Nasib Singh vs The State Of Punjab on 8 October, 2021

Equivalent citations: AIRONLINE 2021 SC 871

Author: D.Y. Chandrachud

Bench: B.V. Nagarathna, Vikram Nath, Dhananjaya Y Chandrachud

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal Nos. 1051-1054 of 2021

Nasib Singh … Appella

Versus

The State of Punjab & Anr. … Respond

With

Criminal Appeal Nos. 1055-1059 of 2021

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. These appeals arise from a judgment dated 20 December 2019 of a Division Bench of the High Court of Punjab and Haryana in a batch of nine criminal appeals. The High Court remitted the orders of acquittal and conviction arising out of two separate FIRs for fresh trial and directed that the proceedings arising out of both the 11:30:42 IST Reason:

> FIRs be clubbed together under Section 223 CrPC and be tried together by one court. The issue that arises for consideration is whether holding separate trials arising out of two FIRs warrants the direction of the High Court for a de novo trial.

2. The case of the prosecution is that on 13 November 2012, the prosecutrix along with Shinderpal Kaur went to Gugga Mari near Ghaggar river for lighting earthen lamps. While they were returning home, a car driven by accused Gurpreet Singh alias Aman approached them. Balwinder Singh was alleged to be sitting in the rear seat of the vehicle. Gurpreet Singh halted the car near the prosecutrix and Shinderpal Kaur whereupon Balwinder Singh who was known to her opened the door of the vehicle, grabbed her and threw her on the rear seat of the vehicle. The doors and window panes of the vehicle were closed as a result of which the alarms raised by the prosecutrix could not be heard by the passers-by. Shinderpal Kaur left the spot. Balwinder Singh is alleged to have committed sexual assault on the prosecutrix in the car after which she was taken to the motor shed of accused Sandeep Singh. Sandeep Singh handed over the key to Balwinder Singh after which the prosecutrix is alleged to have been repeatedly raped by Balwinder Singh and Gurpreet Singh in the precincts of the motor shed. The prosecutrix is alleged to have been forcible administered an intoxicant as a result of which she became semi- conscious. At 9.30pm, she was brought in the vehicle and thrown near the Gurudwara of the village. The prosecutrix managed to reach her home and narrated the incident to her mother Surjeet Kaur.

3. On 22 November 2012, the prosecutrix along with her relative, sister and mother is alleged to have reached Police Station City Samana from where they were directed to Police Station Ghagga.

4. On 27 November 2012, the prosecutrix got her statement recorded with Sub- Inspector In charge Nasib Singh (the appellant) of the Police Post at Badshahpur on the basis of which First Information Report 1 96/20122 was registered at Police Station Ghagga, Badshahpur under Sections 363, 366A, 376, 328 and 34 of the Indian Penal Code 3. The FIR named Balwinder Singh, Gurpreet Singh alias Aman and Sandeep Singh as the persons who had committed acts of sexual assault on the prosecutrix. It is alleged by the prosecution that though the appellant received information from the prosecutrix of the alleged incident of rape, no arrest was made and a proper investigation was not conducted.

5. On 26 December 2012, the prosecutrix committed suicide leaving behind a suicide note naming Balwinder Singh, Gurpeet Singh and Shinderpal Kaur to be responsible for her decision to end her life. Immediately after the death of the prosecutrix, the appellant arrested accused Balwinder Singh, Gurpeet Singh and Shinderpal Kaur. On the basis of a statement made by Harvinder Kaur, a cousin of the prosecutrix, FIR No.100/2012 4 dated 26 December 2012 was registered at PS Ghagga against the appellant (SI Nasib Singh), Balwinder Singh, Gurpreet Singh “FIR” “FIR 96” “IPC” “FIR 100” alias Aman and Shinderpal Kaur for abetting the suicide of the prosecutrix. FIR 100 was cancelled since the suicide was committed within the jurisdictional limits of PS Samana. On 31 December 2012, FIR No.187/2012 5 was registered against Balwinder Singh, Gurpeet Singh and Shinderpal Kaur for an offence punishable under Section 306 read with Section 34 of the IPC at PS Samana.

6. A Special Investigating Team 6 was constituted by the ADGP (Crime) to enquire into the standard of investigation conducted by the appellant in the gang rape case registered as FIR 96 of 2012. The SIT concluded that the investigation conducted by the appellant in FIR 96 of 2012 had loopholes. The Superintendent (Crime), Patiala who was a member of the SIT arrested Sandeep Singh on 29 December 2012. The appellant was dismissed from the Police Department on 27 December 2012. On

appeal, the dismissal was set aside on 11 April 2014, and the appellant was reinstated to the service.

7. On 15 January 2013, the appellant was implicated in respect of FIR 96 of 2012 concerning the gang rape of the prosecutrix and alleged offences under Sections 217, 218 and 120B of the IPC were added. In regard to FIR 187 of 2012 registered for the offence under Section 306/34, the appellant was implicated following the addition of offences under Sections 217, 218 and 120-B IPC. Charges were framed in FIR 187 of 2012 by the Additional Sessions Judge, Patiala on 5 April “FIR 187” “SIT” 2013. The accused were charged under Section 306 IPC while the respondent in addition was charged with Sections 217 and 218 IPC.

8. On 29 November 2014, the Additional Sessions Judge, Patiala convicted (i) Balwinder Singh; (ii) Gurpreet Singh alias Aman; (ii) Shinderpal Pal Kaur; and (iv) Sandeep Singh in the trial arising out of FIR 96 of 2012 for offences under Sections 376(2)(g), 366, 328 and 120B of the IPC. A tabular statement of the conviction rendered and sentence imposed by the Additional Sessions Judge on Balwinder Singh, Gurpreet Singh alias Aman, Shinderpal Pal Kaur and Sandeep Singh is reproduced below from the judgment of the Additional Sessions Judge.

Convicts Balwinder Singh and Gurpreet Singh @ Aman Sr. Offence Sentence Awarded No. 1 U/s. Rigorous Imprisonment 376(2)(g) (R.I.) for life each and to IPC pay fine of Rs. 10,000/-

each and in default of payment of fine to suffer further R.I. for 1 year, each 2 U/s. 366 IPC R.I. for 10 years each and to pay fine of Rs.

