

Joseph Stephen vs Santhanasamy on 25 January, 2022

Author: M.R. Shah

Bench: Sanjiv Khanna, M.R. Shah

REPORTABLE
IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 90-93 OF 2022

Joseph Stephen and others

...Appellants

Versus

Santhanasamy and others

...Respondents

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 14.05.2020 passed by the High Court of Judicature at Madras, Madurai Bench in Criminal Revision Application Nos. 323 to 326 of 2013, by which the High Court, in exercise of its revisional jurisdiction under Section 401 Cr.P.C., has set aside the order of acquittal passed by the first appellate Court and has convicted the accused, original accused nos. 6 to 8 have preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as under:

That all the original accused were charged and tried for the offences punishable under Sections 147, 148, 324, 326, 307, 506(ii) r/w section 149 IPC. That the Chief Judicial Magistrate, Tiruchirapalli, by judgment dated 28.09.2012, convicted the accused under the aforesaid offences except Sections 307 and 506(ii) IPC and thereby acquitted the accused under Sections 307 and 506(ii) IPC.

2.1 Feeling aggrieved and dissatisfied with the judgment and order of conviction passed by the Chief Judicial Magistrate, Tiruchirapalli, the accused preferred Criminal Appeal No. 92/2012 in the Court of III Additional Sessions Judge, Tiruchirapalli (hereinafter referred to as the 'first appellate Court'). Challenging the

acquittal of the accused under Sections 307 and 506(ii) IPC, the victims (private respondents herein) filed Criminal Appeal Nos. 108 to 110 of 2012.

2.2 The first appellate Court, vide judgment dated 18.01.2013, allowed the appeal preferred by the accused and acquitted the accused. The criminal appeals filed by the victims against acquittal of the accused under Sections 307 and 506(ii) IPC came to be dismissed. 2.3 Feeling aggrieved and dissatisfied with the common judgment and order passed by the first appellate Court allowing criminal appeal No. 92/2012 preferred by the accused, the victims – private respondents herein preferred criminal revision application nos. 323 to 326 of 2013 before the High Court under Section 397 r/w 401 Cr.P.C. By the impugned judgment and order, while exercising the revisional jurisdiction under Section 401 Cr.P.C., the High Court has set aside the judgment and order passed by the first appellate Court allowing Criminal Appeal No. 92/2012 and acquitting the accused, and consequently has convicted the accused for the offences other than the offences under Sections 307 & 506(ii) IPC and has restored the judgment and order of conviction and sentence passed by the trial Court. The High Court has however modified the sentences imposed by the trial Court. 2.4 Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court reversing the acquittal and thereupon convicting the accused, while exercising the revisional jurisdiction under Section 401 Cr.P.C., original accused nos. 6 to 8 have preferred the present appeals.

3. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has vehemently submitted that the High Court has erred in reversing the acquittal and convicting the accused, while exercising the revisional jurisdiction under Section 401 Cr.P.C.

3.1 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has heavily relied upon Section 401(3) Cr.P.C. Relying upon sub-section (3) of Section 401 Cr.P.C., it is vehemently submitted that while exercising the revisional jurisdiction under Section 401 Cr.P.C., the High Court has no jurisdiction at all to convert a finding of acquittal into one of conviction. It is submitted that the only course open to the High Court would be to give its own finding and thereafter remit the matter either to the trial Court or to the first appellate Court, as the case may be. Reliance is placed upon the decisions of this Court in the cases of K. Chinnaswamy Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788; Sheetal Prasad v. Sri Kant, (2010) 2 SCC 190; Ganesha v. Sharanappa, (2014) 1 SCC 87; and Ram Briksh Singh v. Ambika Yadav, (2004) 7 SCC 665.

3.2 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has further submitted that after the amendment in Section 372 Cr.P.C., by which proviso to Section 372 Cr.P.C. came to be inserted by Act 5 of 2009, w.e.f. 31.12.2009, the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation and as per the said proviso, such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. It is submitted that therefore once the victim has a statutory right of appeal against the order of acquittal

under Section 372, Cr.P.C., the revision application before the High Court shall not be entertained against the judgment and order of acquittal. Reliance is placed on sub-section 4 of Section 401 Cr.P.C.

