Khetrabasi Samal Etc vs State Of Orissa Etc on 14 August, 1969

Equivalent citations: 1970 AIR 272, 1970 SCR (1) 880

Author: G.K. Mitter

Bench: G.K. Mitter, S.M. Sikri, P. Jaganmohan Reddy

PETITIONER:
KHETRABASI SAMAL ETC.

Vs.

RESPONDENT:
STATE OF ORISSA ETC.

DATE OF JUDGMENT:
14/08/1969

BENCH:
MITTER, G.K.
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SIKRI, S.M.
REDDY, P. JAGANMOHAN

CITATION:
1970 AIR 272 1970 SCR (1) 880
1969 SCC (2) 571
CITATOR INFO :
R 1973 SC1274 (17)
R 1975 SC 580 (4)

ACT:
Code of Criminal Procedure (5 of 1898), s. 417(1) and (3)--Case of assault--Case against some accused started on police report and against others on complaint to Magistrate--Two cases clubbed and tried together-Accused acquitted--Appeal against acquittal against accused against whom case initiated on police report--Whether complainant could file or only State competent to life.

HEADNOTE:
A first information report to the police was lodged against the appellants and some others--ten persons in all, for having taken part in an assault and causing hurt to the victim of the assault. On the police report, the Magistrate took cognizance of the case. More than six were after the

incident, the victim filed a complaint before the Magistrate naming thirty-one persons (including the ten persons against whom the first in formation was given) as: his assailants, and the Magistrate took cognizance of the case against the other twenty-one accused as a separate case. On the application of the complainant (victim), the two. cases, one on the police report and the other on the private complaint, were clubbed and tried together. The Magistrate, on an examination of the evidence, held that there was no proof beyond reasonable doubt that the accused persons committed the assault and acquitted all of them. The complainant then filed an appeal under s. 417(3), Criminal Procedure Code, to the High Court. The appellants, against whom cognizance of the case was taken on the police report, challenged the maintainability of the appeal on the ground that the appeal against their acquittal was maintainable only if preferred by the State Government under s. 417(1). The High Court overruled the objection, reappraised the evidence of the witnesses, upset the finding of the Magistrate and convicted the appellants.

In appeal to this Court, on the questions: (1) As to the maintainability of the appeal by the complainant; and (2) Whether the matter should be sent back to the High Court for disposal under s. 439 of the Code,

HELD: (1) Though the two. cases could be clubbed together for convenience of trial under s. 239 of the Code the nature and identity of the cases in relation to their appealability under s. 417 were not altered. In the case started against the appellants on the police report the appeal against acquittal could have been filed only by the State Government, and if no. such appeal was filed, the complainant could only invoke the revisional powers of the High Court under s. 439 if proper grounds were present. [883 A-C]

(2) The High Court can exercise its revisional powers under s. 439 when invoked by a private complainant against an order of acquittal against which the State has a right of appeal under 's. 417, only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. The present case however is one of mere appraisal of evidence. In such a case the High Court under s. 439, could not re-examine the evidence or order a retrial. Therefore, the case was no.t a fit one for sending back to the High Court. [883 E-F; 884 E-G; 885 A. F-H]

D. Stephens v. Nosibolla, [1951] S.C.R. 284, Logendranath jha v. Polailal Biswas [1951] S.C.R. 676 and K. Chinnaswamy Reddy v. State A..p. [1963] 3 S.C.R. 412, 418, followed.

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos.

160) and 171 of 1967.

Appeals by special leave from the judgment and order dated May 12, 1967 of the Orissa High Court in Criminal Appeal No. '194 of 1965.

S.N. Anand, for the appellants (in Cr.A. No. 160 of 67). R.K. Garg, S.C.Agarwal, D.P. Singh, Sumitra Chakravarty and Uma Dutt, for the appellants (in Cr.A. No.' 171 of 1967).

V.C. Mahajan and R.N. Sachthey, for the respondent (in Cr.A. No. 160 of 1967).