10,000/- each and in default of payment of fine to suffer further R.I. for 1 year each 3 U/s. 328 IPC R.I. for 7 years each and to pay fine of Rs. 5,000/-

each and in default of payment of fine to suffer further R.I. for 6 months each Convicts Shinderpal Kaur and Sandeep Singh (PDF Pg 587) Sr. Offence Sentence Awarded No. 1 U/s. 376(2)(g) R.I. for life each and r/w s. 120B to pay fine of Rs.

IPC		10,000/- each and in default of payment o fine to suffer furth	
	2	U/s. 366 r/w s. 120B IPC	R.I. for 1 year, eac R.I. for 10 years each and to pay fine of Rs. 10,000/- each and in default of payment of fine to suffer further R.I. 1 year each
	3	U/s. 328 r/w s. 120B IPC	R.I. for 7 years eac and to pay fine of R 5,000/- each and in default of payment o fine to suffer furth R.I. for 6 months

each

9. The Additional Sessions Judge, Patiala acquitted the appellant - Nasib Singh on the ground that there was nothing on record to prove that he had conducted a tainted investigation. The Trial Judge relied inter alia on the depositions of DW1 and PW20 and held:

> (i) The handwriting expert (DW1) has deposed that the writings on the Zimni Report dated 27.11.2012 do not match with the standard writings of Nasib Singh. The prosecution has not examined any subordinate of Nasib Singh to prove whether the Zimni report was written under the instructions or in the absence of instructions of the appellant; and
>
> (ii) PW 20, the Head Constable who was a member of the police party that conducted the preliminary investigation headed by Nasib Singh deposed that the appellant conducted all the proceedings according to the rules and procedure governing the investigation.

10. As regards the offence punishable under Section 306 read with Section 34 in FIR 187 of 2012, the Additional Sessions Judge, Patiala convicted the three accused but acquitted the appellant by a judgment dated 29 January 2015. The appellant was acquitted with the following findings:

> (i) There was nothing on record to show that the photo copy of the suicide note that was handed over to him by PW2 has been tampered with. PW22 (SP Jaipal Singh) who conducted the investigation after the appellant was removed from the investigation deposed that the preliminary investigation conducted by the appellant was adopted by him during his further investigation; and
>
> (ii) No other witness has deposed against the manner of investigation conducted by the appellant. For the offence under Section 218 to be attracted, the prosecution must be able to prove that a public servant prepared a record knowing that it is incorrect. In the instant case, there is no evidence to prove that the appellant had the intention to provide an incorrect record.

11. Nine appeals were filed before the High Court. Five appeals were filed by the accused appellants against the judgment and order dated 29 November 2014 of the Additional Sessions Judge, Patiala in the trial arising out of FIR 96 of 2012 under Sections 328, 363A, 366, 376 and 34 of the IPC. Similarly, appeals were also filed against the conviction of the accused and sentence imposed on 29 January 2015 arising out of FIR 187 of 2012 dated 31 December 2012 under Sections 306 read with 34, 217, 218 and 120B of the IPC.

12. The acquittal of the appellant of offences arising out of FIR 96 and FIR 187 was also challenged by the prosecutrix's mother in appeal before the High Court. The High Court disposed of all the nine appeals by a common impugned judgment and order dated 20 December 2019. The High Court

noted that the appeals arising out of the judgments of the Additional Sessions Judge dated 29 November 2014 and 29 January 2015 be listed together for final hearing.

13. The High Court remitted the judgments of conviction and acquittal dated 29 November 2014 and 29 January 2015 of the Additional Sessions Judge in the trials arising out of FIR 96 and FIR 187 and directed that trials be clubbed and tried together as provided under Section 223 CrPC. The High Court made the following observations during the course of its judgment to arrive at the said conclusion:

> (i) Most of the witnesses in the proceedings arising out of the different FIRs are common. They are just numbered differently;
>
> (ii) The evidence in FIR 187 was produced during the trial in FIR 96;
>
> (iii) Both the offences arising out of FIR 96 and FIR 187 are connected with each other. Serious prejudice would be caused if two separate trials are held. The evidence in both the FIRs will have to be scanned together;
>
> (iv) The court is vested with the discretion to decide if the FIRs must be tried together or separately. While exercising the discretion, the court should apply the test of whether trying the FIRs separately would lead to illegality.

However, in this case both the offences in the separate FIRs "are so connected together as to form part of the same transaction";

(v) The case of the prosecution is that the prosecutrix committed suicide because of the rape committed by the accused. In the appeal filed by Gurpreet Singh alias Aman, an application was filed under Section 391 of the CrPC to bring on record additional facts to show that another person by the name of Manpreet Singh had also attempted suicide on the same day and at the same place as the prosecutrix and was taken to the hospital by PW10-Harvinder Kaur, with whom the prosecutrix was staying at the relevant time. FIR 1 dated 12 November 2013 was registered under Section 309 of the IPC at PS SAS Nagar. Both the prosecution and defense are relying on the facts and evidence in both the cases. However, in view of the decision of the Supreme Court in Nathi Lal v. State of UP 7, where it was laid down that the evidence in one case must not influence the decision in another case, the evidence in the other case cannot be relied on. In order to deliver justice, the evidence and facts arising out of both FIR 96 and FIR 187 must be tried together under Section 223 CrPC. The High Court observed:

> 1988 SC (Criminal) 638 "This Court has also noticed that CRM-24912-2019 has been filed by accused – appellant Gurpreet Singh @ Aman in CRA- D-385-DB-2015, under Section 391 Cr.P.C. for permission to bring on record additional facts to show that in fact another person named Manpreet Singh, had also attempted suicide on the same day at the same place as the deceased and was taken to hospital by PW-10 – Harwinder Kaur (with whom the deceased was staying at that time). FIR No.1 dated

> 12.01.2013 under Section 309 IPC was registered at Police Station. SAS Nagar, was registered in this regard. The learned counsel by putting forth this evidence wanted to assert that in fact the deceased had concocted story in the earlier FIR and had also committed suicide due to different reason(s).

