

Abdul Hamid Vs. Juman

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SooperKanoon Citation : sooperkanoon.com/457309

Court : Allahabad

Decided On : Sep-13-1949

Reported in : AIR1950All266

Judge : Desai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 417, 439, 439(1) and 439(4); [Indian Penal Code \(IPC\), 1860](#) - Sections 403

Appeal No. : Criminal Revn. No. 530 of 1949

Appellant : Abdul Hamid

Respondent : Juman

Advocate for Def. : Prakash Chandra, Adv.

Advocate for Pet/Ap. : Suresh Narain Mulla, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Desai, J.

1.This is rather an unfortunate case because the learned Sessions Judge who decided the appeal has done so on mere surmises and thereby caused injustice to

the applicant. The applicant paid Rs. 400 to the opposite party Jumman in order to buy from him a sewing machine at Calcutta. But the opposite party neither bought the machine nor returned the money to the applicant. The applicant thereupon prosecuted him under Section 406 and succeeded in the trial Court but not in the Sessions Court. The defence of the opposite party in both the Courts was that the applicant had paid the money not to him but to one Abdul Majid and he even led evidence to prove this. But it has been found by both the Courts that the money was paid to the opposite party. On this finding he should have been convicted because he has not bought the machine and has misappropriated the money. His denial of the receipt of the money is nothing but misappropriation. The learned Sessions Judge, however, made out a defence which was never pleaded by the opposite party, and is even inconsistent with his case. He thought (without any evidence) that the opposite party paid the money to Abdul Majid in order to buy the machine and that if Abdul Majid did not buy the machine and does not return the money to the opposite party, the latter cannot be held guilty of criminal misappropriation. Had the opposite party admitted to have received the money and pleaded that he acted bona fide in paying it to Abdul Majid, he would have been entitled to be acquitted on that ground. But he himself did not admit that he had received the money and paid it to Abdul Majid and the learned Sessions Judge was not at all justified in presuming without any evidence that this was the case. It was not for him to make out a case which was not supported by any evidence on the record. He should have decided the matter on the basis of the material on record and not on mere surmises. What the opposite party told the applicant on his demand of the money is certainly no evidence of its truth. The acquittal of the opposite party to him is clearly unjust.

2. Though a prayer is made in this application that I should set aside the order of acquittal and convict the opposite party, it is conceded, and it is also the law, that I cannot alter the finding of acquittal into one of conviction and that the most that I can do is to order retrial. I have to see whether a retrial would be justified.

3. Different Courts have expressed themselves differently about the circumstances in which a retrial can be ordered on revision against acquittal. The power to interfere with acquittal on revision has never been disputed ; the very provision

that on revision a finding of acquittal cannot be converted into one of conviction shows that a High Court can interfere with acquittal on revision. Since it cannot convert a finding of acquittal into one of conviction, it can only order retrial. The problem is to know in what circumstances a High Court would be justified in ordering a retrial. I should make it clear here that when the acquittal is by the trial Court itself, the retrial has to be by it; there is no appellate Court to be considered. When, however, the acquittal is by an appellate Court, there are two Courts which can be ordered to retry the case--the trial Court which can be ordered to retry the case, and the appellate Court which can be ordered to retry or rehear the appeal. In such a case the retrial can be only by the appellate Court because it is that Court's judgment of acquittal that is set aside. The trial Court having convicted, cannot be ordered to retry the case. There will be no sense in ordering it to retry the case when it would have nothing to do but to confirm its previous judgment. This view is in conformity with the view taken by a Full Bench of this Court in *Queen Empress v. Balwant*, 9 ALL. 134: (1886 A W N 322 F. B.) and followed in *Ma Thaung v. Nandiya* A.I.R. (25) 1938 Rang. 193; (39 Cr. L. J. 623). In the present case it was the Sessions Judge who set aside the conviction of the opposite party and, therefore, if any retrial is to be ordered it would be of the appeal heard by him.