3.3 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has also relied upon the decision of this Court in the case of Mallikarjun Kodagali v. State of Karnataka, (2019) 2 SCC 752, by which the right of the victim to prefer an appeal against the order of acquittal has been recognised. It is submitted that as held by this Court, even in a case where the victim prefers an appeal against acquittal, he has an absolute right of appeal and therefore he is not required to even seek leave to appeal as required in case of “complainant” while preferring the appeal under Section 378(4) Cr.P.C.

3.4 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has further submitted that assuming that the High Court in exercise of powers under sub-section (5) of Section 401 Cr.P.C. may treat the application for revision as a petition of appeal and deal with the same accordingly, the High Court has to pass a judicial order to treat the application for revision as a petition of appeal. It is submitted that in the present case, no such judicial order has been passed by the High Court and the High Court has exercised the jurisdiction under Section 401 Cr.P.C. and has reversed the acquittal and has convicted the accused which, as such, is not permissible and it is beyond the scope and ambit of exercise of revisional jurisdiction under Section 401 Cr.P.C. 3.5 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has also tried to make submissions on merits and has submitted that the first appellate Court gave cogent reasons while acquitting the accused and recorded the findings in favour of the accused which were not required to be interfered with by the High Court in exercise of the revisional jurisdiction. However, for the reasons stated hereinbelow, we propose to remand the matter to the High Court, we do not propose to consider any of the submissions on merits of the case and to go into whether the High Court on merits is justified in reversing the order of acquittal and convicting the accused.

4. Shri (Dr.) Joseph Aristotle, learned Advocate appearing on behalf of the respondent-State has, as such, fairly conceded that in exercise of powers under Section 401 Cr.P.C., the High Court could not have reversed the acquittal and/or convert a finding of acquittal into one of conviction. However, he has submitted that the High Court could have treated the application for revision as a petition of appeal and dealt with the same accordingly as provided under sub-section (5) of Section 401 Cr.P.C.

4.1 It is further submitted that even otherwise the victims in the present case were having a right of appeal to the High Court against the order of acquittal as provided under Section 372 Cr.P.C. It is therefore submitted that even otherwise the victims could have preferred the appeal before the High Court against the order of acquittal. It is submitted that merely because mistakenly and/or inadvertently the victims preferred revision applications, their right to appeal conferred under Section 372 Cr.P.C. could not have been taken away. Therefore, it is submitted that either the revision applications preferred by the victims may be treated as petitions of appeals in exercise of powers under sub-section (5) of Section 401 Cr.P.C. or the matter may be remanded to the High Court to convert the revision applications into appeals and to treat them as appeals under Section 372 Cr.P.C.

5. Though served, no body appears on behalf of the private respondents – victims.

6. In rejoinder, Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has opposed the prayer made on behalf of the respondent-State to treat the revision applications as appeals as per sub-section (5) of Section 401 Cr.P.C. It is submitted that firstly the High Court has to pass a judicial order to treat the revisional applications as petitions of appeals and thereafter the High Court is required to give an opportunity to the accused as if the High Court is deciding the appeal against the order of acquittal. It is submitted that the scope and ambit of revisional jurisdiction and appellate jurisdiction is distinct and separate. It is submitted that while considering the revision application, the revisional court would have a limited scope, however, while deciding the appeal, the appellate Court has a wide jurisdiction than that of the revisional jurisdiction.

7. We have heard the learned counsel appearing on behalf of the respective parties at length.

Having heard the learned counsel for the respective parties, the following questions arise for the consideration of this Court:

i) Whether the High Court in exercise of the revisional jurisdiction under Section 401 Cr.P.C. is justified in setting aside the order of acquittal and convicting the accused by converting the finding of acquittal into one of conviction?;

ii) In a case where the victim has a right of appeal against the order of acquittal, now as provided under Section 372 Cr.P.C and the victim has not availed such a remedy and has not preferred the appeal, whether the revision application is required to be entertained at the instance of a party/victim instead of preferring an appeal?; and

iii) While exercising the powers under sub-section (5) of Section 401 Cr.P.C. treating the revision application as petition of appeal and deal with the same accordingly, the High Court is required to pass a judicial order?

