

(2010) 07 CAL CK 0067

Calcutta High Court

Case No: C.R.R. No. 3210 of 2005 and C.R.R. No. 1176 of 2004

Anil Kumar Biswas and Others,
Nakari Ghosh

APPELLANT

Vs

State of West Bengal and
Another , Anil Biswas and Others

RESPONDENT

Date of Decision: July 28, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 360, 361, 401, 482
- Explosive Substances Act, 1908 - Section 3, 4
- Penal Code, 1860 (IPC) - Section 307, 323, 324, 326, 334
- Probation of Offenders Act, 1958 - Section 3, 4

Citation: (2010) 4 CALLT 112

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: Sekhar Basu, Debasish Roy and S. Dutta, in C.R.R. No. 3210 of 2005, Depanjan Chatterjee and Prabir Majumder, in C.R.R. No. 1176 of 2004, for the Appellant; S.S. Roy in C.R.R. No. 3210 of 2005 Kallol Kr. Basu and Arijit Pyne, in C.R.R. No. 1176 of 2004, for the Respondent

Judgement

Prasenjit Mandal, J.

These two applications have been filed u/s 401 read with Section 482 of the Code of Criminal Procedure, 1973. The applicants of the C.R.R. No. 3210 of 2005 have prayed for quashing the Judgment and order dated 30.09.2005 passed by the learned Additional Sessions Judge, Fast Track Court, Kandi in Criminal Appeal No. 2 of 2004 thereby confirming the Judgment and order dated 16.03.2004 passed by the learned Sub-Divisional Judicial Magistrate, Kandi in G.R. Case No. 369 of 1992 convicting and sentencing the applicants of the C.R.R. No. 3210 of 2005 to pay a fine of Rs. 1000/- each if default to suffer simple imprisonment for one month each for offences punishable under Sections 323/34 of the I.P.C. The applicant No. 1 was also

convicted and sentenced to suffer simple imprisonment for six months and to pay a fine of Rs. 1,000/-, in default to undergo further period of one month simple imprisonment for commission of offence u/s 324 of the I.P.C. The convicts have filed the C.R.R. No. 3210 of 2005 for setting aside the said order of conviction and sentence.

2. On the other hand, the de-facto complainant filed the C.R.R. No. 1176 of 2004 for setting aside the Judgment and order dated 16.03.2004 passed by the learned Sub-divisional Judicial Magistrate, Kandi in G.R. Case No. 369 of 1992 convicting the opposite party Nos. 1 to 8 therein for offences u/s 323/34 of the I.P.C. in respect of all the accused persons and u/s 324 in respect of the opposite party No. 1 therein with the sentences just mentioned above.

3. Since the identical issue is involved; these two applications are disposed of by this common judgment.

4. The prosecution case in short is that on 23.07.1992 at 6.30 p.m. when Sri Nakari Ghosh, de-facto complainant, of the G.R. Case came out of his house and he was attacked and assaulted by the convicted persons. At that point of time, Anil Biswas hurled a bomb upon Braja Nath Biswas from his varandah causing serious injury to him. He became unconscious then he was taken to the Bharatpur police station. He was then referred to the Baratpur Primary Health Centre. Then he was sent to the Kandi Sub-Divisional Hospital as the condition of the injured was very serious. On that very day, an FIR was lodged by Nakari Ghosh. Police investigated the case and submitted the chargesheet against the convicts for the offences punishable under Sections 323/324/326/341/34 of the Indian Penal Code read with Sections 3 and 4 of the Explosive Substances Act. The learned Additional Sessions Judge, Berhampur framed charge under Sections 323/324/34 of the I.P.C. and directed that the case shall be tried by the learned Magistrate. Accordingly, the learned Sub-divisional Judicial Magistrate, Kandi held trial of the case and found the applicants of the C.R.R. No. 3210 of 2005 guilty under the Sections mentioned above and passed sentences as stated above. An appeal was preferred by the convicts before the learned Additional Sessions Judge, Fast Track Court, Kandi, District - Mursidabad and the learned appellate court confirmed the conviction and sentence passed by the learned Sub-divisional Judicial Magistrate, Kandi dated 16.03.2004. The de-facto complainant preferred the application bearing C.R.R. No. 1176 of 2004 and the convicts have preferred the C.R.R. No. 3210 of 2005. Now, these two applications are under consideration.

