(2002) 12 GAU CK 0027

Gauhati High Court (Agartala Bench)

Case No: Criminal Rev. P. No. 49 of 1997

Chandra Lal Das and Others	APPELLANT
Vs	
State of Tripura	RESPONDENT

Date of Decision: Dec. 16, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 386, 391

Citation: (2003) CriLJ 2162 : (2003) 2 GLR 57 : (2005) GLT 75 Supp

Hon'ble Judges: Aftab H. Saikia, J

Bench: Single Bench

Advocate: M. Kar Bhowmik and A.K. Deb, for the Appellant; D. Sarkar, PP, for the Respondent

Final Decision: Allowed

Judgement

A.H. Saikia, J.
Heard Mr. M. Kar Bhowmik, learned senior counsel along with Mr. A.K. Deb, learned counsel for the petitioners and Mr. D. Sarkar, learned Public Prosecutor for the respondent.

2. This criminal revision has been laid against the Judgment and order dated 5.9.1997 passed by the learned Additional Sessions Judge, Belonia, South Tripura in Criminal Appeal No. 16(2)797 setting aside the Judgment and Order of conviction and sentence dated 21.5.1997 passed by the learned Sub-Divisional Judicial Magistrate, Belonia, South Tripura in connection with G.R. 97/1994 and remanding back the matter to the learned Trial Court for recording evidences of the ''remaining material witnesses'' and for passing Judgment afresh accordingly.

3. The prosecution case, briefly stated, is that, on 13.5.1994 at about 6.30 a.m., the appellants-accused persons having formed unlawful assembly armed with deadly weapons entered into the house of the informant, Smt. Bhagyabati Majumder and forcibly took away her son, Sri Haradhan Majumder and assaulted him mercilessly

causing grievous hurt on his person. While the father of the victim attempted to rescue his son, he was also assaulted and sustained grievous injury. On receipt of the FIR, Police registered a case under Sections 148/149/325/448 of IPC and on completion of investigation. Police submitted charge-sheet against all the five accused persons/appellants under the aforesaid sections.

4. During trial, the prosecution examined as many as 7 witnesses in support of its case, though there were altogether 17 charge sheeted witnesses, including the victims, Sri Haradhan Majumder and Sri Ananta Majumder. It appears that the aforesaid two injured persons, i.e., Sri Haradhan Majumder and Sri Ananta Majumder including the medical officer could not be examined on behalf of the prosecution. Upon examination of those prosecution witnesses and on perusal of the materials available on record the learned Trial Court found the appellants/accused persons guilty of the offences u/s 325 read with Section 149 of IPC holding that the prosecution established its case beyond the shadow of reasonable doubt against the accused persons/appellants and accordingly convicted and sentenced them vide Judgment dated 21.5.1997 to suffer R.I, for one year each.

5. Being aggrieved by the said conviction and sentence, the appellants preferred the criminal appeal before the learned Additional Sessions Judge, Belonia, South Tripura in Criminal Appeal No. 16(2)/1997 and the learned Additional Sessions Judge upon hearing the learned counsel for the parties and on perusal of the records of the learned Trial Court by his impugned Judgment and Order dated 5.9.1997, instead of disposing the appeal on merit, set aside the order of conviction and sentence passed by the learned Trial Court and remanded back the case as already mentioned above.

6. The only challenge made in this revision is against the order of remand with a condition for recording evidence of the ''remaining material witnesses'' by the learned Trial Court and for passing Judgment afresh. The initial conviction and sentence of the petitioners was u/s 325 read with Section 149 of IPC as noted hereinabove and the petitioners were sentenced to undergo R.I. for one year each. The learned Appellate Court being confronted with the aforesaid Judgment and conviction observed that out of 17 witnesses, only 7 witnesses were examined by the prosecution without securing attendance of the other prosecution witnesses, especially the victims and injured, Shri Haradhan Majumder and Sri Ananta Majumder as well as the medical officer. The learned Additional Sessions Judge viewed that all the process ought to have exhausted by securing the attendance of all the witnesses and the prosecution was not justified in closing the prosecution evidences without examining those material witnesses and accordingly, the Court felt it to be justified to remand the case for recording evidence of ''remaining material witnesses'' for ends of Justice.

6. In passing the impugned Judgment and order, the learned Appellate Court observed as follows :

"4. On perusal of the record of the trial Court I find that altogether 17 witnesses were listed by the I.O. with the charge-sheet including the victims Haradhan Majumder and Ananta Majumder and the medical officers who examined the injured victims in the hospital, I do not understand how the learned counsel of the prosecution prayed for closing the prosecution evidence before examination of the material witnesses including the I.O. It is apparent on the face of the record that the victims Haradhan Majumder and Ananta Majumder as alleged sustained grievous injuries as per the injury reports but both the victims are not examined and the injury reports also are not taken to evidence. A court of law cannot consider the materials on record which are not legally taken to evidence as per the provisions of the Evidence Act. On perusal of the record of the trial Court I do not find that all process are exhausted to secure the attendance of the witnesses and that even after exhausting of all the process the attendance of witnesses could not be procured.