4. In *In re Hardeo*, 1 ALL. 130, Pearson J. laid down, at page 141, that retrial can be ordered where the acquittal is 'by reason of some material error in a judicial proceeding'; Turner J. laid down at p. 142, that it can be ordered where the acquittal is due to a material error, that is, 'such an error as makes the proceeding bad in law'; and Spankie J. laid down at p. 144 that: 'if there is a revision at all, it must be on some purely material error (in law) in the proceedings'. In *Pahalwan Singh v. Sahib Singh*, 19 A. L. J. 382 : (A. I. R. (8) 1921 ALL. 76 : 22 Cr. L. J. 597), Stuart J. stated that the power to interfere with acquittal on revision should be used very sparingly. *Faujdar Thakur v. Kasi Chaudhri*, 42 Cal. 612: (A. I. R. (2) 1915 Cal. 388: 16 Cr. L. J. 122), is a well-known case laying down that a High Court 'should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice'.

In re Netesa Padayachi 16 Cr. L. J. 558 : (A.I.R. (3) 1916 Mad. 1106), Sankaralinga Mudaliar v. Narain Mudaliar, 45 Mad. 913: (A. I. R. (9) 1922 Mad. 502: 23 Cr. L. J. 583 (F. B.) and In re Faredoon Cawasji, 41 Bom. 560 : (A. I. R. (4) 1917 Bom. 226: 18 Cr. L. J. 668) have followed Faujdar Thakur v. Kasi Chaudhri, 42 Cal. 612: (A. I. R. (2) 1916 Cal. 388 : 16 Cr. L. J. 122). In Krishna Namdeo v. Sulaiman, 49 Cr. L. J. 894: (A.I.R. (35) 1948 Nag. 276) it was stated that there should be no interference with acquittal in the absence of exceptional circumstances that would justify a second trial. Bind Basni Parsad J. in Mohammad Sattar v. Bihari Lal : AIR1948 All339 was of the opinion that a High Court should interfere only when the case is of a serious nature. He was dealing with an offence punishable with imprisonment extending up to two years only and did not consider the case serious enough for interference in revision. In the case of Pahalwan Singh, (19 A. L. J. 882: A. I. R. (8) 1921 ALL. 76: 22 Cri. L. J 597) Stuart J. observed that 'except in the most serious cases and in the event of grave miscarriage of justice no High Court should interfere in revision.'

He was also dealing with a case which was trivial to a degree. 'Extreme cases' are the only cases in which, according to In re Kisni Baxi Ram, 38 Cr. L. J. 719 : (A. I. R. (24) 1937 Nag. 103), there can be revision against acquittal on the consideration of evidence at the instance of a complainant. In Kamikha Pershad v. Emperor, 28 Cr. L. J. 788 : (A. I. R. (14) 1927 Oudh 345), it was stated that a High Court would not move in the absence of

'some glaring defect either in the procedure or in the view of the evidence taken by the Court below'

because ordering a retrial is

'an extreme step and one which should only be taken where there has been a flagrant miscarriage of justice' (p. 790).

The rule laid down by Stuart A. J. C. in Tilak Ram v. Baggha Singh, 16 Cr. L. J. 352: (A. I. R. (2) 1915 Oudh 203), is that the revisional powers should not ordinarily be exercised because an appeal can always be instituted by Government against the acquittal. Dalip Singh, J. in delivering judgment of the Full

Bench in Partap Singh v. Harnam Singh, A. I. R. (29) 1942 Lah. 70 : (43 Cr. L. J. 453 F. B.) stated that:

'It is only when the record is incomplete or there is a flaw in jurisdiction or where the finding is manifestly wrong or perverse that the High Court will interfere.'

