

Choudhary Vs. Devi Ram and ors.

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Court : Himachal Pradesh

Decided On : Oct-26-1950

Reported in : AIR1951HP25

Judge : Chowdhry, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 225, 232, 417, 435, 439(4) and 537; ;[Indian Penal Code \(IPC\), 1860](#) - Section 497

Appeal No. : Criminal Ref. No. 30 of 1950

Appellant : Choudhary

Respondent : Devi Ram and ors.

Advocate for Def. : K.C. Pandit, Adv.

Advocate for Pet/Ap. : R.N. Malhotra, Adv.; Bakshi Sita Ram, Govt. Adv.

Judgement :
ORDER

Chowdhry, J.

1. This is a reference under Section 438, Criminal P. C. by the District Magistrate of Mahasu recommending that this Court, in exercise of its revisional jurisdiction, should set aside the order of a first class Magistrate of Solan acquitting the

accused Devi Bam of an offence punishable under Section 498, Penal Code, and order his retrial.

2. A complaint was filed by one Chaudhari on 18-9-1948 that about 6 years ago the accused had enticed away the complainant's legally wedded wife Mt. Dilgiro, knowing her to be the complainant's wife, and that he had been detaining her and having illicit intercourse with her. The accused admitted Mt. Dilgiro being the complainant's wife but he denied that he had enticed her, or had been detaining her, or that he had illicit intercourse with her. He stated that she was his wife's cousin and had come to his house in her absence, and had been living there, of her own accord. He also stated that when she came to his house he had a report lodged in the police, and that as soon as his own wife died he gave complainant notice on 9-9-1948 to take Mt. Dilgiro away. The accused proved both the report and the notice and produced witnesses who supported the above contentions. One of them, also stated that, although requested several times during those 5 years, the complainant had refused to take back Mt. Dilgiro. Among the witnesses produced by the complainant was Mt. Dilgiro, who, besides supporting the defence contentions, also stated that she had been turned out by the complainant.

3. The trial Court, the 1st class Magistrate of Solan, framed a charge against the accused under Section 498, Penal Code, and, on a consideration of the evidence produced by the parties, came to the conclusion that enticement had not been proved, and that Mt. Dilgiro was related to the accused's wife and had been living at his house of her own free-will and had not been detained there by the accused, and he acquitted the accused.

4. The complainant thereupon applied to the District Magistrate of Mahasu praying that he should either move the Public Prosecutor to present an appeal to this Court from the order of acquittal, or treat the application as an application in revision under Section 435, Criminal P. C. The Public Prosecutor did not agree to file an appeal because it was not a case of public importance. The learned District Magistrate, however, examined the record under Section 435, Criminal P. C. and he has made the reference noted above. The grounds on which he has made the reference are (1) that no formal charge as required by Section 221, Criminal P. C.

had been framed, and (2) that enticement and detention had been proved. He therefore held that the trial was irregular and the trial Magistrate had made an obvious mistake in regard to the above findings which had resulted in a failure of justice.

5. The Government Advocate had nothing to say, but elaborate arguments were advanced before me by the learned counsel for the complainant and the accused, on the principles governing the exercise of revisional jurisdiction by the High Court, especially in revisions against acquittals, and on the application of those principles to the facts of the present case.

6. A large number of rulings, some of which were in conflict with others, were cited on both sides, but, in my opinion, it is not necessary to go farther a field than the Criminal Procedure Code itself, which clearly defines the powers of the High Court in the exercise of its revisional jurisdiction. And I think those powers cannot be brought out in fuller relief than by a comparison and contrast of the provisions relating to revision with those relating to appeals.

7. Section 404, Criminal P. C. provides that no appeal shall be from any judgment or order of a criminal Court except as provided for by this Code or by any other law for the time being in force. The judicial examination by a higher Court of the decision of an inferior Court, called an appeal, is therefore a creation of statute. Neither the party in whose favour the right accrues, nor the higher Court to which it appeals, can therefore go beyond the statutory provision creating that right. For instance, a private complainant has no right of appeal against acquittal, and a High Court cannot hear an appeal from the decision of a Court of Session passing a sentence of imprisonment not exceeding one month. There are also other impediments to the exercise of appellate jurisdiction by the higher Court. The word 'order' in the above section has been interpreted as meaning a final order, and therefore an interlocutory order has been held not to be open to appeal. *Kashi Bam v. R. L. Dikshit*, 27 Cr. L. J, 191: (A. I. R. (13) 1926 Oudh 280). Again, it is not open even to the highest Court to hear an appeal from any inferior Court it likes, the forum of appeal being dependent on the powers of the trial Court, vide Sections 407, 408, 410 and 411 of the Code. There is also a procedure which has

been prescribed for appeals, as laid down in Sections 419 to 431. One of the rules of this procedure is that, except in the case of an appeal from jail, an appellant has a right to be heard. Appeals are also subject to limitation under Articles 160, 154 and 165, Limitation Act.

