Biswanath Ghosh

Vs

State of West Bengal and Others

Criminal Appeal No. 94 of 1987

(A. P. Sen, V. B. Eradi JJ)

16.02.1987

ORDER

1. Special leave granted. Arguments heard.

2. The short question involved in this appeal is whether the High Court was justified in allowing the appeal preferred by the accused persons against their conviction under Section 148 and Section 302 read with Section 149 of the Indian Penal Code, 1860 without having the records of the Court of Session before it and without perusal of the evidence adduced by the prosecution.

3. Normally, this Court, as a matter of practice, is reluctant to interfere with an order of acquittal recorded by the High Court at the instance of a private complainant, but the circumstances of the case are such that there is no other alternative for us but to interfere. We wish to mention that earlier the court had in Special Leave Petition (Crl.) No. 2025/84 dated October 15, 1984 allowed the petitioner-complainant to withdraw the petition to move the High Court for review. The petitioner on December 5, 1984 filed an application for review but the High Court dismissed the same by its order dated February 8, 1985 on the ground that it had no power to review its judgment under the Code of Criminal Procedure, 1973. The complainant has accordingly applied for special leave. The application is much belated but we have no other alternative but to interfere.

4. The facts. Aggrieved by their conviction and sentence under Section 148 and Section 302 read with Section 149 of the Indian Penal Code by the Additional Sessions Judge, Ist Court, Burdwan by his judgment and sentence dated March 19, 1984, the respondents preferred an appeal to the Calcutta High Court. On March 22, 1984 a Division Bench of the High Court (P. C. Barooah and S. Chakravarty, JJ.) admitted the appeal but did not grant bail to the respondents on that date and reserved them liberty to apply for bail later. It directed that the records be requisitioned from the Court of Session. Within a fortnight thereafter i.e. on April 12, 1984, the application for bail moved by the respondents came up for consideration. On that day the appeal was not listed for hearing. The records which had been requisitioned from the Court of the Additional Sessions Judge had not been received and notices of the bail had not been issued. Instead of dealing with the application for bail, the learned Judges appeared to have acted on an alleged concession made by the learned Public Prosecutor and acquitted the respondents.

5. The learned Judges during the course of their order observed that the contention on behalf of the respondents in support of their bail application was that the alleged dying declaration made by the deceased Jagannath Ghose having been disbelieved by the learned Additional Sessions Judge, no reliance could be placed on the testimony of the eye-witnesses as the place of incident was not visible from where they are alleged to have seen the occurrence, and also that about 100 persons had

surrounded the victim and as such it was not possible to definitely state that only the 8 accused i.e. the respondents were involved. After stating this, the learned Judge observed :

> The learned Public Prosecutor in his usual fairness has pointed out that although the witnesses spoke of 4/5 injuries, the deceased had actually 27.

and added that this was a fit case where benefit of doubt should be given to the accused and accordingly said that no useful purpose would be served in having a paper-book prepared and keeping the accused in further agony. In that view, the learned Judges allowed the appeal, set aside the conviction and sentence passed on the respondents on their conviction under Section 148 and Section 302 read with Section 149 of the Indian Penal Code.

6. We are constrained to observe that the procedure adopted by the High Court was not in consonance with the procedure established by law. Under Section 385 of the Code of Criminal Procedure, it was obligatory for the High Court to fix a date for the hearing of the appeal and then send for the records of the Court of Session and hear the parties on merits. There was no warrant for the procedure adopted by the learned Judges in disposing of the appeal in this cavalier manner. It does no credit to any branch of administration of justice that an appeal against conviction should be allowed without the appellant court having the records before it and without perusing the evidence adduced by the prosecution. To say the least, there has been a flagrant miscarriage of justice. It may be, as the High Court records in its order, that the learned Public Prosecutor conceded that there was no evidence but then the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused under Section 148 and Section 302 read with Section 149 of the Indian Penal Code.

7. The result therefore is that the appeal succeeds and is allowed. The order of acquittal recorded by the High Court is set aside and we direct the High Court to admit the appeal to its file and dispose it of afresh after notice to the parties and after the records requisitioned are received by it. After the respondents 2-9 are taken into custody, they may apply to the High Court for being enlarged on bail. The High Court will deal with the application on its merits.

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