After going through the evidence and the facts mentioned above this Court is of the view that both the alleged offences are connected with each other in such a way that a serious prejudice has been caused to both prosecution as well as defence by the separate trials in the said cases. This Court feels that unless the evidence of both the FIRs is scanned together by the Court to arrive at final conclusion, it may lead to failure of justice."

(vi) Nasib Singh (appellant) was acquitted by the trial court in respect of offences arising out of FIR 96 and FIR 187 and the court must be slow to disturb it. However, because of the apparent failure of justice, there is a necessity to remit the case back for retrial. The High Court observed:

> "We are conscious of the fact that one of the alleged accused Nasib Singh who was tried together with the appellants during trial in both the FIRs was acquitted by the trial Court in 2014. Thus, he had earned a right and we should be slow in disturbing the same. But when the entire scenario is taken into consideration and is viewed from the angle of failure of justice then this Court is of the considered opinion that to maintain the balance and delivery of justice, these cases should be remanded back for retrial."
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> (vii) The following two cases were thus remitted:
>
> (a) The judgment of conviction and order of sentence dated 29 November 2014 of the Additional Sessions Judge, Patiala arising out of FIR No. 96 dated 27 November 2012; and
>
> (b) The judgment of conviction and order of sentence dated 29 January 2015 of the Additional Sessions Judge, Patiala arising out of FIR No. 187 dated 31 December 2012.

14. Nasib Singh is in appeal before this Court.

15. Leave has been granted.

Submissions

16. Mr Vipin Gogia, Counsel appearing on behalf of the appellant submitted that:

> (i) Both sets of judgments – the judgment dated 29 November 2014 of the Additional Sessions Judge arising from FIR 96 alleging rape and the judgment dated 29 January 2015 arising out of FIR 187 alleging abetment of suicide were rendered by one and

the same court and by the same judge;

(ii) The appellant was acquitted by the Additional Sessions Judge in both the Sessions Trials and no appeal was filed by the State against the order of acquittal;

(iii) The appellant who had been dismissed from service was reinstated;

(iv) Though Section 386(a) of the CrPC empowers the Appellate Court in an appeal from an order of acquittal to inter alia reverse such an order and direct that a further enquiry be made or that the accused be retried or committed for trial, the power to order a retrial is of an exceptional nature and none of the well-established grounds for the exercise of the power have been demonstrated to exist in the present case;

(v) The order of the High Court remitting the judgment of conviction and sentence imposed on the accused and directing a fresh trial has caused serious prejudice to the appellant since the order of acquittal in his favour has also been set aside without any evaluation on merits and without cause or justification;

(vi) The judgment of the High Court would cause serious prejudice because two crucial witnesses PW20 - Head Constable Ranja Ram and PW17 - Head Constable Gurjeet Singh (who were part of the investigating team with the appellant) have died and their depositions in regard to the nature of the investigation conducted by the appellant would be wiped out where fresh evidence has to be adduced at the retrial;

(vii) During the course of the trial, PW2, PW12, PW17, PW21 and PW22 were examined and their evidence would demonstrate that the investigation has been properly conducted by the appellant. The benefit of the evidence which has been recorded during the course of the earlier trials would be totally obliterated if the case is remitted for retrial;

(viii) The appellant is currently 65 years old. A de novo trial could cause severe distress to him; and

(ix) Though the acquittal of the appellant was challenged by the mother of the prosecutrix, it is material to note that she has been declared hostile qua the appellant in the course of the criminal trial.

17. On the other hand Ms. Uttara Babbar, Counsel appearing on behalf of the State of Punjab who has ably presented the case, submitted that:

(i) Section 218 of the CrPC postulates the general rule of separate trials for separate offences to which inter alia Section 223 CrPC, which provides when persons may be charged and tried together, is an exception;

(ii) The High Court in the present case has applied the provisions of Section 223(d) under which persons accused of different offences committed in the course of the same transaction may be charged and tried together but it is important to note the precedents of this Court which establish that:

a) A joint trial is not peremptory but lies at the discretion of the court;

b) Whether a joint trial should be held must be decided at the beginning of the trials;

c) The power of the Appellate Court to order a re-trial is of an exceptional nature which may be exercised only where there is a failure of justice;

d) The High Court has as a matter of fact not come to the conclusion that there would be a failure of justice but only that there may occasion a failure of justice if a joint trial is not ordered; and

e) It is a settled principle of law that an order of re-trial wipes out the evidence from the record in which event, it cannot exist for some accused and not for others.

(iii) Though the State has not filed an appeal before this Court against the judgment of the High Court nonetheless, it is open to it to submit that the High Court has committed a manifest error in ordering a re-trial and remitting the conviction and sentence imposed; and

(iv) As a result of the impugned order of the High Court, there would be a serious miscarriage of justice since the evidence which has been recorded in both the trials on the basis of which the other accused-respondents were convicted of serious offences involving a gang rape of the prosecutrix resulting in her committing suicide would be completely obliterated and wiped out from the record.

18. Opposing the above submissions, Mr. D Bharat Kumar, Counsel appearing on behalf of Balwinder Singh (Respondent No.4) has urged the following submissions:

(i) No appeal was filed by the State before this Court against the impugned judgment of the High Court remitting the conviction and sentence to the trial Court for a re-trial;

(ii) There are three FIR's relating to the offences in the same transaction - FIR 96/2012 arising out of the alleged gang rape of the prosecutrix; FIR 187/2012 arising out of the suicide of the prosecutrix and FIR 1/2013 involving Manpreet Singh under Section 309 of the IPC and if they are tried separately, it will lead to a miscarriage of justice;

(iii) In view of the decision of this Court in Nathi Lal v. State of UP 8, the evidence in one criminal trial cannot be relied upon in a cross-case. Therefore, remitting for clubbing of the trials is the only option that would render justice;

(iv) The suicide of the prosecutrix is alleged to be a consequence of the alleged gang rape which in itself is indicative of the fact that both the gang rape and the abetment of suicide fall within the ambit of Section 223(d) of the CrPC, which provides that persons may be tried jointly where different offences are alleged to be committed by different persons in the course of the same transaction;

(v) The High Court has recorded in the impugned judgment that the prosecution had sought to rely upon the evidence which was recorded in both the cases arising out of FIRs 96 and 187; and

(vi) The order of retrial does not cause any prejudice to the appellant since the High Court had directed that fresh charges should be framed. It would be open to the appellant to pursue his remedies of seeking a discharge at that stage.

