Satyajit Banerjee And Others vs State Of West Bengal And Others on 23 November, 2004

Equivalent citations: AIR 2005 SUPREME COURT 4161, 2004 AIR SCW 6646, 2005 ALL MR(CRI) 249, 2005 SCC(CRI) 276, 2005 (1) CALCRILR 142, 2005 (8) ACE 490, 2005 (1) SCC 115, (2004) 10 JT 27 (SC), 2004 (7) SLT 205, 2005 CALCRILR 1 142, (2005) 1 MARRILJ 703, 2005 (2) SRJ 258, 2004 (9) SCALE 617, 2004 (10) JT 27, (2005) 25 ALLINDCAS 558 (SC), 2005 CRILR(SC MAH GUJ) 41, 2005 (1) MARR LJ 703, (2005) 1 EASTCRIC 65, (2005) 1 GUJ LH 782, (2005) 1 HINDULR 579, (2004) 3 KER LT 1098, (2004) 8 SUPREME 285, (2005) 1 ALLCRIR 236, (2004) 9 SCALE 617, (2005) 51 ALLCRIC 202, (2005) 1 CALLT 30, (2005) 1 CHANDCRIC 54, (2004) 4 CRIMES 385, (2005) 1 PAT LJR 203, (2005) 1 RAJ CRI C 161, (2005) 1 RECCRIR 723, (2005) 1 CAL LJ 180, (2005) 1 DMC 35, (2005) 30 OCR 118, (2005) 1 ALLCRILR 920, 2005 CRILR(SC&MP) 41, 2005 CHANDLR(CIV&CRI) 81, (2005) 1 JLJR 123, (2004) 4 RECCRIR 900, (2005) 1 ALLCRILR 553, 2005 (1) ALD(CRL) 81

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Bench: D.M. Dharmadhikari

CASE NO.:
Appeal (crl.) 1331 of 2004

PETITIONER:
Satyajit Banerjee and others

RESPONDENT:
State of West Bengal and others

DATE OF JUDGMENT: 23/11/2004

BENCH:
Y K. SABHARWAL & D.M. DHARMADHIKARI

JUDGMENT:

J U D G M E N T (@ out of Special Leave Petition (Crl.) No. 676 of 2003) Dharmadhikari J.

Leave to appeal, as prayed for, is granted.

Counsel for the parties are heard at length.

The appellants are accused of commission of offence of alleged cruel treatment meted out to deceased Kana Banerjee, punishable under Section 498A of the Indian Penal Code and abetting her suicidal death punishable under Section 306, IPC.

On the evidence produced by the prosecution, the trial court acquitted them. But in revision, preferred by mother of the deceased, the High Court by the impugned order has set aside the acquittal and directed a de novo trial.

The necessary facts leading to the trial and eventual remand by the High Court for fresh trial are as under:

> Appellant No.1 was married to the deceased in the year 1990. She was employed in Railways and was regularly attending to her duties. Her parents also lived not far away from her matrimonial home. On 25.10.1995 she was found dead. The accused-husband had informed her parents of her death. It is the case of her mother that soon after the incident, a First Information Report was lodged with the police alleging harassment and cruel treatment to her by the accused. The said FIR has not been produced. The FIR which was produced was lodged on 22.12.1995 which led to the prosecution, and acquittal of the accused by the trial court.
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> In the course of investigation a suicide note was seized from the mother-in-law of the deceased. The contents of the suicide note read that the deceased had developed illicit relationship with some other person and it was no longer possible for her to deceive her husband. It was further written in the suicide note that she was lucky to get such a husband and her father should treat him well and arrange for his second marriage after her death.
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> In his post-mortem report the Autopsy Surgeon opined that the cause of death was poisoning and also hanging as ligature marks were found on her neck.
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> The prosecution examined mother of the deceased as PW8and three other witnesses living in the neighbourhood. The mother in her deposition stated that in her frequent visits to the house of the accused the deceased used to complain about her physical and mental torture by the accused but had asked her mother not to disclose this fact to her father who was a heart-patient. The mother also deposed that the deceased was medically examined by Doctor Baidyanath Chakroborty who had opined that there was no possibility of her bearing child in her womb and she should opt for test tube baby. She further deposed that after one and a half years of her marriage, the deceased did conceive but in the fallopian tube and that conception was terminated in a hospital at Aliduar. The allegation of the mother is that for the aforesaid reason, the accused got annoyed and increased their torture on her. She stated that immediately after her daughter's death, an FIR was lodged by father of the deceased and subsequently she also lodged an FIR in writing. The delay in second FIR was explained saying that for a few months she was mentally disturbed. In the