8. Now so far as the first issue, whether in exercise of the revisional jurisdiction under Section 401 Cr.P.C., the High Court can convert a finding of acquittal into one of conviction and what is the procedure to be followed by the High Court, as such, the said issue is now not res integra. On the aforesaid, few decisions of this Court, referred to hereinabove, are required to be considered.

a) In the case of K. Chinnaswamy Reddy (supra), while considering the similar provision under the old Code, namely, Section 439(4) Cr.P.C., it is observed and held that “though sub-section (1) of Section 439 of the Criminal Procedure Code authorised the High Court to exercise in its discretion any of the powers conferred on a Court of Appeal by Section 423, yet sub-section (4) specifically excludes the power to convert a finding of acquittal into one of conviction”. It is observed that “at that stage the revisional court stops short of finding the accused guilty and passing sentence on him by ordering a retrial”. What order should be passed by the High Court in a revision application against the order of acquittal, while exercising the revisional jurisdiction, has been dealt with and considered in paragraph 11, which reads as under:

“11. The next question is what order should be passed in a case like the present. The High Court also considered this aspect of the matter. Two contingencies arise in such a case. In the first place there may be an acquittal by the trial court. In such a case if the High Court is justified, on principles we have enunciated above, to interfere with the order of acquittal in revision, the only course open to it is to set aside the acquittal and send the case back to the trial court for retrial. But there may be another type of case, namely, where the trial court has convicted the accused while the appeal court has acquitted him. In such a case if the conclusion of the High Court is that the order of the appeal court must be set aside, the question is whether the appeal court should be ordered to rehear the appeal after admitting the statement it had ruled out or whether there should necessarily be a retrial. So far as this is concerned, we are of opinion that it is open to the High Court to take either of the two courses. It may order a retrial or it may order the appeal court to rehear the appeal. It will depend upon the facts of each case whether the High Court would order the appeal court to rehear the appeal or would order a retrial by the trial court. Where, as in this case, the entire evidence is there and it was the appeal court which ruled out the evidence that had been admitted by the trial court, the proper course in our opinion is to send back the appeal for rehearing to the appeal court. In such a case the order of the trial court would stand subject to the decision of the appeal court on rehearing. In the present case it is not disputed that the entire evidence has been led and the only defect is that the appeal court wrongly ruled out evidence which was admitted by the trial court. In the circumstances we are of opinion that the proper course is to direct the appeal court to rehear the appeal and either maintain the conviction after taking into consideration the evidence which was ruled out by it previously or to acquit the accused if that is the just course to take. We should like to add that the appeal court when it rehears the appeal should not be influenced by any observations of the High Court on the appreciation of the evidence and should bring to bear its own mind on the evidence after taking into consideration that part of the evidence which was considered inadmissible previously by it. We therefore allow the appeal subject to the modification indicated above.”

b) In the case of Ram Briksh Singh (*supra*), after considering the decision in the case of K. Chinnaswamy Reddy (*supra*) and earlier decision in the case of D. Stephens v. Nosibolla, AIR 1951 SC 196, it is observed and held that the High Court in a revision application against the order of acquittal and while exercising the powers of the revisional Court can set aside an order of acquittal and remit the case for retrial where material evidence is overlooked by the trial Court.

c) Again, in the case of Sheetala Prasad (*supra*), it is reiterated that Section 401(3) Cr.P.C. prohibits conversion of a finding of acquittal into one of conviction and in such cases retrial or rehearing of the appeal might be ordered.

d) In the case of Ganesha (*supra*), it is observed in pragraphs 10 to 12 as under:

“10. Section 386(a) thus authorises the appellate court to reverse an order of acquittal, find the accused guilty and pass sentence on the person found guilty. However, sub-section (3) of Section 401 of the Code contemplates that the power of revision does not authorise a High Court to convert a finding of acquittal into one of conviction. On the face of it, the High Court while exercising the powers of revision can exercise all those powers which have been conferred on the court of appeal under Section 386 of the Code but, in view of sub-section (3) of Section 401 of the Code, while exercising such power, cannot convert a finding of acquittal into one of conviction.

