

Ashima Dey Vs. Abhijit Dey and ors.

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Court : Kolkata

Decided On : Dec-21-2004

Reported in : 2006(1)CHN233

Judge : Pravendu Narayan Sinha, J.

Acts : Evidence Act - Section 114; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 325, 326 and 401; ;Code of Criminal Procedure (CrPC) - Sections 222, 222(2) and 311

Appeal No. : C.R.R. No. 823 of 2003

Appellant : Ashima Dey

Respondent : Abhijit Dey and ors.

Advocate for Def. : Ashim Roy, Adv.

Advocate for Pet/Ap. : Utpal Kanti Mondal, Adv.;Kasem Ali Ahmed, Adv.

Judgement :

Pravendu Narayan Sinha, J.

1. De facto complainant Smt. Ashima Dey has preferred the instant revisional application against an order of acquittal dated 10.1.2003 passed by the learned Sub-Divisional Judicial Magistrate (in short SDJM), Howrah in G.R. Case No. 867

of 1996 arising out of Shibpur Police Station Case No. 86 dated 16.5.96 under Section 325 of IPC.

2. Mr. Utpal Kanti Mondal, learned Advocate for the petitioner contended that the de facto complainant lodged the FIR on the basis of which Shibpur P.S. Case No. 86 dated 16.5.1996 under Section 326/34 of Indian Penal Code (in short IPC) was started against the accused opposite parties 1 and 2 and after completing investigation chargesheet under Section 325/34 of IPC was submitted against the accused persons. In the trial that followed thereafter in the Court of learned SDJM, five witnesses were examined on behalf of prosecution including P.W.1 Smt. Ashima Dey and P.W.5 her husband Animesh Dey. These two witnesses are the injured persons of the case and their ocular testimony was well corroborated by medical evidence of P.W. 2 Dr. Rabin Manna, a private practitioner and P.W.4 Dr. Harasit Kar, a Medical Officer of Howrah General Hospital. P.W. 3 Tapan Kumar Dutta is the Sub-Inspector of Police and the Investigating Officer (I.O.) of the case. Evidence of P.W.1 revealed that on 16.5.96 the accused persons were assaulting her husband with 'lathi' and iron rod and when she tried to save her husband she was also assaulted and she sustained injury on forehead and right wrist. There was fracture on her right wrist. They came to the police station at about 7.30 a.m. to lodge the information but, were advised by the police officer to go to hospital for treatment. Accordingly after treatment at Howrah General Hospital by P.W.4, they again came back to P.S. and lodged the FIR. Evidence of P.W.4 establishes injuries caused by blunt weapon both on the persons of P.W.1 and on her husband. P.W.4 opined that there was fracture right forearm and colles' fracture to be confirmed by X-ray and at that time there was no X-ray plates at hospital. So she was examined by private doctor P.W.2 and X-ray done by P.W.2 revealed there was colles' fracture of the right radius. In spite of such convincing testimony of the injured persons which were corroborated by medical evidence and injury reports the learned Magistrate acquitted the accused persons which amounted to miscarriage of justice.

3. Referring the decisions namely Bansi Lal and Ors. v. Laxman Singh reported in : 1986 CriLJ1603 ; Vilas Pandurang Patil v. State of Maharashtra reported in : 2004 CriLJ2870 and State of Rajasthan v. Laxman Singh and Ors. reported in :

(2002)10SCC65 . Mr. Mondal contended that scope of this Court in a revisional application against order of acquittal is limited no doubt, still the failure of the learned Magistrate to consider the ocular evidence and evidence of medical experts and the medical reports resulted into miscarriage of justice and the judgment and order of the learned Magistrate is so illegal that it has become perverse. There was no ground of delay in FIR still the learned Magistrate held that there was no explanation for the delay in lodging the FIR. The learned Magistrate also acted illegally by placing reliance on some minor discrepancies as vital, though in fact, the said discrepancies ought to have been ignored. Accordingly, the order of acquittal should be set aside.