cross-examination she admitted to have derived knowledge that her daughter had left a suicide note containing the writings abovementioned. When cross- examined she did not dispute that the suicide note was not in the writing of the deceased. The other three witnesses PW2, PW3 and PW4 examined by the prosecution to prove the alleged cruel treatment of the deceased by the accused did not support the prosecution case and were declared hostile. The opinion of the hand-writing expert, on the suicide note, was filed but he was not examined in proof of his opinion.

The trial court, by appreciating and weighing the evidence on record did not accept the case of the prosecution. The First Information Report alleged to have been lodged soon after the incident was not proved. The second FIR was lodged after a delay of two months. There was no convincing explanation for the same. The learned trial judge observed that conduct of mother of the deceased showed that she had tried to develop the prosecution case by introducing new stories step- by-step. The trial judge has also observed thus:

"This suicidal note has come from the side of prosecution and as such, this Court cannot rule out the contents of the same. Taking together the contents of suicidal note and belated FIR I have reasons to hold that this FIR was lodged after two months by some wrong advice. Moreover, the explanation given in the FIR does not appear to be convincing. It is the settled principle that there is every possibility of concoction, embellishment, motivation in a belated FIR I have already observed that PW 8 has tried to develop the prosecution case by introducing some new stories which is far away from the prosecution case and, as such, she cannot be considered to be faithful witness. Moreover she has failed to explain by convincing reason about inordinate delay in lodging the FIR. Her evidence has not been corroborated by a single prosecution witness even."

On the medical evidence, the trial court observes thus:

"That the Autopsy Surgeon had recorded that there was a ligature mark on her neck and the cause of death was indosulfan-poison in her body."

On the evidence produced, the trial court has recorded his conclusion that evidence of cruel treatment to the deceased is not reliable and the accused cannot be held guilty of the suicidal death. The trial acquitted all of them.

The mother of the deceased preferred a revision to the High Court. The High Court did take note of the various infirmities in the prosecution case, such as seizure of suicide note by the investigating agency 125 days after the incident, non-examination of Hand-Writing Expert, belated FIR and single testimony of the mother of the deceased on the allegation of cruelty. The High Court also took note of the fact that the post-mortem reported presence of ligature mark on the neck of the deceased indicating hanging. Presence of poison in the body was also found. Even after noticing the above serious infirmities in the prosecution case, the High Court observes:

> "The learned trial court ought to have been more, without meaning any disrespect, dynamic and to have taken active truth instead of resigning to the fate as ordained by the prosecution."

The High Court then went on to observe that where prosecution lacks in bringing necessary evidence, the trial court ought to have invoked its powers under Section 311 of the Cr.P.C. and summoned for examining the father of deceased and other additional witnesses whom it considered necessary. The High Court by observing thus set aside the order of acquittal passed by the trial court and directed remand of the case 'for fresh decision from stage one.' In the concluding part of the its judgement, the High Court made the following observation:

> "Lest it may even unconsciously influence the mind of the learned trial court, while on remand it is made absolutely clear that by way of guiding formula the observations here-in-above have been made but it cannot be said to have a binding effect on the learned trial court which would be free to arrive at its independent conclusion in accordance with law and in the suggested formula here-in-above."

[Emphasis supplied] Learned counsel appearing for the accused assails the order of remand made by the High Court and the above mentioned observations made therein. It is submitted that sub-section (3) of Section 401 prohibits the High Court in its revisional jurisdiction to convert acquittal into conviction. By directing examination of additional witnesses under Section 311 and making observations mentioned above it has indirectly suggested the trial court to record a conviction on retrial.

Strong exception has been taken on behalf of the accused to the course adopted by the High Court of directing a retrial. Reliance has been placed on K.Chinnaswamy Reddy vs. State of Andhra Pradesh [1963 (3) SCR 412 at 413] and particularly on the following observations mentioned therein on the scope of identical provisions of revision in the old Code of Criminal Procedure.