19. The representation on behalf of the other accused persons is as follows : Dr Nishesh Sharma, learned counsel, has entered appearance on behalf of the accused – Gurpreet Singh. Mr Narender Kumar Verma, learned counsel, has entered appearance (1990) Supp SCC 145 on behalf of the accused – Sandeep Singh. There is no appearance on behalf of the accused – Shinderpal Kaur, though the office report indicates that she is served. Since Shinderpal Kaur though served has not appeared in these proceedings, we have requested Mr D Bharat Kumar to assist the Court as amicus curiae. The submissions which have been urged by Mr D Bharat Kumar would essentially cover the submissions of all the accused – respondents on whether the High Court is justified in remitting their conviction and sentence and ordering a re-trial. Analysis A. Power to Direct Retrial

20. Section 386 of the CrPC defines the powers of the Appellate Court and is extracted below:

"386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate

Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal." (emphasis supplied) Under clause (a), the Appellate Court is empowered inter alia in an appeal from an order of acquittal:

(i) To reverse such order and direct that a further inquiry be made; or

(ii) That the accused be re-tried or committed for retrial; or

(iii) Find him guilty and pass sentence on him according to law.

The power of the Appellate Court to order a retrial is also recognized in clause (b)(i) in the context of an appeal from a conviction and in clause (c)(i) in an appeal for enhancement of sentence.

21. The scope of the power of the Appellate Court to direct a re-trial has come up before this Court for interpretation in several decisions. The judgment of a Constitution Bench in Ukha Kolhe v. State of Maharashtra9 has dealt with the issue extensively. In that case, the appellant was tried before the Judicial Magistrate for the offence of rash and negligent driving while under the influence of liquor thereby causing the death of one person and injuries to four others and for offences under the Motor Vehicles Act. The Trial Judge held that the evidence was not sufficient to prove that the appellant

was driving the motor vehicle at the time of the mishap and acquitted him of the offences under the Motor Vehicles Act and the Penal Code. But he held that the evidence established that the appellant had consumed illicit liquor and committed an offence punishable under Section 66(b) of the Bombay Prohibition Act. The appellant was convicted and sentenced to imprisonment for three months and was directed to pay fine. On appeal, the Sessions Court set aside the order of the trial court and ordered a retrial on the ground that a "fair and full trial" had not taken place. The revision was summarily dismissed by the High Court which led to the appeal to this Court. Justice J.C. Shah, speaking for the Constitution Bench observed:

> "11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier (1964) 1 SCR 926 proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. [..]" The Court held that though undoubtedly the trial before the Magistrate suffered from irregularities and the evidence led was deficient on important aspects; that could by itself not be a sufficient ground for directing a retrial. If additional evidence was to be brought on the record, a retrial was not required and the procedure prescribed by Section 428(i) of the 1898 Code could have been resorted to.

22. The above extract emphasizes that a retrial would not be ordered unless the Appellate Court is satisfied that:

> (i) The court trying the proceeding had no jurisdiction;
>
> (ii) The trial was vitiated by serious illegalities and irregularities or on account of a misconception of the nature of the proceedings as a result of which no real trial was conducted; or
>
> (iii) The prosecutor or an accused was for reasons beyond their control prevented from leading or tendering evidence material to the charge and that in the interest of justice, the Appellate Court considers it appropriate to order a retrial.

Another feature which emerges from the above decision is that an order of retrial wipes out from the record the earlier proceeding and exposes the present accused to another trial. It is for that reason

that the court has affirmed the principle that a retrial cannot be ordered merely on the ground that the prosecution did not produce proper evidence and did not know how prove their case.

22. The next decision of significance is of a two Judge Bench in State of M P v. Bhooraji 10 . In that case eleven persons were charge-sheeted for offences including Section 302 read with Section 149 IPC and Section 3(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The accused were convicted under Sections 148, 323 and 302/149 IPC and sentenced to imprisonment for life by the Additional Sessions Judge. During the pendency of the appeals before the High Court of Madhya Pradesh, the Supreme Court held in a decision in Gangula Ashok v. State of A P 11, that committal proceedings are necessary for a specified court under the SC/ST Act to take cognizance of the offences to be tried. Initially in the State of Madhya Pradesh, a Division Bench had adopted the same position in 1995. This judgment of the Division Bench was overruled by a Full Bench in 1996. In view of the decision of this Court in Gangula Ashok (supra), the convicted persons moved the High Court to quash the trial on the ground that the Court of Session had no jurisdiction to take cognizance of and try the case in the absence of an order of committal by the Magistrate. The High Court upheld the contention and ordered that (2001) 7 SCC 679 (2000) 2 SCC 504 the entire trial must be quashed and directed retrial. The issue before this Court was whether the High Court necessarily should have quashed the proceedings on account of the declaration of the law by this Court. Justice K.T. Thomas writing for a Bench consisting of Justice K.G Balakrishnan and himself stated that the Appellate Court can send the case for retrial only when there is a 'failure of justice' and the court must be conscious of the huge pendency of cases in the trial court. It was observed thus:

> "8. ..... A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation." (emphasis supplied)

23. In Zahira Habibulla Sheikh v. State of Gujarat 12, this Court had directed the retrial of the "Best Bakery Case" where communal riots in the State of Gujarat had led to a massacre. The trial court had acquitted the accused and the appeal against it was dismissed by the High Court. Along with the appeal, the High Court also dismissed the petitions filed for adducing additional evidence and a direction seeking retrial. Justice Ajit Pasayat writing for a two judge Bench observed this was a fit case for directing retrial in view of the nature of additional evidence sought to be adduced and the faulty manner in which the trial was conducted:

> " 73. We are satisfied that it is a fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation a retrial is a must and essentially called for in order to save and preserve the justice-delivery system unsullied and unscathed by vested interests. We should not be understood to have held that whenever additional evidence is accepted, retrial is a necessary corollary. The case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence. It is normally for the appellate court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on the facts of this case, the direction for retrial becomes inevitable."