In Rama Murti v. Jai Indra Bahadur Singh, 34 Cr.L J. 661: (A. I. R. (20) 1933 Oudh 257), Raza J. explained on what grounds of law and fact a High Court could interfere with acquittal; on a ground of law, it would not interfere with an error or omission or irregularity unless the same has caused a failure of justice, and on a ground of fact it would not interfere save in exceptional cases as where the judgment is perverse. In Abdul Manir v. Kadir Khan, 38 Cr. L. J. 470 : (A. I. R. (24) 1937 pat. 110), Rowland J. was of the opinion that interference with acquittal is reserved for exceptional cases in which there is "a failure of justice due to some error in a matter of a principle'. The existence of a remedy in a civil Court was held in the Corporation of Calcutta v. Bengal Dooars Railway Co. Ltd. : AIR1940 Cal531 , to be a ground for refusal to interfere in revision. Similarly the fact that the Government can file an appeal against acquittal under Section 417, Criminal P. C., was held to be a ground for refusal to interfere in revision in Tilak Ram v. Baggha Singh, (16 Cr. L. J. 352 : A. I. R. (2) 1915 Oudh 203) (supra), P. D. Shamdasani v. Central Bank of India, Ltd, (No. 1), A. I. R. (31) 1944 Bom. 107 : (45 Cr. L. J. 612 F. B.) and the case of Faujdar Thakur, (42 Cal. 612: A. I. R. (2) 1915 Cal 388 :16 Cr. L. J. 122). Sometimes, however, a High Court has leant towards interference with acquittal on revision on the ground that the matter not being of public interest the Provincial Government would not be interested in filing an appeal. Thus, in cases of defamation, etc., some High Courts have shown greater inclination towards interference than in other cases. If a Magistrate for reasons outside the merits of the dispute really declines to decide the controversy and deals with matters which really do not decide-the complaint before him, it is a case of failure to exercise jurisdiction justifying interference; see Bhagwan Singh v. Arjun Dutt, 18 A. L. J. 846 : (A. I. R. (7) 1920 ALL. 232 : 21 Cr. L. J. 564). If he misquotes the evidence or gives no ground whatsoever for rejecting evidence that is prima facie credible and reasonable, that is said to be a ground for revision; see Nand Ram v. Khazan, 19 A. L. J. 589 : (A. I. R. (8) 1921 ALL. 266: 22 Cr.. L. J. 337). A retrial

was ordered in *Satish Chandra v. Chinta Haran* : AIR1938 Cal613 , on the ground that the lower appellate Court did not direct its mind to the evidence and circumstances on the record in a manner consonant with a proper exercise of appellate jurisdiction.

5. This is a bewildering mass of principles, rules or reasons. Some are too vague for instance those laying stress on miscarriage of justice. There is always miscarriage of justice when a person is acquitted though he should have been convicted. The purpose of justice being to punish the guilty I cannot conceive of greater miscarriage of justice than acquittal of the guilty on conviction of the innocent. Degrees of badness of reasons for acquittal are of no consequence; whether there is miscarriage or not does not depend on whether the reasons are, or are not, hopelessly wrong. Then some decisions conflict with others; for example, the decisions that a High Court should lean towards interference in a case of private interest and other decisions that it should do so only in public interest. Lastly there are some decisions which it would be difficult to reconcile with reason; for example those-which distinguish between acquittal resulting from wrong appreciation of facts and acquittal resulting from application of wrong law, those which state that acquittal in a case punishable with imprisonment of two years is not fit to be disturbed in revision and those which indirectly distinguish between revision against acquittal and revision against conviction.

6. I am decidedly of the view that the real answer to the question in what circumstances a High Court should interfere in revision with acquittal should be sought in the provisions of the Code of Criminal Procedure itself. What a High Court has to see on revision is whether the finding, sentence or order of the subordinate Court is incorrect, or illegal or improper. Section 439 (1) confers unlimited power upon a High Court to pass any order on revision, but Sub-section (4) of the section places a restriction upon the power. I attach great importance to this restriction be-cause it supplies the clue to the solution of the problem. When a High Court can only order retrial on revision, it follows that it should interfere only in a case where retrial is the proper remedy. It would be illogical for it to grant the remedy or retrial in every case just because that is the only remedy it can grant; really it should be granted only when the circumstances call for it. The remedy

