

Khetrabasi Samual Etc.

Vs

The State of Orissa

Criminal Appeal Nos. 160 and 171 of 1967

(P. Jagmohan Reddy, S. M. Sikri, G. K. Mitter JJ)

14.08.1969

JUDGMENT

MITTER, J. -

1. These two appeals by special leave from one judgment of the High Court of Orissa hearing an appeal from an order of acquittal of 31 persons accused on charges under Section 147, 323 and 325 of the Indian Penal Code for being members of an unlawful assembly and having voluntarily caused hurt and inter alia a grievous one by dislocating a tooth by means of a knife-like thing of one Jagabandhu Behera, the appellants before the High Court.

2. The incident is alleged to have happened on October 4, 1963 at about 11 a.m. in village Anantapur in course of which the accused persons are said to have assaulted Jagabandhu Behera with lathis and sharp instruments. The motive for the crime was said to be enmity arising out of a Gram Panchayat election and previous litigation between Jagabandhu Behera and Khetrabasi Samual, one of the said 31 persons. The first information report was lodged at 5 p.m. by one Maguni Charan Biswal who however was not examined at the trial. In this report ten persons were stated to have taken part in assaulting and hurting Jagabandhu. More than six weeks thereafter Jagabandhu filed a complaint before a Magistrate in which he named 31 persons including those against whom the first information report had been lodged as his assailants. The complainant stated therein that he had been assaulted so mercilessly as to render him unconscious and he recovered consciousness in Anantapur Dispensary where he was treated by a doctor. From there he was taken to a hospital in Cuttack and was lodged there till November 18, 1962.

3. The Magistrate examined the complainant on the same day and directed another Magistrate of the First Class to inquire and report. On January 23, 1963, after getting the report of such inquiry and hearing the person against whom the complaint was made on their protest petition, the Magistrate held "that there was a prima facie case against the accused persons under Sections 147/323 I.P.C. except the first ten accused persons as per the complaint petition since they had already been sent for trial in G.R. No. 1943 of 1962". He took cognizance against accused persons from serial Nos. 11 to 31 as per the complaint petition under Sections 147/323 I.P.C.

4. The G.R. case had already been started on the basis of the first information report. On July 12, 1963, the complainant Jagabandhu Behera filed a petition to club the complaint case along with the analogous G.R. case and after giving a hearing to both parties the Magistrate passed an order on 15th July 1963 to the effect that the two cases were to be clubbed together and provisions of Section 252 Cr. P.C. were to be followed. The proceedings went on for an inordinately long time and ultimately on August 23, 1965, the trying Magistrate delivered a judgment acquitting all the

accused. Jagabandhu Behera filed an appeal to the High Court under Section 417(3) of the Code of Criminal Procedure and the grounds urged in support of such appeal were substantially based on the alleged failure of the Magistrate to take a proper view of the evidence.

5. Before the High Court, a point was taken on behalf of the respondents challenging the maintainability of the appeal as against accused 1 to 10 against whom cognizance was taken on the police report. Among these ten persons are the appellants in the two appeals to this Court. It was urged that as these ten persons had figured as accused in G.R. Case No. 1943 of 1968 an appeal against their acquittal would not lie at the instance of the complainant under Section 417(3) but would only be maintainable if preferred under Section 417(1) by the State Government. It was also contended that mere clubbing together of the two cases, the G.R. case and the complainant's case, for joint trial would not change the character thereof so as to convert the G.R. case into a complaint case.

6. The High Court overruled this objection mainly on the ground that Section 239 Cr. P.C. allowed the trial of a number of persons whether accused of the same offence or of different offences if these were committed in the course of the same transaction. The High Court then considered the merits of the appeal, examined the evidence of the prosecution witnesses and took the view that the testimony of prosecution witnesses 1, 2 and 5 who claimed to have witnessed the incident themselves had been discarded by the Magistrate on extraneous considerations. Sifting the evidence for itself the High Court held that seven of the accused i.e., the appellants to this Court were guilty of some of the charges framed against them and passed sentences ranging from three months to six months in different cases after setting aside the acquittal.