24. In Satyajit Banerjee v. State of West Bengal13, the trial court acquitted the appellant who was charged with offences under Sections 498A and 306 IPC. The High Court noted the infirmities in the case of the prosecution such as seizure of the suicide note 125 days later, non-examination of the handwriting expert and belated (2004) 4 SCC 158 2005 (1) SCC 115 filing of the FIR and observed that the trial court ought to have invoked its powers under Section 311 CrPC and examined additional evidence. However, it went on to set aside the acquittal of the appellants and directed a retrial. On appeal, this Court did not disturb the finding of the High Court since the trial court had already began the trial fresh. However, the Court cautioned that the Appellate Court may direct a re-trial only in exceptional cases. This court also distinguished the Best Bakery case and held that that was an extraordinary case and the principles laid down in it cannot be applied to all cases uniformly. As a matter of general rule, a retrial cannot be directed to adduce additional evidence and correct the faulty investigation:

> "25. Since strong reliance has been placed on Best Bakery case [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] (Gujarat riots case) 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.

26. The law laid down in Best Bakery case [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] 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 [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] 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 Best Bakery case [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] .

27. 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."

25. A three Judge Bench of this Court in Mohd Hussain v. State (Government of NCT of Delhi), 14 dealt with the question of retrial under Section 386 CrPC. In that case, a foreign National was subjected to trial for causing a bomb blast in a public transport vehicle. The trial Court convicted the accused and imposed the death sentence. On appeal, the High Court dismissed the appeal, confirming the sentence. However, the two judge Bench of this Court observed that the trial was vitiated. While one of the learned judges ordered the accused person's release, the other ordered for a time-bound retrial. A larger Bench confirmed the second view directing a retrial, however, observing that the power must be exercised by the appellate Court in exceptional situations. It was observed that keeping in view the gravity of the offence and the denial of due process, a retrial was warranted:

> "41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial (2012) 9 SCC 408 and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

26. In Nar Singh v. State of Haryana 15, this Court was considering the question whether the Appellate Court can direct a retrial if all the relevant questions are not put to the accused by the trial court as required under Section 313 CrPC. This Court answered the question in the affirmative, holding that the Appellate Court may direct a retrial in such circumstances from the stage of questioning the accused because non-compliance of Section 313 CrPC had caused prejudice to the accused:

> "30.3. If the appellate court is of the opinion that non- compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh."

27. The provisions of section 386(d)(1) CrPC have come up for consideration before a two judge Bench of this Court in Ajay Kumar Ghoshal v. State of Bihar 16 ("Ajay Kumar Ghoshal"). In that case, the trial court convicted the accused of an offence under Section 302 and the provisions of the Dowry Prohibition Act, among others. On appeal, the High Court set aside the order of conviction and remitted he matter to the trial court for a fresh trial, pointing out the lapses on the part of the investigating officer and the trial court in the recording of evidence. This Court set aside the judgment of the High Court by distinguishing it from Nar Singh (supra) on the ground that in Nar Singh important evidence such as the ballistic report and (2015) 1 SCC 496 (2017) 12 SCC 699 other incriminating evidence was not put to the accused in the course of recording the statement under Section 313. It was also held that it is necessary for the High Court to explain the 'lapses in the trial' and how the lapse has caused prejudice to the accused. Justice Banumathi writing for a two Judge Bench observed:

> "8. In para 29 of its judgment, the High Court pointed out certain lapses; but has not stated as to how such alleged lapses have resulted in miscarriage of justice necessitating retrial. Certain lapses either in the investigation or in the "conduct of trial" are not sufficient to direct retrial. The High Court being the first appellate court is duty-bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice.
>
> 11. Though the word "retrial" is used under Section 386(b)(i) CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or

wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard." Explaining the concept of a de novo trial, the Court held:

"12. "De novo" trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law." This principle was reiterated in Isaac v. Ronald Cheriyan 17 and Mary Pappa Jebamani v. Ganesan 18.

28. The principles that emerge from the decisions of this Court on retrial can be formulated as under:

(i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;

(ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-

trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;

(iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

(iv) It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

(v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

(vi) The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice :

(2018) 2 SCC 278 (2014) 14 SCC 477

a) The trial court has proceeded with the trial in the absence of jurisdiction;

b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.

B. Power to Direct Joint Trial

29. The question before the Court is whether the non-joinder of the trials in FIR 96 and FIR 187 has caused a miscarriage of justice, prejudicing the rights of the accused-respondents or the case of the prosecution such that it necessitated the order of the High Court directing a retrial after clubbing the proceedings arising out of both the FIRs. Before we refer to the judicial pronouncements on this issue, it is necessary that we advert to the statutory provisions relating to framing and joinder of charges.

30. Chapter 17 of the CrPC, 1973 deals with "the charge". Part A comprising of Sections 211 to 217 is titled "form of charges". Part B comprising Sections 218 to 224 is titled "joinder of charges". Section 218 provides as follows:

> "218. Separate charges for distinct offences.—(1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:
>
> Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.
>
> (2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

31. Sub-section(1) of section 218 stipulates first, that there must be a separate charge for every distinct offence of which any person is accused and second, that every such charge must be tried separately. However, under the proviso, where the person accused makes a request in writing to the Magistrate and the latter is of the opinion that such person is not likely to be prejudiced, the Magistrate may try all or any of the charges framed against the person together. Sub-section (2) of Section 218 stipulates that nothing in sub-section (1) would affect the operation of the provisions of Sections 219 to 221 and 223. Section 219(1) stipulates that when a person is accused of more than one offence of the same kind of offences, all of which are committed within the space of twelve months whether in respect of the same person or otherwise, he may be charged with and tried at one trial for up to three of them. Sub-section (2) of Section 219 provides that offences are of a same kind when they are punishable with the same amount of punishment under the same section of the IPC or of any special or local law. Section 220(1) stipulates that if in one series of actss "so connected together as to form the same transaction", more than one offence is committed by the same person, he may be tried at one trial for every such offence. Sub-section (2) stipulates that a person maybe tried together for offence when the situation arises where a person is charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-Section (2) of Section 212 or in sub-Section (1) of Section 219, and the person is accused of committing, for the purpose of facilitating or concealing the commission of that offence(s) one or more offences of falsification of accounts. Sub- Section (3) of Section 220 enunciates that if the acts

alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused may be charged with and tried at one trial for each of such offences. Sub-Section (4) of Section 220 envisages a situation where several acts of which one or more than one, would by itself or by themselves constituent an offence, constitute when combined a different offence; in that event, the person accused may be charged with and tried in one trial for that offence constituted by such acts when combined and for any offence constituted by any one or more of such acts. Section 222 provides that where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a minor offence and 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. Sub-section (2) of Section 222 provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