must be appropriate to the disease; if a particular remedy is not appropriate to a particular disease, it should not be adopted merely because that is the only remedy within one's power to adopt. The remedy of re-trial is appropriate only when there has been no valid or proper trial. If a Subordinate Court has refused to exercise jurisdiction on any ground whatsoever and the refusal is incorrect, illegal or improper, a High Court can order retrial. If a Subordinate Court, in the exercise of its jurisdiction, has committed an illegality in the procedure on account of which the proceedings can be said to be null and void, that also would be a case for ordering retrial. The illegality, however, must be such as has caused miscarriage of justice. An illegality which has not contributed to the finding of acquittal and which, therefore, cannot be said to have caused miscarriage of justice, is not such as to demand interference by a High Court. If a Subordinate Court wrongly shuts out material evidence of the complainant or admits inadmissible evidence of the accused and is influenced by it in coming to the conclusion of 'not guilty,' that also would be a fatal flaw vitiating the trial. Barring such cases where there has been a refusal to try or the purported trial is in the eye of the law no trial, I cannot imagine a case in which retrial would be an appropriate remedy.

7. If there is no flaw in the trial, no shutting out of relevant and admissible evidence and no reception of inadmissible evidence, the only way of setting right the Subordinate Court's judgment, which is erroneous either on fact or on law, is by proceeding under Section 417. If a Subordinate Court commits an error whether on fact or on law in coming to a conclusion, that would not vitiate the trial. I agree with the authorities which have laid down that a High Court should not attempt to do under the guise of revision what it can do only on appeal. I cannot go to the extent of saying that a High Court should not act in revision at all because the remedy of an appeal under Section 417 is open as that would amount to legislating by denying the power of interference with acquittal and revision which undoubtedly exists. But I am certainly opposed to treating a revision application as an easy substitute for an appeal under Section 417. I am not impressed by the distinction between a case of a personal nature in which the Provincial Government is not likely to be so interested as to be persuaded to prefer an appeal under Section 417 and a case involving some public interest. My view being that retrial should be ordered only when there has been no trial either in fact

or in law, it is irrelevant to consider the nature of the offence. I recall the following principle stated by Tindal L. C. J. in *Booth v. Bank of England*, (1841) 7 Cl. & F. 509 ; (6 Bing. (N. C.) 415). 'Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.' The statutory provision that a High Court acting in revision should not convert a finding of acquittal into one of conviction should be obeyed in letter as well as in spirit, and a High Court should not order retrial in such circumstances as would make that order in effect one of conviction. If I order retrial in the present case, it would have no effect but of ordering conviction by the learned Sessions Judge. There is no flaw in the hearing of the appeal by him. He has not shut out any evidence of the applicant nor has he received any inadmissible evidence offered by the opposite party. He has only come to an erroneous finding from the facts. If that finding is set aside on revision, there remains nothing to be done on retrial but to record conviction. It would be a mockery to say that a retrial of the opposite party is ordered. In the case of *Rama Murti*, (34 Cr. L. J. 661: A. I. R. (20) 1933 oudh 257), Raza J. uttered a warning against admitting an appeal at the instance of a private person in the guise of an application in revision. The learned Judge uttered the warning while discussing when a High Court would interfere on a question of fact. With great respect to the learned Judge I must say that the warning applies in all cases. In *Ma Nyein v. Maung Chit Hpu*, 7 Rang. 538 : (A.I.R. (16) 1929 Rang. 321 : 31 Cr. L. J. 186), Baguley J. observed at p. 540 :

'Where there is no erroneous recording or shutting out of evidence, should I direct a retrial it would be for all practical purposes the same thing as sending the case to a Magistrate with directions to convict and this I do not see my way to do.'