4. Mr. Kasem Ali Ahmed, learned Advocate for the State contended that both the husband (P.W.5) and wife (P.W.1) were assaulted. Their direct evidence has been corroborated by medical evidence of doctors who are P.W.2 and P.W.4. The injury reports issued by the said doctors were marked Ext. 2, Ext. 4 and Ext. 5 but, the learned Magistrate did not consider at all the injury reports as well as medical experts opinion. If the learned Magistrate took pains to go through the injury reports and evidence of doctors he could have found that fracture on right forearm particularly colles' fracture of right radius was established beyond all reasonable doubts. Failure of the I.O. to cite independent witnesses in the chargesheet cannot be a ground for order of acquittal when evidence was sufficient to prove the charge. The prosecution case was proved beyond all reasonable doubts. The order of acquittal was illegal and it should be set aside.

5. Mr. Ashim Kr. Roy, learned Advocate for the opposite parties 1 and 2 contended that scope of this Court in revisional application against an order of acquittal is very limited. There is no scope of reappraisal of evidence nor it is permissible. If two views are possible from the evidence and materials on record, the High Court would not interfere into the order of acquittal. The injury reports issued by P.W. 4 reveals that injuries were simple. P.W.1 did not get her X-ray from Government hospital. The X-ray report of private doctor is difficult to believe and learned Magistrate rightly did not place reliance on it. Accordingly, there is no ground at all to come to any different finding and order of acquittal passed by the learned SDJM requires no interference. In support of his contention Mr. Roy cited the decisions in

Mahendra Pratap Singh v. Sarju Singh and Anr. reported in : 1968 CriLJ665 , Bansilal and Ors. v. V. Laxman Singh reported in 1986 C Cr. LR (SC) 132, Jagannath Choudhary and Ors. v. Ramayan Singh and Anr. reported in 2002 C Cr. LR (SC) 643 and Vimal Singh v. Khuman Singh and Anr. reported in 1999 C Cr. LR (SC) 17.

6. I have carefully perused the revisional application and annexures and the contents of the Lower Court Record including oral and documentary evidence lying therein and duly consider the submissions made by the learned Advocates of the parties. There is much force in the argument canvassed before me by Mr. Roy, learned Advocate for the opposite parties that in a revisional application against order of acquittal, that too, not by State but by private de facto complainant, the scope of this Court is very limited. The decisions cited by Mr. Roy for the opposite parties namely Mahendra Pratap Singh (supra), Bansilal (supra), Jagannath Choudhary (supra) and Vimal Singh (supra) are quite appropriate in this matter. Amongst the decisions cited by the learned Advocate for petitioner the decision of Bansilal (supra) is the same and identical which has been cited by the learned Advocate for the opposite parties. It is well-accepted that in the absence of any legal infirmity either in the procedure or in the conduct of the trial, there is no justification for the High Court to interfere in exercise of its revisional jurisdiction at the instance of the informant. It may be that the High Court on appreciation of evidence on record may reach a conclusion different from that of the Trial Court. But that by itself is no justification for exercise of revisional jurisdiction under Section 401 against the judgment of acquittal. The Supreme Court has repeatedly, not only in the aforesaid decisions but, in galaxy of decisions has observed that in exercise of revisional jurisdiction against an order of acquittal at the instance of a private party, the Court exercises only limited jurisdiction and should not constitute itself into an Appellate Court which has a much wider jurisdiction to go into the questions of facts and law, and to convert an order of acquittal into one of conviction. It is, therefore, clear that the scope of this Court in a revisional application against order of acquittal is very limited and interference may be made when there is manifest illegality or gross miscarriage of justice in the order of the Trial Court regarding acquittal of the accused opposite parties.

7. Keeping in mind the position of law in such a matter after going through the evidence and materials on record as well as the impugned judgment of the Trial Court, it is manifestly clear that there was failure on the part of the learned Magistrate to consider the oral and documentary evidence in proper perspective.