5. The learned Advocate for the applicants of the C.R.R. No. 3210 of 2005 submitted that the applicants had to file several revisional applications before the Hon"ble High Court for expeditious disposal of the case. Ultimately, the trial of the case by the learned Sub-divisional Judicial Magistrate, Kandi was completed on 16.03.2004, when the learned Sub-divisional Judicial Magistrate, Kandi convicted the applicants in the aforesaid manner. The learned appellate court confirmed the judgment, of

conviction and sentence on 30.09.2005. The learned Advocate contended that the learned appellate court made his observations in such a way as if he was above the over-reach of the Hon"ble High Court. While it was decided earlier that the trial of the case would be held under Sections 323/324/34 of the I.P.C. the appellate court observed that the case record shows that it is a clear case of Section 307 of the I.P.C. and not u/s 23/324/34 of the I.P.C. He contended that though as per evidence of the medical officer who examined the victim, Braja Nath Biswas, found the injury on his person as simple, the learned appellate court observed that the patient was in the hospital on 23.07.1992 to 05.09.1992. The word simple was written by another ink on the carbon copy and as such the said injury was not simple as the doctor claimed. He also pointed out that the doctor at Kandi hospital had observed that the preliminary treatment of Braja Nath Biswas was made at Bharatpur Primary Health Centre. So the learned appellate court observed that there was surgical interference and cleaning by the doctor of Bharatpur Primary Health Centre. That is why, the P.W. 7, i.e., the medical officer did not find any splinter or bomb on the portion of the injury. These observations are not correct. He also contended that both the courts below did not consider the provisions of the Probation of Offenders Act, 1958 and as such the Judgment of conviction passed by both the Courts should be set aside.

6. On the other hand, the learned Advocate for the State and also for the de-facto complainant submitted that this is a case where the convicted persons dragged the case unnecessarily for a long period in order to avoid conviction and for that reason the convicts moved the higher court including this Hon"ble Court time and again against different orders with the aim of dragging the matter for an unending period. Ultimately, conviction was awarded by the learned Sub-divisional Judicial Magistrate, Kandi and it was confirmed by the learned appellate court. The trial has been done in accordance with law and so there is no illegality or infirmity in the judgment.

7. The learned Advocate for the de-facto complainant also submitted that according to the observations made by the learned appellate court, the sentence was inadequate and so adequate sentence should be passed.

8. Therefore, the points to be decided in these applications are (i) whether the Judgment of conviction and sentence passed by the learned Sub-divisional Judicial Magistrate, Kandi dated 16.03.2004 and (ii) that of the appellate court dated 30.09.2005, should be affirmed.

9. After hearing the submission of the learned Counsel of both the sides and on perusal of the materials on record, I find that the case was dragged for a long period at the instance of the applicants of the C.R.R. No. 3210 of 2005. Ultimately, on 16.03.2004 the learned Sub-divisional Judicial Magistrate, Kandi convicted and sentenced the applicants of the C.R.R. No. 3210 of 2005. Though the learned Advocate for the applicants of the C.R.R. No. 3210 of 2005 have raised several