7. It was contended before us on behalf of the appellants that the appeal to the High Court was incompetent and in our view this contention must be accepted. There were two separate cases of which cognizance was taken separately. One was started on the basis of a police report while the other was on the complaint of Jagabandhu Behera. As the accused in both the cases were said to have committed the offences in the course of the same transaction, the cases were clubbed together for the purpose of trial and such a course was clearly permissible under Section 239 Cr. P.C. That did not however alter the nature of the cases so as to affect their appealability under Section 417. The two cases retained their individuality except for the convenience of the trial. If the cases had ended in conviction they would have had to be separately recorded. The first ten accused would have had to appeal from their conviction and sentence in the G.R. case and similarly the remaining accused from the complaint case. If the State did not think it proper to direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal in the G.R. case it might have been open to the complainant to invoke the powers of the High Court under Section 439 of the Code if proper grounds for revision were present.

8. Counsel for the respondents argued that this was a case where we should not allow the appeal on the ground that the High Court had gone wrong in exercising its powers under Section 417(3) of the Code but should send the matter back to the High Court for disposal according to law including the powers under Section 439 of the Code. It was said that Jagabandhu Behera had been beaten up by a number of persons in a public place in broad day light and although there might be infirmities in the evidence adduced on behalf of the prosecution and contradictory statements made by some of the prosecution witnesses, we should not put an end to the proceedings here but send the matter back to the High Court for proper disposal.

9. In our view, the law does not permit such a course to be adopted on the facts of this case. The

powers of the High Court under Section 439 Cr. P.C. although wide are subject to certain limitations. Section 439(4) expressly provides that the section shall not be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

10. This Court has had to examine the jurisdiction of the High Court under this section on several occasions. In *D. Stephens v. Nosibolla* (1951 SCR 284) it was pointed out (see at p. 291) that :

"The revisional jurisdiction conferred on the High Court under Section 439 of the Code of Criminal Procedure is not to be lightly exercised, when it is invoked by a private complaint against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record."

Again in *Jogendranath Jha and Others v. Shri Polailal Biswas* (1951 SCR 676) where the High Court had set aside an order of acquittal of the appellants by the Sessions Judge and directed their re-trial, this Court (see at p. 681) said :

"Though sub-section (1) of Section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by Section 423, sub-section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial court's appreciation of the evidence in the case."

11. In *K. Chinnaswamy Reddy v. State of Andhra Pradesh* (1963-3 SCR 412, 418). The court proceeded to define the limits of the jurisdiction of the High Court under Section 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said :

".....this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.....It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be : where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law."

12. It may be that a case not covered by any of the contingencies mentioned above may still arise. But, where, as here, the appeal court (the High Court in this case) has set aside the order of acquittal almost entirely on the ground that the Magistrate should not have disbelieved the three eye witnesses, viz., P.Ws. 1, 2 and 5, the case clearly falls within the contingencies mentioned in the above decision of this Court. The High Court judgment does not show that the trial court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or overlooked any material evidence. The Magistrate examined the evidence produced by the prosecution. According to him, there was strong enmity between the two parties of Jagabandhu Behera and Khetrabasi Samual and although the incident was supposed to have taken place in front of a large number of shops and before a large gathering, only one person from those shops, P.W. 5 who was a chance witness occasionally going to the place for the purpose of carrying on his business in fish, was examined by the prosecution and there was no explanation for not examining the other witnesses named in the complaint petition. P.W. 1, one of the witnesses mentioned in the judgment of the High Court and relied on by it was the complainant's father-in-law and as such a person interested in the success of the prosecution. Relying on the testimony of the doctor who had examined Jagabandhu Behera, the Magistrate found himself unable to accept the evidence of the prosecution witnesses to the effect that the injury to the tooth was caused by a sharp-cutting instrument in which case other external injuries could not have been avoided. The Magistrate was doubtful as to whether the accused persons had any hand in the commission of the crime and although the assault on Jagabandhu was a brutal one there was, according to the Magistrate, no proof beyond reasonable doubt that it was the accused persons who had committed it. The High Court proceeded to re-appraise the evidence of the witnesses and upset the finding of the Magistrate thereon on the ground that he "had not taken the trouble of sifting the grain from the chaff". Clearly such a course is not permissible under Section 439 of the Criminal Procedure Code. Nor in our opinion the facts and circumstances of this case warrant the ordering of a re-trial by the High Court if it felt disposed to exercise powers under Section 423 Cr. P.C. expressly included in Section 439. Sending the case back to the High Court can serve no useful purpose.

13. As the appeal to the High Court was incompetent, we allow the appeals and direct the cancellation of their bail bonds.

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