8. In the FIR marked as Ext. 1 it was stated by the informant (P.W.1) that the accused opposite parties assaulted her husband with 'lathi' and iron rod and seeing the incident she tried to save her husband. The accused persons also assaulted her and pushed her as a result of which she fell down and received severe injury on her right wrist. In the trial that followed five witnesses were examined out of which P.W.1 is the informant-cum-injured and P.W.5 is her husband and another injured. P.W.2 is a private medical practitioner and he made X-ray on right forearm of P.W.1 and found colles' fracture of right radius. P.W.4 is a medical officer of Government hospital namely, Howrah General Hospital, and the injury reports issued by him are Exts. 4 and 5. Ext. 4 is the injury report in respect of P.W.5 Animesh Kumar Dey and Ext. 5 is the injury report in respect of Smt. Ashima Dey. Exts. 4 and 5 reveal that on 16.5.96 at 9 a.m. he examined the injured persons and opined that injuries were simple and caused by blunt instruments. But Ext. 5 reveals that he found fracture on right forearm of P.W.1 and colles' fracture and indicated that X-ray should be done for confirmation. Undoubtedly true, that no X-ray was done by P.W.1 at Government hospital but, X-ray was done by a private practitioner namely P.W.2. The report given by P.W.2 is Ext. 2 and it confirmed fracture and confirmed the opinion of P.W.4 regarding fracture of P.W.1 on her right wrist. The judgment of the learned Magistrate clearly reveals that the learned Magistrate did not consider at all the evidence of P.W.1, P.W.2, PW.4 and P.W.5 and the Exts. 1, 2, 4 and 5. Law does not distinguish the evidence of a private doctor from that of a Government hospital doctor. Evidence of P.W.2, a private practitioner has the same value, importance and quality like the evidence of PW.4. There was no evidence before the Court to establish that PW.2 intentionally gave false evidence and issued false medical report. While appreciating the evidence of a private doctor and a Government hospital doctor the evidence of both the doctors shall have same quality and importance.

9. Findings of the learned Magistrate that there was delay in lodging FIR is without any foundation and his finding amounts to perversity. Evidence reveals that the injured persons came to the police station first at about 7.30 a.m., that is, immediately after the incident but, the police officer sent them to hospital. They were examined by P.W. 4 at 9 a.m. and evidence of PW. 4 and Exts. 4 and 5 confirms it. Thereafter, the injured persons came to the police station when the FIR was recorded at 10.10 a.m. The incident was at about 7 a.m. The evidence, the materials on record and the circumstances clearly establish that there was no delay at all in lodging the FIR but, the learned Magistrate illegally observed that there was delay in lodging FIR and contended that this delay might have exaggerated the matter. The observation of the learned Magistrate amounts to failure to consider evidence in proper perspective which has resulted into patent illegality.

10. Appreciation of evidence by the learned Magistrate was not proper and not in accordance with law. There was specific evidence of assault on them by the accused opposite parties as stated by PW. 1 and PW. 5. Their evidence got convincing corroboration by medical experts namely P.W. 2 and PW. 4 and the injury reports issued by them which are Exts. 2, 4 and 5 respectively. Learned Magistrate came to the finding that P.W.1 sustained injury by fall and there was no basis for coming to such finding. Fall, if any, was due to the push given by the accused persons to P.W.1 with such force that P.W.1 fell down on the ground and sustained severe injury on her right hand. Giving of push to her itself amounted to an offence. The learned Magistrate quite illegally came to the finding that there was 'maramari'. It signifies failure of the learned Magistrate to appreciate the evidence properly. P.W.1 in her evidence stated no doubt that, on the morning of the date of occurrence a 'maramari' took place. The learned Magistrate only read that portion of the evidence but did not consider that the sentence was not complete and, the said sentence contained few more words which were not perused by the learned Magistrate. In the said sentence P.W.1 stated that, 'on the morning of the date of occurrence a 'maramari' took place, my husband was being assaulted by the two accused persons namely Ashes Dey and Abhijit Dey, by 'lathi' and iron rod.' Therefore, the word 'maramari' does not mean here free-fighting which the learned Magistrate has construed. It clearly establishes failure of the learned

Magistrate to read or peruse the evidence properly and failure to appreciate evidence caused serious legal infirmities in this case and prejudice to prosecution.