contentions as described above, on careful perusal of the evidence on record, I find that the Judgment of conviction and sentence passed by the learned Sub-divisional Judicial Magistrate, Kandi is not without any basis or substance. There is enough evidence to support the conviction and sentence. Thus, I find that both the courts below held the concurrent findings with regard to the conviction of the applicants of the C.R.R. No. 3210 of 2005. Upon due consideration of the material evidence, I am of the view that the Judgment passed by the learned Sub-divisional Judicial Magistrate, Kandi is not perverse or without any evidence. It is duly supported by the learned Additional Sessions Judge, Fast Track Court, Kandi by assigning adequate reasons. This Court is not dealing with any appeal but exercising revisional jurisdiction u/s read with Section 482 of the Cr.P.C., 1973. So, this Court has a very limited scope to consider the legality, correctness and the propriety of the judgment. So far as the legality and propriety are concerned, I do not find any material to hold the view contrary to the views taken by the trial court and as well as the appellate court. As regards correctness of the same, upon due consideration of the materials on record, I find that the provisions of Probation of Offenders Act, 1958, have not been properly considered by the courts below before awarding the sentences and confirming the same by the appellate court subsequently.

10. Mr. Roy, appearing on behalf of the opposite party in C.R.R. No. 3210 of 2005 refers to the following decisions for consideration of the Court:

1. In the case of *Gulzar v. State of M.P.* reported in (2007) 2 C Cr LR (SC) 172. By referring this decision Mr. Roy has submitted that when the trial court convicted an accused person for the offence of theft of money and valuables the successive appeals were dismissed. Nevertheless, neither Court applied the provisions of the Probation of Offenders Act, 1958 or Section 360 of the Code of Criminal Procedure, 1973 nor gave any reason for not applying the same. The Hon'ble Supreme Court also did not find any infirmity in the judgments of findings and conviction of the accused. Yet the order of remand was passed for consideration of the applicability of Sections 3 and 4 of the Probation of Offenders Act and Section 360 of the Code of Criminal Procedure, 1973. In the case of [Bishnu Deo Shaw Vs. State of West Bengal](#), . He has referred that according to the provisions of Sections 360 and 361 the question of rehabilitation is to consider having regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed and thus, the convicts should be dealt with such provisions of the Cr.P.C., 1973. In the case of *Dilip Kumar Mukherjee v. Central Bureau of Investigation and Ors.* reported in (2007) 2 C Cr LR By referring this decision he has submitted that court should also take note of the fact that a long period of time has been consumed to complete the trial and that during such time the accused persons must have spent time in terrible mental agony. In view of the above facts and circumstances, I am of the opinion that the courts below should have properly dealt with the provisions of the Probation of Offenders Act, 1958 to see before awarding sentences whether the convicts could be dealt with the provisions of the Probation

of Offenders Act, 1958.

11. This being the position, I am of the view that the Judgment of conviction as passed by the learned Trial court and duly affirmed by the learned appellate court should be maintained, but the order of sentence against the applicants of the C.R.R. No. 3210 of 2005 should be set aside directing the appellate court to consider afresh whether the convicts could be dealt with the provisions of the Probation of Offenders Act, 1958.

12. Accordingly, the order of sentence passed by the learned Sub-divisional Judicial Magistrate, Kandi dated 16.03.2004 in G.R. Case No. 369 of 1992 is set aside. Consequently, the order of affirmation of the sentence passed by the learned appellate court against the applicants of the C.R.R. No. 3210 of 2005 is also set aside. The Criminal Appeal Case No. 2 of 2004 is sent back to the learned Additional Sessions Judge, Fast Track Court, Kandi to consider if the convicts could be dealt with the provisions of the Probation of Offenders Act, 1958. He shall proceed from the stage of conviction against the convicts to consider if they could be dealt with the provisions of the Probation of Offenders Act, 1958. Thereafter, he shall pass appropriate orders in accordance with law.

13. The learned appellate court, Kandi shall dispose of the criminal appeal within 30 days from the date of communication of this order.

14. The convicts are directed to appear before the learned appellate court, Kandi for receiving necessary directions from the learned Court on 06.08.2010 at 10.30 a.m. without fail.

15. The two applications bearing C.R.R. No. 3210 of 2005 and C.R.R. No. 1176 of 2004 are disposed of with the above observations.

16. Considering the circumstances, there will be no order as to costs.

17. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.