11. However, in a case where the finding of acquittal is recorded on account of misreading of evidence or non-consideration of evidence or perverse appreciation of evidence, nothing prevents the High Court from setting aside the order of acquittal at the instance of the informant in revision and directing fresh disposal on merit by the trial court. In the event of such direction, the trial court shall be obliged to reappraise the evidence in light of the observation of the Revisional Court and take an independent view uninfluenced by any of the observations of the Revisional Court on the merit of the case. By way of abundant caution, we may herein observe that interference with the order of acquittal in revision is called for only in cases where there is manifest error of law or procedure and in those exceptional cases in which it is found that the order of acquittal suffers from glaring illegality, resulting into miscarriage of justice. The High Court may also interfere in those cases of acquittal caused by shutting out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. In such an exceptional case, the High Court in revision can set aside an order of acquittal but it cannot convert an order of acquittal into that of an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial.

12. The view, which we have taken finds support from a decision of this Court in *Bindeshwari Prasad Singh v. State of Bihar* [(2002) 6 SCC 650 :

2002 SCC (Cri) 1448] , in which it has been held as follows: (SCC pp. 654- 55, para 12) “12. ... Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub- section, which places a limitation on the powers of the Revisional Court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an

order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party.”

9. Applying the law laid down by this Court in the aforesaid decisions and on a plain reading of sub-section (3) of Section 401 Cr.P.C., it has to be held that sub-section (3) of Section 401 Cr.P.C. prohibits/bars the High Court to convert a finding of acquittal into one of conviction.

Though and as observed hereinabove, the High Court has revisional power to examine whether there is manifest error of law or procedure etc., however, after giving its own findings on the findings recorded by the court acquitting the accused and after setting aside the order of acquittal, the High Court has to remit the matter to the trial Court and/or the first appellate Court, as the case may be. As observed by this Court in the case of K. Chinnaswamy Reddy (supra), if the order of acquittal has been passed by the trial Court, the High Court may remit the matter to the trial Court and even direct retrial. However, if the order of acquittal is passed by the first appellate court, in that case, the High Court has two options available, (i) to remit the matter to the first appellate Court to rehear the appeal; or (ii) in an appropriate case remit the matter to the trial Court for retrial and in such a situation the procedure as mentioned in paragraph 11 of the decision in K. Chinnaswamy Reddy (supra), referred to hereinabove, can be followed. Therefore, in the present case, the High Court has erred in quashing and setting aside the order of acquittal and reversing and/or converting a finding of acquittal into one of conviction and consequently convicted the accused, while exercising the powers under Section 401 Cr.P.C. The order of conviction by the High Court, while exercising the revisional jurisdiction under Section 401 Cr.P.C., is therefore unsustainable, beyond the scope and ambit of Section 401 Cr.P.C., more particularly sub-section (3) of Section 401 Cr.P.C. Issue no.1 is answered accordingly.

10. Now so far as issue no.2, namely, in a case where no appeal is brought though appeal lies under the Code, whether revision application still to be entertained at the instance of the party who could have appealed, the answer lies in sub-section (4) of Section 401 Cr.P.C. itself. Sub-section (4) of Section 401 Cr.P.C. reads as under:

“(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.” 10.1 It cannot be disputed that now after the amendment in Section 372 Cr.P.C. after 2009 and insertion of proviso to Section 372 Cr.P.C., a victim has a statutory right of appeal against the order of acquittal.

