

Gopal Maity Vs. the State

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Court : Kolkata

Decided On : Mar-28-1996

Reported in : (1996)2CALLT250(HC)

Judge : Nripendra Kumar Bhattacharyya, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 374, 386, 401, 408 and 464(2); ;[Indian Penal Code \(IPC\), 1860](#) - Sections 148 and 326

Appeal No. : Crl. Rev. No. 395 of 1995

Appellant : Gopal Maity

Respondent : The State

Advocate for Def. : Manas Ranjan Chakraborty, ;Samiran Giri and ;Md. Mokram Hossain, Advs. and ;Sasanka Kumar Ghosh, Adv.

Advocate for Pet/Ap. : S.S. Roy and ;Mahenda Roy, Advs.

Disposition : Application allowed

Judgement :

Nripendra Kumar Bhattacharyya, J.

1. Heard the submission of the learned Advocate for the petitioners Mr. S.S. Roy appearing with Mr. Mahananda Roy, the learned Advocate for the de facto

complainant, Mr. Manas Ranjan Chakraborty, appearing with the learned Advocates Mr. Samiran Giri and Mr. Md. Mokram Hossain and the learned Advocate for the State, Mr. Sasanka Kr. Ghosh. Considered the materials on record.

2. By this revision under Section 401 read with Section 482 of the Cr.P.C. the petitioners, who were figured as accused in the trial, have come up before this Court to challenge order dated 30-1-95 passed in Criminal Motion No. 208 of 1994 by the learned Additional Sessions Judge, Midnapore, whereby the learned Assistant Sessions Judge allowed the revision as filed by the State, set aside the order of the learned Additional Chief Judicial Magistrate, Tamluk and directed the said Additional Chief Judicial Magistrate to deliver a Judgment on the basis of the evidence on record and to deliver the same within 2 weeks from the date of receipt of his order.

3. This is a case where the petitioners were compelled to hang on the tenterhook due to the bungling in the process of judicial decision for a period spreading for more than two decades.

4. The short background of the case is that the 6 accused persons, namely, Gopal Maity, Madan Maity, Laxmi Pada Maity, Dilip Kumar Maity, Smt, Jayanti alias Nayantra Maity and Sukhada Maity were tried before the Court of the learned Additional Chief Judicial Magistrate in G.R. Case No. 255 of 1977(T.R.No. 63/81) and the learned Additional Chief Judicial Magistrate acquitted Sukhada Maity, Dilip Maity and Smt. Jayanti alias Nayantra Maity from the charges and convicted Gopal Maity for offence under Section 326 of the I.P.C. and sentenced him to suffer rigorous imprisonment for 5 years and also to pay a fine of Rs. 1000/- i.d., to suffer rigorous imprisonment for another 6 months. Madan and Laxmi Pada Maity were also convicted under section 326 of the I.P.C. and sentenced to suffer rigorous imprisonment for 3 years each and also to pay a fine of Rs. 1000/- each, in default, to suffer rigorous imprisonment for another 6 months.

5. That order of conviction and sentence as contained in the Judgment in T.R. No. 63/81 of the learned Additional Chief Judicial Magistrate was challenged before the learned Additional Sessions Judge, 1st Court, Midnapore in Criminal Appeal

No. 2/90, under Section 374 of the Cr. P. C.

6. While disposing the appeal, the learned Sessions Judge took a quire view in the matter. He sent the case back on remand for fresh hearing directing the learned Additional Chief Judicial Magistrate, to amend the charge and to allow the parties to adduce additional evidence, if advised, to allow the defence to cross-examine any witness, if they wants do so. In the ordering portion he set aside the order of acquittal of the 3 accused persons. He also set aside the conviction and sentence of the 3 accused persons who were so convicted by the Trial Court and ultimately he sent back the matter for fresh trial. He also directed that the amended charge would include all the 6 accused, that is, the persons who have been acquitted by the Trial Court.

7. After such direction, the Trial Court framed charge against all the persons, that is, the persons who were originally convicted and the persons who were acquitted for the offence under Sections 148 and 326 of the I.P.C. He also framed charge against accused Gopal Maity under Section 326. He also framed charge against all the persons accused and acquitted earlier under Sections 149 and 326. Charge was framed against Madan Maity and Jayanti Maity and Sukhada Maity who were earlier acquitted for an offence under Section 326. He also framed charge against all the 6 persons who were convicted and acquitted under Section 324. Alternatively he charged Madan Maity, Laksmipada Maly for offence under Section 324. He also framed charge against Dilip Kumar Maity who was acquitted from the charge earlier under Section 323. Gopal Maity was charged for offence under Section 324.