The Judgment of the Court was delivered by Mitter, J. These two appeals by special leave are from one judgment of the High Court of Orissa hearing an appeal from an order of acquittal of 31 persons accused on charges under as. 147, 323 and 325 of the Indian Penal Code for being members of an unlawful assembly and having voluntarily caused hurt and inter alia a grievous one by dislocating a tooth by means of a knife-like thing of one Jagabandhu Behera, the appellant before the High Court. The incident is alleged to have happened on October 4, 1963 at about 11 a.m. in village Anantapur in course of which the accused persons are said to. have assaulted Jagabandhu Behera with lathis and sharp instruments. The motive for the crime was said to be enmity arising out of Gram panchayat election and previous litigation between Jagabandhu Behera and Khetrabasi Samal, one of the said 31 persons. The first information report was lodged at 5 p.m. by one Maguni Charan Biswal who however was not examined at the trial. In this report ten persons were stated to have taken part in assaulting and hurting Jagabandhu. More than six weeks thereafter Jagabandhu filed a complaint before a Magistrate in which he named 31 persons including those against whom the first information report had been lodged as his assailants. The complainant stated therein that he had been assaulted so mercilessly as to render him unconscious and he recovered consciousness in Anantapur Dispensary where he was treated by a doctor. From there he was taken to a hospital in Cuttack and was lodged there till November 18, 1962.

The Magistrate 'examined the complainant on the same day and directed another Magistrate of the First Class to inquire and report. On January 23, 1963 after getting the report of such inquiry and hearing the person against whom the complaint was made on their protest petition, the Magistrate held "that there was a prima facie case against the accused persons under ss. 147/ 323 I.P.C. except the first ten accused persons as per the complaint petition since they had already been sent for trial in G.R. No. 1943 of 1962". He took cognizance against accused persons from serial Nos. 11 to 31 as per the complaint petition under ss. 147/323 I.P.C.

The G.R. case had already been started on the basis of the first information report. On July 12, 1963 the complainant Jagabandhu Behera filed a petition to club the complaint case along with the analogous G.R. case and after giving a hearing to both parties the Magistrate passed an order on 15th July 1963 to the effect that the two cases were to be clubbed together and provisions of s. 252

Cr.P.C. were to be followed. The proceedings went on for an inordinately long time and ultimately on August 23, 1965 the trying Magistrate delivered a judgment acquitting all the accused. Jagabandhu Behera filed an appeal to the High Court under s. 417(3) of the Code of Criminal Procedure and the grounds urged in support of such appeal were substantially based on the. alleged failure of the Magistrate to take a proper view of the evidence. Before the High Court, a point was taken on behalf of the respondents challenging the maintainability of the appeal as against accused 1 to 10 against whom cognizance was taken on the police report. Among these ten persons are the appellants in the two appeals to this Court. It was urged that as these ten persons had figured as accused in G.R. Case No. 1943 of 1962 an appeal against their acquittal would not lie at the instance of the complainant under s. 417(3) but would only be maintainable if preferred under s. 417(1) by the State Government. It was also contended that mere clubbing together of the two cases, the G.R. case and the complainant's case, for joint trial would not change the character thereof so as to convert the G.R. case into a complaint case.

The High Court over-ruled this objection mainly on the ground that s. 239 Cr.P.C. allowed the trial of a number of persons whether accused of the same offence or of different offences if these were committed in the course of the same transaction. The High Court then considered the merits of the appeal, examined the evidence of the prosecution witnesses and took the view that the testimony of prosecution witnesses 1, 2 and 5 who claimed to have witnessed the incident themselves had been discarded by the Magistrate on extraneous considerations. Sifting the evidence for itself the High Court held that seven of the accused i.e. the appellants to this Court were guilty of some of the charges framed against them and passed sentences ranging from three months to six months in different cases after setting aside the acquittal.

It was contended before us on behalf of the appellants that the appeal to the High Court was incompetent and in our view this contention must be accepted. There were two separate cases of which cognizance' was taken separately. One was started on the basis of a police report while the other was on the complaint of Jagabandhu Behera. As the accused in both the cases were said to have committed the offences. in the. course. of the same transaction, the cases were clubbed together for the purpose of trial and such a course was clearly permissible under s. 239 Cr.P.C. That did not however alter the nature of the cases so as to affect their appealability under s. 417. The two cases retained their individuality except for the convenience of the trial. If the cases had ended in conviction they would have had to be separately recorded. The first ten accused would have had to appeal from their conviction and sentence in the G.R. case and similarly the remaining accused from the complaint case. If the State. did not think it proper to direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal in the G.R. case it might have been open to the complainant to. invoke the powers of the High Court under s. 439 of the' Code if proper grounds; for revision were present.