32. Section 223 provides as follows: -

> "223. What persons may be charged jointly.—The following persons may be charged and tried together, namely:—
>
> (a) persons accused of the same offence committed in the course of the same transaction;
>
> (b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
>
> (c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
>
> (d) persons accused of different offences committed in the course of the same transaction;
>
> (e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;
>
> (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
>
> (g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any

such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the 1 [Magistrate or Court of Session] may, if such persons by an application in writing, so desire, and 2 [if he or it is satisfied] that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

(emphasis supplied)

33. Section 223 begins with the expression "persons accused" meaning thereby that the provision is applied when more than one person is involved in the commission of an offence or offences. Section 223 stipulates - in clauses (a) to (g) - situations where persons may be charged and tried together. Clause (a) envisages a situation where persons are accused of the same offence committed in the course of the same transaction. Clause (b) envisages a situation where persons accused of an offence and persons accused of abetment or attempt to commit the offence may be charged and tried together. Clause (c) applies to a situation where persons are accused of more than one offence of the same kind within the meaning of Section 219 committed by them jointly within twelve months. Clause (d) envisages that persons accused of different offences committed in the course of the same transaction may be charged and tried together. Clauses (e), (f) and (g) deal with specific situations envisaged therein. The proviso to Section 223 stipulates that where a number of persons are charged with separate offences and such persons do not fall within the ambit of the categories specified in clauses (a) to (g), the Magistrate may, if such persons so desire, in writing, and if he is satisfied that they would not be prejudicially affected, and it is expedient to do so, try all such persons together.

34. Section 239(d) of the old Code which corresponds to Section 223(d) of the CrPC 1973 was interpreted by a three-Judge Bench of this Court in State of Andhra Pradesh v. Cheemalapati Ganeswara Rao 19 by juxtaposing the provision with AIR 1963 SC 1850 Section 225(1) of the old Code, which is Section 219(1) of CrPC 1973. In that case, two respondents along with two others were tried together for offences under the Penal Code. The High Court set aside the convictions on the ground that inter alia the joint trial of two or more offences committed by each of them is illegal. Justice Mudholkar speaking for the Bench observed that the phrase "offence committed in the course of the same transaction" would mean offences that are committed in the proximity of time or place, or unity of purpose and design :

"25. According to Mr Chari Section 235(1) cannot be construed as having an overriding effect on Section 239 because whereas it contemplates acts so connected together as to form the same transaction resulting in more offences than one, Section 239(d) contemplates offences committed in the course of the same transaction and nothing more. The question is whether for the purposes of Section 239(d) it is necessary to ascertain anything more than this that the different offences were committed in the course of the same transaction or whether it must further be ascertained whether the acts are intrinsically connected with one another. Under

> Section 235(1) what has to be ascertained is whether the offences arise out of acts so connected together as to form the same transaction, but the words "so connected together as to form" are not repeated after the words "same transaction" in Section 239. What has to be ascertained then is whether these words are also to be read in all the clauses of Section 239 which refer to the same transaction. Section 235(1), while providing for the joint trial for more than one offence, indicates that there must be connection between the acts and the transaction. According to this provision there must thus be a connection between a series of acts before they could be regarded as forming the same transaction. What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a, strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and, therefore, the mere absence of the words "so connected together as to form" in clauses (a),
>
> (c) and (d) of Section 239 would make little difference.

Now a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression "same transaction" alone had been used in Section 235(1) it would have meant a transaction consisting either of a single act or of a series of connected acts. The expression "same transaction" occurring in clauses

(a), (c) and (d) of Section 239 as well as that occurring in Section 235(1) ought to be given the same meaning according to the normal rule of construction of statutes [..]." The Bench held that holding a separate trial is the rule and a joint trial is the exception. However, in case the accused persons commit different offences forming a part of the same transaction, a joint trial would be the rule unless it is proved that joint trial would cause difficulty:

> "28. [...] No doubt, as has been rightly pointed out in this case, separate trial is the normal rule and joint trial is an exception. But while this principle is easy to appreciate and follow where one person alone is the accused and the interaction or intervention of the acts of more persons than one does not come in, it would where

> the same act is committed by several persons, be not only inconvenient but injudicious to try all the several persons separately. This would lead to unnecessary multiplicity of trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separate trials. Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves." This Court, however, held that the High Court was wrong in setting aside the order of conviction on the ground of misjoinder of parties. It was observed that the court could have set aside the order of conviction only on the ground that such misjoinder caused a failure of justice to the accused and not merely because there is misjoinder of parties:
>
> "31. Even if we were to assume that there has been a misjoinder of charges in violation of the provisions of Section 233 to 239 of the Code, the High Court was incompetent to set aside the conviction of the respondents without coming to the definite conclusion that misjoinder had occasioned failure of justice. This decision completely meets the argument based upon Dawson case [(1960) 1 All ER 558]. Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless it in fact came to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice. For all these reasons we cannot accept the argument of learned counsel on the ground of misjoinder of charges and multiplicity of charges." This interpretation placed on Section 223(d) CrPC was relied on in a decision of this Court in R. Dineshkumar v. State 20.