8. The revisional jurisdiction of the High Court is also a creation of the Statute in that it is derived from Sections 435 and 439 of the Code, but, except that it cannot convert a finding of acquittal into one of conviction, it has been given a wide discretion in the exercise of this jurisdiction which is almost untrammelled. There is no procedure laid down for the institution of a revision. The powers of revision can be exercised by High Court even on the record of any proceeding coming to its knowledge without either a reference under Section 438 or an application by a party. In fact, there is no provision for the filing of a revision petition by a party, and, except that no order in revision can be passed to the prejudice of an accused, unless he has had an opportunity of being heard (Sub-section (2) of Section 439), it is optional with the Court to hear parties in revision or not (Section 440). There is no limitation prescribed by law for the filing of revision although, in order to discourage delay, some High Courts have adopted the practice of refusing applications made after 60 days. The rule of the forum of the higher Court being determined by the status of the trial Court is also not applicable, since the High Court, in the exercise of its revisional jurisdiction, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its jurisdiction. Under the Codes of 1801 and 1872 the High Court could call for the records of only judicial proceedings, but the word judicial has been omitted since the Code of 1882, and thus the revisional jurisdiction of the High Court has been extended to even non-judicial proceedings before inferior criminal Courts. Even interlocutory orders are open to revision. Under Section 489, High Court's powers of revision are coextensive with the powers of an appellate Court, subject to the exception that the High Court cannot convert a finding of acquittal into one of conviction, and to the addition that it may enhance the sentence. But a clue to the extensive scope for the exercise of these powers is afforded by a reference to Section 435. Under that section it can call for and examine the records of any proceeding before any inferior criminal Court for the purpose of satisfying itself as to the correctness) legality or propriety of any finding, sentence

or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. It is difficult to imagine the Legislature employing words plainer in their meaning or wider in their range in conferring jurisdiction on a Court.

9. It is manifest therefore that the object of conferring such wide revisional powers on the High Court, despite judgments and orders being otherwise made final by way of appeal under Section 430 of the Code, is to give it an all-pervading supervisory jurisdiction in order to prevent miscarriage of justice, whether from the view-point of maintenance of law and order or that of the interests of the individual. It is immaterial how miscarriage of justice has arisen, whether from misconception of law, erroneous finding of fact, irregularity of procedure, or in any other manner, for all that is laid down in Section 435 is that the Court has to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, and there are no qualifying words indicating how the incorrectness, illegality or impropriety has come into being.

10. As remarked in *Emperor v. Bankatram Laahiram*, 28 Bom. 633 at p. 666: (1 Cr. J. 390), the Legislature could not have expressed itself with greater clearness, but Courts have sometimes imposed on these sections a gloss which narrows the scope of the discretion vested in the High Courts. For instance, it has been laid down in *Abdul Hamid v. Jumman*, A. I. R. (37) 1950 ALL. 266: (51 Cr. L. J. 505), a ruling strongly relied upon on behalf of the accused, that the High Court should in exercise of its re-visional jurisdiction order a retrial only when there has been no valid or proper trial, which would be the case where the Subordinate Court has refused to exercise jurisdiction and the refusal is incorrect, illegal or improper, or where it has wrongly shut out material evidence of the complainant, or admitted inadmissible evidence of the accused and is influenced by it in coming to the conclusion of 'not guilty'. That was a case where the accused was prosecuted under Section 406, Penal Code, on the allegation that the complainant had paid him Rs. 400 to purchase for him a sewing machine, but that the accused had neither purchased the machine nor returned the money. The defence was that the money had not been paid by the complainant to the accused but to one Abdul Majid. Both the Courts below found that the money had been paid to the accused, but the learned Sessions Judge acquitted the accused on the finding that the

accused had paid the amount of Abdul Majid and if Abdul Majid did not buy the machine or return the money the accused could not be held guilty. The Sessions Judge did so by a sort of special pleading because such a defence was neither pleaded nor supported by any evidence. The complainant's revision was however rejected by the High Court on the above dictum although it was remarked that the Sessions Judge had acted on mere surmises and thereby caused injustice to the applicant.

11. I trust, with great respect, that the language of Section 435, Criminal P. C., is plain enough and so no question of any interpretation, much less of putting a narrow interpretation on it, arises, absolute sententia expositors non indigent. A corollary to this general rule is to be found in the following dictum of Lord Loreburn in *Vickers Sons & Maxim v. Evans*, (1910) 79 L. J. K. B. 954: (1910 A. C. 444) :

'We are not entitled to read words into an Act of Parliament unless clear reason for it, is to be found within the four corners of the Act itself.'

But that is what it will come to if the power under Section 435, to order retrial in a revision from acquittal is confined to the case of no proper trial.