Counsel for the respondents. argued that this was a case where we should not allow the appeal on the ground that the High Court had gone wrong in exercising its powers under s. 417(3) of the Code but should send the matter back to the High Court for disposal according to law including the powers under s. 439 of the Code. It was said that Jagabandhu Behera had been beaten up. by a number of persons in a public place in broad day light and although there might be infirmities in the

evidence adduced on behalf of the prosecution and contradictory statements made by some of the prosecution witnesses, we should not put an end to the proceedings here but send the matter back to the High Court for proper disposal.

In our view, the law does not permit such a course to be adopted on the facts of this case. The powers of the High Court under s. 439 Cr.P.C. although wide are subject to certain limitations. Section 439 (4) expressly provides that the section shall not be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

This Court has had to. examine the jurisdiction of the High Court under this section on several occasions. In D. Stephens v. Nosibulla (1) it was pointed out (see at p. 291) that :-

> "The revisional jurisdiction conferred on the High Court under section 439 of the Code of Criminal Procedure is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal against which the Government has a right of appeal under section 417. It could be exercised only in exceptional cases where the interests of public justice [1951] S.C.R. 284.
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> require interference. for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has take.n a wrong view of the law or misapprehension the evidence, on record".

Again in Logendranath Jha & Others v.

Polailal Biswas(1) where the High Court had set aside an order of acquittal of the appellants by the Sessions Judge and directed their retrial, this Court (see at p. 681) said :-

> "Though sub-section (1) of section 439 authorises the High Court to exercise, in its, discretion, any of the powers conferred on a court of appeal by section 423, sub-section (4) specifically excludes the power to 'convert a finding of acquittal into one. of conviction'. This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court could in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial court as 'perverse' and 'lacking in perspective', the High Court cannot reverse pure findings of fact based on the trial court's appreciation of the evidence in the case". In K. Chinnaswamy Reddy v. State of Andhra Pradesh(2). The court proceeded to define the limits of the jurisdiction of the High Court under s. 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said:
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> ": ..... this jurisdiction should in our opinion be exercised by 'the High Court only m exceptional cases, when there is some glaring defect in the procedure and there is a

> manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. It is not possible to. lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the. High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or wh ere the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked (1) [1561] S.C.R. 676. (2) [1963] 3 S.C.R. 412, 418.

either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law".

It may be that a case not covered by any of the contingencies mentioned above may still arise. But, where, as here, the appeal court (the High Court in tiffs case) has set aside the order of acquittal almost entirely on the ground that the Magistrate should not have disbelieved the three eye witnesses, viz., P.Ws. 1, 2 and 5, the case clearly falls within the contingencies mentioned in the above decision of this Court. The High Court judgment does not show that the trial court shut out any evidence which the prosecution wanted to produce or admitted any in admissible evidence or overlooked any material evidence. The Magistrate examined the evidence produced by the prosecution. According to him, there was strong enmity between the two parties of Jagabandhu Behera and Khetrabasi Samall and although the incident was supposed to have: taken place in front of a large number of shops and before a large gathering, only one person from those shops, P.W. 5 who was a chance witness occasionally going to the place for the purpose of carrying on his business in fish, was examined by the prosecution and there was no explanation for not examining the other witnesses named in the complaint petition. P.W. 1, one of the witnesses mentioned in the judgment of the High Court and relied on by it was the complainant's father-in-law and as such a person interested in the success of the prosecution. Relying on the testimony of the doctor who had examined Jagabandhu Behera, the Magistrate found himself unable tO accept the evidence of the prosecution witnesses to the effect that the injury to the tooth was caused by a sharp-cutting instrument in which case other external injuries could not have been avoided. The Magistrate was doubtful as to whether the accused persons had any hand in the commission of the crime and although the assault on Jagabandhu was a brutal one there was, according to the Magistrate, no proof beyond reasonable doubt that it was the accused persons who had committed it. The High Court proceeded to reappraise the evidence of the witnesses and upset the finding of the Magistrate thereon on the ground that he "had not taken the trouble of sifting the grain from the chaff". Clearly such a course is not permissible under s. 439 of the Criminal Procedure Code. Nor in our opinion the facts, and circumstances of this case warrant the ordering of a re- trial by the High Court if it felt disposed to exercise powers under s 423 Cr.P.C. expressly included in s. 439. Sending the ease back to the High Court can serve no useful purpose.

As the appeal to the High CoUrt was incompetent, we allow the appeals and direct the cancellation of their bail bonds. V.P.S. Appeal allowed.