35. In Chandra Bhal v. The State of UP 21, the appellant was convicted of an offence under Section 302, while the two co-accused who were charged with offences under Section 302 read with Section 34 of the Penal Code were acquitted. The conviction was affirmed by the High Court. Before this Court, the question canvassed was that in the incident in which the deceased was shot by the appellant, some other persons were also shot dead and wounded. The appellant contended that the trials for those incidents were held separately which had prejudiced the appellant in his trial. The plea of the appellant was that the acquittal of the appellant in those cases on the plea of self-defence would also serve as conclusive proof of his plea of self-defence in the subsequent trial, and not clubbing the trial prejudiced him. While interpreting the provisions of Section 223 of the CrPC, the Court speaking through Justice ID Dua observed:

> "5. Turning to the provisions of the Code, Section 233 embodies the general mandatory rule providing for a separate charge for every distinct offence and for separate trial for every such charge. The broad object underlying the general rule seems to be to give to the accused a notice of the precise accusation and to save him

> from being embarrassed in his defence by the confusion which is likely to result from lumping together in a single charge distinct offences and from combining several charges at one trial. There are, however, exceptions to this general rule and they are found in Sections 234, 235, 236 and 239. These exceptions embrace cases in which one trial for more than one offence is not considered likely to embarrass or prejudice the accused in his defence.
>
> (2015) 7 SCC 497 1971 (3) SCC 983 The matter of joinder of charges is, however, in the general discretion of the court and the principle consideration controlling the judicial exercise of this discretion should be to avoid embarrassment to the defence by joinder of charges.

On the appellant's argument the only provision requiring consideration is Section 235(1) which lays down that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person then he may be charged with and tried at one trial for every such offence. This exception like the other exceptions merely permits a joint trial of more offences than one. It neither renders a joint trial imperative nor does it bar or prohibit separate trials. Sub-section (2) of Section 403 of the Code also provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235(1). No legal objection to the appellant's separate trial is sustainable and his counsel has advisedly not seriously pressed any before us." (emphasis supplied)

36. The Court observed that a separate trial on the charge of causing the homicidal death of one 'L' was not contrary to law even if a joint trial of this offence together with others was permissible. The Court also observed that this matter was required to be considered by the trial court at the beginning of the trial and is not to be determined on the basis of the result of the trial. The Court further observed that its attention was not drawn to any material on record suggesting that prejudice had been caused to the appellant as a result of a separate trial. It was finally held that the plea of self defence and the argument that both the offences were committed during the course of the same transaction was rejected by both the courts below, and that the court would not interfere with concurrent findings of fact. The judgment therefore lays down three significant principles on joint trials:

> (i) A separate trial is not contrary to law even if a joint trial for the offences along with other offences is permissible;
>
> (ii) The possibility of a joint trial has to be decided at the beginning of the trial and not on the basis of the result of the trial; and
>
> (iii) The true test is whether any prejudice has been sustained as a result of a separate trial. In other words, a retrial with a direction of a joint trial would be ordered only if there is a failure of justice.

37. In Essar Teleholdings Limited v. Central Bureau of Investigation 22, Justice R F Nariman, speaking for a three-Judge Bench reiterated the principles which have been enunciated in Chandra Bhal (supra). Further, it was held that even if the conditions stipulated in Section 223 CrPC to conduct a joint trial have been fulfilled, it may not be desirous to direct a joint trial if a joint trial would (i) prolong the trial; (ii) cause unnecessary wastage of judicial time; and (iii) confuse or cause prejudice to the accused, who had taken part only in some minor offence.

38. From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

> (i) Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219 - 221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted.

Similarly, under Section 223, a joint trial may be held for persons charged with (2015) 10 SCC 562 different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enunciated in Sections 218 - 223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

(iv) Since the provisions which engraft an exception use the phrase ‘may’ with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.

39. At this stage, it would be necessary in the present case to revisit the judgment of the Additional Sessions Judge Ranhaula dated 29 January 2015 in FIR 187 of 2012. The allegation against the appellant was that that he had made a tainted investigation in the rape case (FIR 96) so as to help the accused and had abetted the commission of suicide by the deceased. The Trial judge while acquitting the appellant found that:

> (i) The appellant’s name is not mentioned in the suicide note;

(ii) The original suicide note which was taken into possession by PW 22 (investigating Officer) had not been tampered with by the appellant and PW 22 had admitted during his cross-examination that the preliminary investigation conducted by the appellant had been adopted by him during further investigation; and

(iii) Surjit Kaur-PW12, Harmeet Kaur-PW2 and PW21 had not made any allegation during the course of their evidence against the appellant but on the contrary had stated that he had conducted a proper investigation.

On appreciating the evidence, the trial Judge came to the conclusion that there was an absence of evidence on record to demonstrate that the appellant committed any offence under Sections 306, 217, and 218 of the Penal Code.

40. The High Court has proceeded to order a retrial holding that a separate trial in FIR 96 and FIR 187 has caused prejudice to both the parties in as much as they were unable to rely on the evidence in the other case. In this context, the following conclusions were drawn by the High Court :

(i) The Court has the discretion to conduct a joint trial for both the alleged offences, namely, the gang rape of the prosecutrix and the resultant suicide and its abetment since they are connected in view of Section 223(d) CrPC;

(ii) The prosecution and the defence are relying on the facts and evidence of both the cases - FIR 96 and 187. But since the trials were separately held, in view of Nathi Lal (supra), the Court was unable to refer to the evidence in the other case. If the evidence in the trials arising out of both FIRs is not scanned together by the court to arrive at the final conclusion, it will lead to a failure of justice; and

(iii) Though Nasib Singh (the appellant) was acquitted in both FIR 96 and FIR 187, taking into the consideration the entire situation and 'the angle of failure of justice, the case must be remanded for retrial.

41. The decision of this Court in Nathi Lal is reported as an order which states that cross cases must be disposed of by two separate judgments without referring to the evidence in the other case. The order is extracted below in its entirety:

"1. Special leave granted. Heard both the sides.

2. We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he

> can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into.

Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

3. We allow this appeal partly to the aforesaid extent and direct the learned Judge to proceed with the police case and the cross case instituted by the respondent-complainant by way of a private complaint and hold the trial in both the matters in the light of the directions given hereinabove. Learned Judge will accord priority to these cross cases and dispose of both the cases expeditiously."