> "That it was open to a High Court in revision and at the instance of a private party to set aside an order of acquittal though the State might not have appealed. But such jurisdiction should be exercised only in exceptional cases, as where a glaring defect in the procedure or a manifest error of law leading to a flagrant miscarriage of justice has taken place. When Section 439(4) of the Code forbids the High Court from converting a finding of acquittal into one of conviction, it is not proper that the High Court should do the same indirectly by ordering a retrial. It was not possible to lay down the criteria for by which to judge such exceptional cases. It was, however, clear that the High Court would be justified in interfering in cases such as (1) where the trial court had wrongly shut out evidence sought to be adduced by the prosecution (2) where the appeal court had wrongly held evidence admitted by the trial court to be inadmissible (3) where material evidence has been overlooked either by the trial court or the court of appeal or, (4) where the acquittal was based on a compounding of the offence not permitted by law and cases similar to the above."

It is further argued for the accused that merely because a different view of the evidence is possible, the High Court, in exercise of revisional powers ought not to have directed a retrial. Reliance is placed on Bansi Lal vs. Laxman Singh [1986 (3) SCC 444].

Lastly, it is submitted on behalf of the accused that direction of the High Court to the trial court to record further evidence and take a 'fresh decision from stage one' is totally without jurisdiction as it suggests that the evidence already recorded in the initial trial should be given no consideration.

On the other side learned counsel appearing for the respondent- complainant made streneous efforts to support the impugned order for retrial passed by the High Court. It is submitted that prosecution has left lacunae in the case which should not go in favour of the accused. Reliance is placed on Ram Bihari Yadav vs. State of Bihar [1998 (4) SCC 517].

On behalf of the complainant very strong reliance has been placed on the landmark decision of this Court in the case of Zahira Habibulla Sheikh vs. State of Gujarat [2004 (4) SCC 158] which arise from mass killings during Gujarat riots, commonly known to the public as "Best Bakery Case." It is submitted that the above decision of this Court fully supports the course adopted by the High Court in remanding the case for retrial. It is also submitted that where prosecution has left an inherent weakness in the case, it was not only expected but incumbent on the trial judge to invoke his power under Section 311 Cr.P.C. and summon all relevant witnesses and evidence. As the trial court failed to discharge its duty to hold a fair trial to discover the truth, the High Court was fully justified in directing a retrial and 'a fresh decision from stage one.' In the course of hearing of this case, we are informed that before this Court stayed operation of the impugned judgment, the retrial as directed by the High Court had already commenced. The trial judge has recorded the statement of father of the deceased and only remaining part of the evidence is to be recorded.

In exercise of the discretionary jurisdiction under Article 136 of the Constitution and keeping in view the stage of retrial we refrain from upsetting the whole judgment of the High Court. We however consider it necessary to set right some of the uncalled for observations made by the High Court in the impugned judgment directing retrial.

The cases cited by the learned counsel show the settled legal position that the revisional jurisdiction, at the instance of the complainant, has to be exercised by the High Court only in very exceptional cases where the High Court finds defect of procedure or manifest error of law resulting in flagrant miscarriage of justice.

The State has chosen not to prefer any appeal against acquittal. In the present appeal by the complainant it has filed a counter-affidavit and tried to support the order of remand passed by the High Court.

Without going into the correctness of all the observations made by the High Court in the impugned judgment, we find it necessary to clarify that the High Court ought not to have directed the trial court to hold a de novo trial and take decision on the basis of so called 'suggested formula.' The High Court in its concluding part of the judgment does state that any observation in its judgment should

not influence the mind of the trial court but, at the same time, the High Court directs the trial court to take 'a fresh decision from stage one' and on the basis of the 'suggested formula.' Learned counsel for the accused is justified in his grievance and apprehension that the aforesaid observations and directions are likely to be mistaken by the trial court as if there is a mandate to it to record the verdict of conviction against the accused regardless of the worth and weight of the evidence before it.

Since strong reliance has been placed on the Best Bakery Case (Gujarat Riots Case- supra) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a de novo trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

The law laid down in the 'Best Bakery Case' in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case, the first trial was found to be a farce and is described as 'mock trial.' Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in the Best Bakery Case(supra).

So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the HIgh Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.

With the above clarification, we decline to interfere in the order of remand. To put the matter beyond any shadow of doubt we further clarify and reiterate that the trial judge, after retrial, shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or this Court.