There is a great amount of force in this observation which was approved of by Bose J. in *Jalaluuddin v. Kartik Ram*, 38 Cr. L. J. 433 : (A. I. R. (24) 1937 Nag. 123). In *Ahsan Ullah Khan v. Mansukh Ram*, A. I. R. (1) 1914 ALL. 211 : (15 Cr. L. J. 598), it was laid down by this Court that the revisional powers should not be so exercised as to make one part of the Code conflict with another, as would be the case if acquittal were interfered with in revision so as to give a right of appeal where, such right is definitely excluded by another part of the Code. In the case of *Pahalwan Singh*, (19 A. L. J. 382 : A.I.R. (8) 1921 ALL 76 : 22 Cr.L.J. 597), Stuart

J. was unable to see how the accused is better off if at the complainant's instance he is ordered to be retried and subsequently convicted, and thought that if retrial is ordered and conviction results, the complainant gains by another method the privilege to which he is not entitled under the law. I am in full agreement with this view of the learned Judge.

8. That retrial is not the proper remedy when the complaint is that the judgment of the subordinate Court is wrong, whether on facts or on law, would be obvious from the fact that mere ordering retrial without something more is not guaranteed to get a correct decision. If the case is remanded to the same subordinate Court, it may again come to the same erroneous finding. There is no reason in law why the retrial should be ordered by another Court, but there is nothing to prevent another Court also from coming to the same erroneous finding. An erroneous finding on retrial can be prevented only by the High Court's giving directions to the subordinate Court. Though it was held in one case that this can be done, I do not think it can be done. In a criminal case there is nothing like pleading, issues and disposal of a case on preliminary ground; so there is no question of a High Court's setting aside some findings and ordering retrial of the issues concerned. When a criminal Court decides a case, it decides the entire dispute before it; and if a High Court on revision sets aside the order of acquittal and directs retrial, it either leaves the matter open to the subordinate Court or gives directions to it on those matters on which its views were erroneous in the first trial. If it chooses the first alternative, the subordinate Court is not prevented from coming to the same erroneous finding on retrial. If it chooses the other alternative, it almost decides the whole case and retrial would be only a farce.

9. In *Sambu Chandra v. Munshi Ismail*, 49 Cr. L. J. 628 : (A. I. R. (35) 1948 Cal. 291), the High Court of Calcutta set aside acquittal because the case was dismissed on a wrong application of law. Similarly, in *Hittu Bansi v. Sheo Lal Dinnaji*, 49 Cr. L. J. 822 : (A. I. R. (35) 1948 Nag. 243), acquittal was set aside because the law was incorrectly applied by the lower appellate Court. In *In re Mogul Beg*, 42 Mad, 109 : (A. I. R. (6) 1919 Mad. 658 : 20 Cr. L. J. 49), serious injustice caused by an error of law was said to be a good ground for interference with acquittal. According to *Ma Thaung v. Nandiya*: (A. I. R. (25) 1938 Rang. 193 :

39 Cr. L. J. 623), a High Court must interfere on the ground that the lower appellate Court has misdirected itself on a point of law, point out the error and direct rehearing of the appeal. Even in this Court Alston J. laid down in *Nanhi Bahu v. Dhunde*, 10 Cr. L. J. 417 : (3 Ind. Cas. 908, ALL.), that where acquittal has proceeded solely on a mistaken view of the law, interference in revision is not only justified but demanded. I regret my inability to agree with the proposition so broadly laid down by these authorities. According to the view that I take, the question is not whether the acquittal resulted from an erroneous view of the law or from an erroneous view of the facts. There is no reason why retrial is more appropriate when it has resulted from an erroneous view of the law than when it has resulted from an erroneous view of the facts. Ordering retrial on the ground that the subordinate Court misdirected itself on a point of law would certainly in effect be allowing an appeal at the instance of a private person. It is the established convention of all High Courts not to interfere ordinarily in revision with any order, judgment or sentence on a question of fact. So a High Court does not ordinarily enter into a question of fact in a revision against conviction even. Revision against acquittal is a particular case of revision and it is needless again to consider whether the question on which the revision application is founded is of fact or law.

10. Injustice has been done to the applicant, but he cannot have any remedy from this Court now. The judgment of the learned Sessions Judge is final unless an appeal is filed against it under Section 417. I cannot interfere with it as if I were sitting in appeal, and no case is made out for ordering a retrial.

11. I must, therefore, dismiss this application.