large group of people armed with lethal weapons and when they belong to an organized group like RSS, the people of the locality may be like terrorised(sic) and might be unwilling to testify even if they had actually seen the occurrence. The High Court observed that the victims in the case no doubt belong to the rival party, but that does not render their evidence interested or partisan and thereafter set aside the acquittal order passed in appeal by the Sessions Judge and remitted it for fresh hearing and disposal by observing that the Court would decide the matter unhampered by any of the observations contained in the order. From the findings recorded by the High Court, it is difficult to hold that there was any manifest error of law or procedure. It is nobody''s case that the appellatecourt has shut out or Has overlooked the evidence which clinches the issue. The High Court has only reappreciated the entire evidence and has taken contrary view for setting aside the acquittal order. This, in our view, is not permissible while exercising the revisional jurisdiction at the instance of the de facto

complainant against the order of acquittal."

16. In the case of Thakkappan Nadar (supra) Supreme Court held that in a revision application filed by defacto complainant against the order of acquittal, the Court''s jurisdiction under Section 397 read with Section 401 of the Code is limited. High Court while dealing with such application does not have the power to reappreciate the evidence.

17. Here in this present revision, the learned Sessions Judge, Hailakandi while appreciating evidence on record both oral and documentary came to a finding that prosecution was unsuccessful in proving the charge framed against the respondents and, therefore, recorded a judgment of acquittal. The revision is admittedly not filed by the State rather it has been filed by Budul Ahmed, the first informant of the G R. Case No. 374 of 1994. Admittedly, Budul Ahmed is defacto complainant and as per law enunciated by Supreme Court, the High Court does not have the revisional jurisdiction to reappreciate the evidence on record. We have already discussed herein before that the learned Sessions Judge recorded judgment of acquittal basing broadly on two grounds namely failure to prove possession of the disputed land and the conflict that crept in, in respect of the injury (s) sustained by Mozaid Ali, the deceased per evidence of P. W1, P. W2 and P. W3.

18. We, after careful scrutiny of the entire facts and circumstances of the case, evidence on record and the judgment rendered by the learned trial court, find no room to interfere with the judgment or to substitute a view reverse to that arrived at by the learned

Sessions Judge, Hailakandi. The judgment to our humble opinion is not perverse per facts and circumstances of the case and evidence on record.

19. Revision fails.