42. In deciding upon the correctness of the judgment of the High Court in the present case, it is necessary to emphasize that the power to order a retrial has been consistently held to be of an exceptional nature beginning with the formulation of the principles by the Constitution Bench in Ukha Kolhe (supra) and the resultant formulation, more recently, by the two judge Bench in Ajay Kumar Ghoshal (supra). Directing a joint trial is not mandatory but lies within the discretion of the Court under Section 223 of the CrPC. Clause (d) of Section 223 permits persons accused of different offences committed in the course of the same transaction to be charged and tried together. While explaining the ambit of the corresponding provision of the Code of 1898, this Court in Chandra Bhal (supra) has emphatically ruled that:

> (i) The statutory provision neither renders a joint trial imperative nor does it bar or prohibit separate trials;
>
> (ii) The matter is required to be determined by the trial court at the beginning of the trial and it is not to be determined on the basis of the result of the trial; and
>
> (iii) Where the issue is raised in the court of appeal, clear prejudice must be established as having been caused as a result of the separate trial.

43. A formulation similar to that in Chandra Bhal finds expression in the two judge Bench decision in Bhooraji (supra) where the Court emphasized that a de novo trial should be a matter of last resort only when such a course of action becomes "so desperate and indisputable". Moreover, this Court emphasized that the Appellate Court would do so in an extreme exigency to avert a failure of justice. While exercising its power as a Court of appeal under Section 386 CrPC, the Court has to be conscious of the fundamental principle that the power to order a de novo trial or "that the accused be retried or committed for trial" is of an exceptional nature which is intended to prevent the miscarriage of justice. The same principle is in fact embodied in section 465(1)23 of the CrPC.

44. The effect of an order of retrial is ordinarily speaking to wipe out the evidence recorded at the earlier stage. As Justice J C Shah, speaking for the Constitution Bench observed "an order of retrial wipes out from the record the earlier proceeding [...]". This is again reemphasized by Justice K T

Thomas in Bhooraji (supra) while "465. Finding or sentence when reversible by reason of error, omission or irregularity.—(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation of revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. cautioning against the "Replay [of] the whole laborious exercise after erasing the bulky records relating to the earlier proceedings by bringing down all the persons to the court once again for repeating the whole depositions". We have noted subsequent decisions which make some departure from the 'wiping out of the evidence recorded' formulation to deal with exigencies bearing on facilitating the ends of justice. We need not dwell on them, save to have noticed them.

45. The High Court in the present case was conscious of the fact that the appellant Nasib Singh was tried together with the other appellants during the trials in both the FIRs in view of Section 223(a) CrPC 24. The appellant was acquitted in the Sessions trial arising out of FIR 96 on 29 November 2014 and in the trial arising out of FIR 187/2012 on 29 January 2015. Though the High Court noted that "he had earned a right and we should be slow in disturbing the same", it yet remanded both the cases back for retrial "to maintain balance and delivery of justice". There is merit in the submission which had been urged both by counsel for the appellant and for the State of Punjab that the order of retrial wipes out the entire record of evidence. The evidence which has been recorded during the separate trials cannot exist for some of the accused and not for the others. The effect of the decision of the High Court is to relegate the appellant to a fresh trial together with the other accused. The High Court has in fact directed that the trial would be conducted afresh by

223. What persons may be charged jointly.—The following persons may be charged and tried together, namely:—

(a) persons accused of the same offence committed in the course of the same transaction;[..] observing that the accused be charged together for the different offences committed by them.

46. The appellant has set up the plea that ordering a retrial at this stage would be a matter of serious prejudice since crucial witnesses (PW 20 and PW 17) who deposed in regard to the manner in which the investigation was conducted by the appellant have since died. Apart from the above considerations, the High Court could not have been oblivious of the seriousness of the alleged offences of which the accused were charged. FIR 96 was registered on 27 November 2012 for offences punishable under Section 328, 363A, 366 and 376 read with Section 34 of the Penal Code. The appellant was implicated on 11 January 2013 after the provisions of Sections 217, 218 and 120B were added. There was a serious allegation of a gang rape having been committed on the prosecutrix which is alleged to have ultimately resulted in her suicide on 26 December 2012 leading to the registration of FIR 100 under Section 306/34 IPC which was transferred to PS Samana and registered as FIR 187. The High Court by its impugned judgment and order dated 20 December 2019 remitted the conviction and sentence of the accused and the acquittal of the appellant to the trial court and ordered a retrial. With a lapse of over 7 years since the date of the incident, a retrial

would not advance the cause of justice but would result in a serious miscarriage of justice. The judgment of the High Court is a travesty of justice.

47. Even if it is conceded that the alleged offences committed in FIR 96 and FIR 197 were committed in the course of the same transaction, within the meaning of the phrase in Section 223(d), in view of the interpretation in Cheemalapati Ganeswara Rao (supra), it does not warrant the exercise of discretion to direct a retrial followed by a joint trial. It was imperative for the accused-respondents to prove that the separate trials caused a miscarriage of justice. The respondents have not been able to demonstrate before the Court that separate trials led to a miscarriage of justice. No explanation has been rendered on the aspect of a miscarriage of justice. Though the High Court has in the impugned judgment observed that the separate trials in FIR 96 and FIR 187 led to a miscarriage of justice, no analysis has been undertaken to explain the finding. Moreover, the High Court has only observed that there 'may' be a miscarriage of justice. Therefore, quite apart from the individual prejudice to the appellant which has been brought out before the Court, we are clearly of the view that the holding of separate trials was not contrary to law and that there was no resultant failure of justice demonstrated to the satisfaction of the High Court.

48. We are conscious of the fact that the State of Punjab is not in appeal before this Court against the retrial which has been ordered by the High Court. But as a matter of first principle, it is evident that even the appellant has been able to establish that a retrial would be a matter of serious prejudice since vital evidence which has been recorded during the course of the trial would be obliterated as a result of the death of the witnesses from the investigating team lead by the appellant. That apart, a retrial will not serve the ends of ensuring that justice is done in a heinous crime alleged to have been perpetrated on the prosecutrix resulting in her suicide.

49. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court of Punjab and Haryana dated 20 December 2019. Consequently, the entire batch of criminal appeals which have been disposed of by the impugned judgment and order shall stand restored to the file of the High Court for disposal afresh on merits. We clarify that nothing contained in this judgment shall be construed as the expression of any opinion on the merits of the appeals which are to be heard and decided by the High Court.

50. The appeals are allowed in the above terms.

51. Pending application(s), if any, stand disposed of.

……J. [Dr. Dhananjaya Y Chandrachud]
……J. [Vikram Nath]
……J. [B.V. Nagarathna] New Delhi;

October 08, 2021.