8. The Trial Judge in his appreciation of the judgment of the appeal court understood the order that a fresh Trial has been directed as appears from inner page 3 of the Judgment of the Trial Court. He also understood that he was directed to frame charge against the said accused persons. That will be apparent from the inner page 4 of the Judgment. Be that as it may, the learned Trial Judge on an observation that the case is not maintainable, discharged the accused persons on the ground that no fresh evidence has been adduced by the prosecution.

9. A revision has been taken against the said order and the revision Court by order dated 30-1-95 directed the learned Trial Judge to write down a judgment as was indicated earlier.

10. I have already pointed out that the accused persons who were convicted and sentenced, have preferred an appeal, that is, Appeal No. 2/90.

11. The duty of the Court in an appeal by the accused persons against conviction and sentence is enshrined in Section 386 of the Cr.P.C. Section 386(b) reads as under :

'(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) alter the finding, maintaining the sentence, or

(iii) with or without the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.'

12. So in exercise of power under Section 386(b)(I), the appeal Court can direct retrial but not limited trial, Section 386(a) of the code provides as under:-

'in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.'

13. In the instant case, no such appeal has been preferred against the order of acquittal either by the State or by the de facto complainant.

14. In a curious process the appeal court remanded the case, and set aside the order of acquittal in an appeal preferred by the accused persons against their conviction and sentence. This procedure of law is unknown in the Code of Criminal Procedure.

15. After the remand what has happened that I have stated earlier.

Section 464 of the Cr.P.C. provides as under:-

(1) 'No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby'.

Sub-section (2) of that section reads as follows :-

(2) ' If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge:

(b) In the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit.'

16. The appeal court in its direction for re-trial had fallen back upon clause (b) of Sub-section (2) of Section 464, as found by the Revision Court. Clause (a) of Sub-section (2) of Section 464 of Criminal Procedure Code speaks of a limited trial. This section empowers the trial court to consider the evidence which are already on record. Clause (b) of that Sub-section speaks of framing of new charge and direction for a new trial. That means If there be any new trial then evidence on record already had cannot be considered again,

17. The revisional court directed the Trial Court to amend the charge as contemplated under Section 216 of the Cr. P.C. and directed retrial. Both cannot go together. The appeal court had not only set aside the order of conviction and sentence of the accused persons but also the order of acquittal directed that charge should be framed against all of them by clubbing all of them together.

18. Charge framed in that way is not maintainable in law. An accused who had already been acquitted, cannot be roped into trial for the same offence.

19. I have already pointed out that the learned trial Judge on a findings that no further evidence has been led by the prosecution after framing fresh charge, discharged the accused persons and further found that the trial is not maintainable.

20. That order was the subject matter in revision. The revisional court also in a curious way tried to Justify the order of the appeal Court as if the revision court was asked to clarify the order of the appeal court. That was not the function of the revisional Court.

21. In paragraph 12 of the Judgment, the revisional court observed as under :-

'So, it is clear that the appellate court had directed retrial under Section 464(2)(b) of the Cr. P. C. and not under Section 386(b)(1) of the Cr. P. C. The intention of the appellate court was clear though there was a direction of fresh trial, but in fact, the appellate court did not want a fresh trial in true sense because in that event, the appellate court should not have mentioned in the order that the parties should be given an opportunity to adduce further evidence'.

22. If it is a retrial under Section 464(2)(h) then fresh charge and fresh evidence is to be adduced and the court cannot fall back upon the evidence already on record because it is a new trial. The revisional court found otherwise which cannot be sustained in law. On such a finding the Trial Court was directed to pass judgment ignoring altogether that the evidence already on record cannot be considered for writing a Judgment and the Trial Court has rightly held that as no further evidence has been adduced, the accused persons are liable to be discharged.

23. The order of discharge is not a proper order. But the Trial Court has also held that the proceeding is not maintainable.

24. I have already pointed out that the order of discharge is not a proper order but at the same time I cannot ignore the fact that the case is of 1977 and we are almost knocking at the door of 1997. So, in the meantime almost two decades

have passed and the accused persons are unnecessarily suffering from a sense of insecurity and uncertainty due to bungling of the court and for no fault of their own.

Accordingly, in exercise of my power under Section 482 of the Cr.P.C, I quash the entire proceeding and allow the revisional application.

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