12. It was observed by Jenkins C. J., in the above cited case of *Emperor v. Bankatram Lachiram*, 28 Bom. 533: (1910 L. J. 390) as follows:

'If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is urged that judicial decision has deprived us of the power that the Legislature has given us, I recall the words of an eminent English Judge, 'I desire to repeat,' he said, 'what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to

be fairly exercised according to the exigencies of each case'. These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision.'

13. I hold that discretion in the exercise of revisional jurisdiction should be exercised in accordance with the above dictum within the four corners of Section 435, Criminal P. C., wherever there has been a miscarriage of justice in whatever manner the miscarriage may have arisen. There is no doubt that this revisional jurisdiction should not be lightly exercised as it cannot be invoked as of right. As to what amounts to miscarriage of justice serious enough to rouse the consistence of the Court, as it is sometimes said, so as to justify interference in revision, that has been left open by the said provision, of the Code to the discretion of the Judge which must be exercised with due regard to the facts and circumstances of each case, and so it is not capable of being determined by any fixed set of rules. I further hold that, in the absence of anything to the contrary in the said Section, the same principle will apply in the case of a re-vision against acquittal. There are, no doubt, certain well recognised principles which the Court would take into consideration in exercising this particular kind of revisional jurisdiction. One is that the High Court, as a rule, is slow to interfere with orders of acquittal. That is obviously based on the fact that the legal presumption of innocence in favour of an accused is further strengthened by an order of acquittal. Another is that there is all the greater reason against interference where the application in revision against acquittal is by a private complainant. There is a two-fold reason for this: firstly, a private complainant, having no right of appeal against acquittal, should not be allowed to achieve that object by means of a revision, and, secondly, it is open to him to apply to the District Magistrate to move the State for filing an appeal under Section 417. This latter consideration does not, however, weigh with the Court in cases of a personal nature in which the Government is not interested, e. g., cases of offences punishable under Sections 500, 497 and 498, Penal Code.

14. It is sometimes said, as in the aforesaid case of *Abdul Samid v. Jumman*, A. I. R. (37) 1950 ALL. 366 : (51 or. L. J. 506), that in a case other than that where there has not been a proper trial an order of retrial, in order to secure a correct decision, must necessarily give directions to the Subordinate Court, which is tantamount to

circumventing the prohibition contained in Sub-section (4) of Section 439. If this argument is taken to its logical conclusion, then the same result is likely to ensue even where retrial is ordered in a case where there has not been a proper trial in the lower Court. To my mind, whatever the nature of miscarriage of justice which impels the High Court to order a retrial, it should not be deterred from making such an order simply because the retrial is likely to result in conviction. It may be that in a certain case nothing but conviction would meet the ends of justice. Apart from that, if it is the clear duty of the High Court to order retrial in any particular case, it must do so and have the matter as that. It is none of its concern at that stage as to what the result of the retrial is likely to be. More-over, the sub-section only prohibits the High Court from itself converting a finding of acquittal into one of conviction in the exercise of revisional jurisdiction; it does not prohibit the Court from ordering a retrial which may possibly result in conviction. Nor are the two things necessarily the same, for in a retrial the accused has the chance afresh of being found not guilty, which he would not have if the finding of acquittal is converted into one of conviction in revision.

16. Having laid down, according to my lights, the above principles for my guidance, their application to the facts of the present case lies within a short compass. The offence being of a personal nature, and the Government having for that reason refused to prefer an appeal, the complainant is entitled to be heard. But beyond that there is nothing else in his favour. The learned District Magistrate was in error in making non-framing of charge a ground of reference. The record shows that a charge under Section 493, Penal Code as in fact framed against the accused. The learned counsel for the complainant argued that, in any case, no charge under Section 497, Penal Code was framed, and that this omission has resulted in a miscarriage of justice. I shall presently show that this argument has no force.

16. The other ground set forth by the learned District Magistrate is equally untenable. Firstly, he is in error in thinking that enticement or detention are ingredients of an offence under Section 497, Penal Code. Secondly, I see no reason to hold, with reference to the charge under Section 498, Penal Code that the finding of fact against detention arrived at by the trial Court, on a consideration

of the evidence produced by both sides, was wrong, to Bay nothing of its being perverse. Enticement was not pressed by the learned counsel for the complainant himself. Finally, Mt. Dilgiro's close relationship with the accused's wife was proved, and the latter died only a few days before the filing of the complaint. The allegation of the accused having had sexual intercourse with Mt. Dilgiro (of which there is no evidence but only a surmise based on her long residence with the accused), or of his having detained her with that intent is therefore unbelievable. And this cuts at the root of both the charges under Sections 497 and 498, Penal Code. Non-framing of a charge under Section 497, Penal Code, has therefore not resulted in miscarriage of justice. Lastly, it was argued that to allow the accused to go scot-free would be to put a premium on corruption, as offences relating to marriage are rampant in this State. It would, however, be a contradiction in terms to call punishment of a person not found guilty a step in the direction of reform.

17. There has been no miscarriage of justice in this case. The reference is accordingly rejected.

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