11. The learned Magistrate did not consider that sole evidence of one witness, if reliable, is sufficient to prove prosecution case. In the present case PW. 1 and P.W. 5 are the injured persons and they are the best witnesses of the case. Their evidence has been corroborated by the evidence of medical experts and injury reports. In case of assault evidence of the injured is sufficient to establish the prosecution case on the basis of ocular evidence of injury and corroboration from medical evidence. There was no ground at all to disbelieve the evidence of P.W.1, P.W.2, P.W.4 and P.W.5.

12. The defective investigation cannot by itself be a ground of acquittal when there was sufficient evidence on record both ocular and medical expert before the learned Magistrate. The I.O. intentionally did not cite the injured P.W.5 Animesh Dey as a witness in the chargesheet. Not only that, he did not cite some other witnesses who saw the occurrence. Another doctor namely A.B. Choudhary was also not cited as a witness and the learned Magistrate found fault with non-examination of Dr. A. B. Choudhary. But the learned Magistrate did not consider at all that A. B. Choudhary did not examine either P.W.1 or P.W.5 during initial stage or on the date of occurrence. Evidence of P.W. 1 reveals that Dr. A. B. Choudhary saw her bandage and cut the bandage. Therefore, non-examination of A. B. Choudhary was not at all a ground to draw adverse presumption under Section 114(g) of the Evidence Act against prosecution. The learned Magistrate erred in law by placing much reliance due to non-examination of Dr. A. B. Choudhary who was not at all an important doctor in this case and the said doctor did not examine the injured person at initial stage or on the date of occurrence. Learned Magistrate did not exercise his jurisdiction under Section 311 of Cr. PC to summon Dr. A. B. Choudhary for examination in Court, if his evidence was necessary for just decision of the case in the eye of learned Magistrate.

13. Learned Magistrate also did not go through the provisions of Section 222(2) of the Code. This section makes it clear that when a person is charged with an offence consisting of several particulars, a combination of some only of which

constitutes a complete minor offence, and if such combination is proved, but the remaining particulars are not proved he may be convicted of the minor offence, though he was not charged with it. Explanation (b) added to Section 222 of the Code clearly indicates that in a charge under Section 325 of IPC an accused may be convicted under a minor offence as mentioned in that section. Even assuming, that charge under Section 325 of IPC was not established, there was evidence galore regarding assault attracting at least minor offence which was proved beyond all reasonable doubts. Failure of the learned Magistrate to consider the provisions of Section 222 of Code in this case also amounted to illegality. These observations I think are unnecessary when evidence on record including evidence of P.W.2 and P.W.4 and Exts. 2, 4 and 5 are sufficient to establish that findings of the learned Magistrate are without proper reasons and against principles of law.

14. Appreciation of evidence and materials on record makes it clear that the learned Magistrate failed to exercise jurisdiction vested on him. Learned Magistrate did not consider at all the ocular evidence, the medical evidence and the circumstances properly. Failure on the part of the learned Magistrate to appreciate the oral and documentary evidence as well as the medical reports amounted to illegality in his order of acquittal and the illegality is so grave that it has resulted into miscarriage of justice and the judgment of the Trial Court is perverse. It is a fit case in which interference by this Court is necessary for the ends of justice and the matter should be remitted back on remand before the learned Trial Court for fresh decision in accordance with law.

15. In view of the discussion made above the judgment and order of acquittal dated 10.1.2003 passed by the learned SDJM, Howrah in G.R. Case No. 867 of 1996 (T. R. Case No. 326 of 1997) is set aside. The case is sent back to the learned SDJM, Howrah for retrial and fresh decision in accordance with law. He may exercise his power under Section 311 of Cr. PC to examine any witness who was not examined earlier for just decision of the case, though evidence on record both orai and documentary cannot be regarded as incomplete or insufficient for prosecution. Learned Magistrate is directed to dispose of the trial expeditiously and preferably within three months from the date of communication of the order in accordance with law.

16. Though a direction for retrail and fresh decision has been ordered, the learned Magistrate shall come to his own decision after discussing the evidence, materials on record and circumstances in true proper perspective and shall not be influenced in any way by the observations of this Court which observations have been made only for the purpose of present revisional application.

17. Send down the Lower Court Record along with copy of this order to learned SDJM, Howrah as expeditiously as possible for his information and necessary action.

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