There is nothing before me on record that all the necessary process prescribed by law was issued to secure the attendance of victim Haradhan Majumder and that of the Medical Officers who are listed as witnesses. Before examination of all the material witnesses, in my view we should not come down to the findings of either conviction or acquittal of the accused in a case. If the witnesses do not appear before the Court in pursuance of the summons in that event warrant of arrest may be issued against the concerned witness as per Section 87 of Cr.PC. Only in the event, after the issue of warrant of arrest the attendance of the witness could not be procured then only it would be justified for the prosecution to close the prosecution evidence of a material witness.

5. In the present case I find that all the material witnesses as listed with the charge-sheet wore not examined by the trial Court and hence after a careful consideration of all the aspects I feel it justified to remand the case for recording the evidence of remaining material witnesses for fair ends of justice and to pass the judgment afresh."

7. Before delving upon the issue in question it would be apt and appropriate to refer to the power of Appellate Court as has been enshrined in Section 386 of Cr.PC. The Sub-clause (i) of Clause (b) of Section 386 of Cr.PC would be relevant in the instant case since the matter relates to an appeal against the conviction and the same may be extracted as under :

"386. Powers of the Appellate Court. - After perusing such record and hearing the appellant or his pleader, if he appears, and the public prosecution, if he appears, and in case of an appeal u/s 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) ***

(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) * * ** * * * * ** **

(iii) * * * * ** * * **"

8. An ordinary reading of the aforequoted provision reveals in its clear and unambiguous language that the Appellate Court has the power to remand the matter for re-trial, meaning thereby, re-trial of the entire matter afresh. There is no scope for any direction for examination of the witnesses etc., in passing the remand order. If the Appellate Court thinks that any additional witness is necessary for proper adjudication of the case in hand it has to fall back upon the provision of Section 391 of Cr.PC which has clearly envisaged for taking further evidence by the Appellate Court or empowering the Appellate Court to give direction to the Court below for taking necessary additional evidence, if so required.

9. For the sake of convenience Section 391 of Cr.PC is also quoted as under :

"391. Appellate Court may take further evidence or direct it to be taken. -

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Sessions or a Magistrate.

(2) When the additional evidence is taken by the Court of Sessions or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall there upon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

10. In view of the above quoted provisions of law it is held that the Appellate Court has two options either (1) it may remand the case for re-trial afresh on hearing the appeal against conviction; or (2) it may direct the court below to record additional evidence, if necessary and thereafter to send the matter before the Appellate Court which on receipt of the evidences so recorded afresh by the court below, shall proceed to dispose of the appeal.

11. In the instant case, the remand of the case ordered by the learned Additional Sessions Judge is unknown and contrary to the provision of law as discussed above. It appears from the perusal of the Judgment that the learned Appellate Court has not exercised the power in ordering re-trial in terms of the above provisions of law

and such order of remand is not permissible under the Code, because once a retrial is permitted by the Appellate Court, the evidence already on record is deemed to be obliterated off from the record. More so, the power of retrial should be exercised only in exceptional cases where the Appellate Court is satisfied that the Court trying the case lacks jurisdiction or trial has been vitiated due to certain serious irregularities or illegalities. It is settled law that this power cannot be exercised for allowing the prosecution to fill up the lacuna in the prosecution case. In Ukha Kolhe, Appellant v. The State of Maharastra, Respondent, reported in AIR 1963 SC 1531 the Hon''ble Apex Court while dealing with a case of similar nature observed at paragraph 11 as follows :

"11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the Prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

12. In view of the aforesaid judicial authority this Court is of the considered view that the impugned Judgment and Order cannot be construed to be an order of remand and oven if it is to be so construed no cogent or plausible reasons have been recorded by the learned Additional Sessions Judge in ordering a retrial. Besides, if the additional evidence is necessary to be taken; the learned Appellate Court ought to have exercised its power u/s 391 of Cr.PC as quoted above, but from the order of the learned Judge it does not reveal that he has exercised the power so entrusted upon him under the provisions of said section. Had he exercised his power u/s 391 of Cr.PC the question of setting aside the Judgment of conviction and sentence passed by the learned trial Court and directing it to pronounce fresh Judgment after examining the witnesses would not have arisen. Accordingly, this Court is of the considered view that a direction by the learned Appellate Court to pronounce a fresh decision after recording the evidence of the material witnesses is wholly illegal and unauthorised which is not sanctioned and justified by Section 386(b)(i) as well as Section 391 of Cr.PC.

13. For the reasons and observations as stated above, this court is of the considered view that the impugned Judgment and order is bad in law and has to be set aside.

14. In the result, this criminal revision is allowed and the Judgment and Order of remand is hereby set aside. The criminal appeal curing No. 16(2)/1997 is restored to its file and the learned Additional Sessions Judge shall make an endeavour to dispose of the appeal in accordance with law in the light of the aforesaid observations as expeditiously as possible keeping in view the matter being an old one. Accordingly, the case is remanded back. The case records be sent down forthwith.