Therefore, no revision shall be entertained at the instance of the victim against the order of acquittal in a case where no appeal is preferred and the victim is to be relegated to file an appeal. Even the same would be in the interest of the victim himself/herself as while exercising the revisional

jurisdiction, the scope would be very limited, however, while exercising the appellate jurisdiction, the appellate Court would have a wider jurisdiction than the revisional jurisdiction. Similarly, in a case where an order of acquittal is passed in any case instituted upon complaint, the complainant (other than victim) can prefer an appeal against the order of acquittal as provided under sub-section (4) of Section 378 Cr.P.C., subject to the grant of special leave to appeal by the High Court. 10.2 As observed by this Court in the case of Mallikarjun Kodagali (supra), so far as the victim is concerned, the victim has not to pray for grant of special leave to appeal, as the victim has a statutory right of appeal under Section 372 proviso and the proviso to Section 372 does not stipulate any condition of obtaining special leave to appeal like sub-section (4) of Section 378 Cr.P.C. in the case of a complainant and in a case where an order of acquittal is passed in any case instituted upon complaint. The right provided to the victim to prefer an appeal against the order of acquittal is an absolute right. Therefore, so far as issue no.2 is concerned, namely, in a case where the victim and/or the complainant, as the case may be, has not preferred and/or availed the remedy of appeal against the order of acquittal as provided under Section 372 Cr.P.C. or Section 378(4), as the case may be, the revision application against the order of acquittal at the instance of the victim or the complainant, as the case may be, shall not be entertained and the victim or the complainant, as the case may be, shall be relegated to prefer the appeal as provided under Section 372 or Section 378(4), as the case may be. Issue no.2 is therefore answered accordingly.

11. Now so far as the power to be exercised by the High Court under sub-section (5) of Section 401, Cr.P.C., namely, the High Court may treat the application for revision as petition of appeal and deal with the same accordingly is concerned, firstly the High Court has to pass a judicial order to treat the application for revision as petition of appeal. The High Court has to pass a judicial order because sub-section (5) of Section 401 Cr.P.C. provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating with the application for revision as petition of appeal and deal with the same accordingly, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 Cr.P.C. Therefore, where under the Cr.P.C. an appeal lies, but an application for revision has been made to the High Court by any person, the High Court has jurisdiction to treat the application for revision as a petition of appeal and deal with the same accordingly as per sub-section (5) of Section 401 Cr.P.C., however, subject to the High Court being satisfied that such an application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do and for that purpose the High Court has to pass a judicial order, may be a formal order, to treat the application for revision as a petition of appeal and deal with the same accordingly.

12. Now the next question is what order should be passed in a case like the present. This Court may either set aside the impugned judgment and order passed by the High Court setting aside the acquittal and convicting the accused so as to enable the High Court to remit the matter to the first appellate Court to rehear the appeal after considering the findings recorded by it or to remit the matter to the High Court to treat the revision application as a petition of appeal against the order of acquittal, which otherwise is permissible under sub-section (5) to Section 401 Cr.P.C. As observed hereinabove, as such, while exercising the powers under sub-section (5) to Section 401 Cr.P.C. to treat the revision application as a petition of appeal, the High Court is required to pass a judicial

order. However, considering the fact that even otherwise being victims they are having the statutory right of appeal as per proviso to Section 372 Cr.P.C., we deem it fit and proper to remit the matter to the High Court to treat the revision applications as petition of appeals under Section 372 Cr.P.C. and to decide the same in accordance with law and on their own merits. The same would be in the interests of all, namely, the victims as well as the accused, as the appellate Court would have a wider scope and jurisdiction as an appellate Court, rather than the revisional court.

13. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court reversing the acquittal and convicting the accused is hereby quashed and set aside. The matters are remitted to the High Court. The High Court is directed to treat the revision applications as appeals under Section 372 Cr.P.C. and thereafter to decide and dispose of the same in accordance with law on their own merits.

14. The present appeals are accordingly allowed in the aforesaid terms.

..... J.
[M.R. SHAH]

NEW DELHI;
JANUARY 25, 2022.

..... J.
[SANJIV KHANNA]