Calcutta High Court
Sher Ali Alias Sk. Sher Ali vs Sk. Masud And Ors. on 14 July, 1958
Equivalent citations: AIR 1959 Cal 457, 1959 CriLJ 835, 62 CWN 873
Author: N Sen
Bench: N Sen
ORDER N.K. Sen, J.

1. This Rule is directed against an order of acquittal of the opposite parties who were tried on various charges by Shrj K.M. Das, Assistant Sessions Judge, Midnapore and a Jury.

2. Before the facts giving rise to the trial of the opposite parties are stated, it is necessary to refer to two preliminary points of objection raised by Mr. N.K. Basu on behalf of the opposite parties regarding the maintainability of the present application of the complainant.

3. The first point raised is that the application Is barred by limitation or in any event has been moved beyond the period which is allowed under the recognised custom prevailing in the High Court in revision cases. The second point raised is that the application upon which the present Rule was issued is not supported by any affidavit.

4. So far as the first point is concerned, it must be remembered that there is no period of limitation prescribed in the Limitation Act for moving applications in revision. Such an application can be moved at any time but the re-visional jurisdiction being entirely a discretionary one, this Court will hardly encourage or entertain an application which is not made without undue delay. The period within which it is thought that these applications should be made is accepted to be the period prescribed for appeals which is 60 days from the date of the judgment complained against in Criminal matters. Both the learned Advocates of the respective parties in the present Rule have accepted the position that the present Rule which was moved on 11-3-1958 was beyond the period of sixty days by one day, even taking the time permissible for taking certified copies of the finding and order of the Court below. In my calculation, however, both the learned Advocates were clearly under a misapprehension of facts. The Order of the learned Assistant Sessions Judge was passed on 14-12-1957. The period of sixty days from that order expired on 13-2-1958. The application for copy was made by the petitioner on 17-12-1957 and the copy was ready for delivery on 13-1-1958. It appears that there was no break in the meantime for which the petitioner could not get the benefit of extension of time. The period thus taken for copy was twenty eight days. Therefore, this application was in time up to 12-3-1958. This being so, the petitioner was clearly within time which is generally granted For moving an application in revision. There is, therefore, no substance in this point taken by Mr. N.K. Basu.

5. The second point taken by Mr, Basu is based on Rule 7 of Chapter IV of Part II of the High Court Appellate Side Rules which requires that facts stated in applications before the High Court shall be verified by the solemn affirmation of the applicant or by an affidavit to be annexed to the application. The present petition which was moved is not a verified one and there was no affidavit annexed to it but at the bottom of the application there is a note made by Mr. Kishore Mukherjee to the effect that "no affidavit is necessary". In the present petition to which this objection has been

raised, it is noticed that there is no statement of any facts beyond what could be found from the summing up of the learned Assistant Sessions Judge. Paragraph 1 of the petition contains the prosecution case "as stated in the judgment of the learned Judge" by which I take it that the prosecution case was taken from the Heads of charge to the Jury in the summing up. Paragraph 2 is a narration of the charges that were drawn up against the opposite parties. Paragraph 3 states the defence case as stated by the learned Assistant Sessions Judge in his summing up. Paragraph 4 states the number of prosecution witnesses examined and the submission that the prosecution case had been proved to the hilt. Paragraph 5 points out that the learned Assistant Sessions Judge erred on facts as well as on points of law involved in this case and the last paragraph states the learned Judge's agreement with and acceptance of the verdict of the Jury and also the submission that the petitioner was aggrieved by it. Of late, it is being observed that even when reference is made to facts which cannot he found from the copies enclosed with the petition very often Rule 7 of Chapter IV of Part II of the Appellate Side Rules is not observed in that no affidavits are annexed to the application. This practice of ignoring the High Court Rules cannot be encouraged. It is certainly the duty of the learned Advocates to satisfy themselves before appending a certificate to the effect that no affidavit is necessary, that all facts stated in a petition are supported by the certified copies attached to the petition. The question of maintainability of an application unsupported by an affidavit was raided as I can find out as far back as in the year 1904 before Brett and Mookerjee, JJ., in the case of Zamiran v. Fateh Ali, ILR 32 Cal 146, in the next year in 1905 before Harington and Mookerjee, JJ., in the case of Mt. Kariman v. A.H. Forbes, 8 Cal LJ 308 and many years thereafter in the case of Rajballav Mandal v. Rajendra Narain Mandal, 40 Cal WN 1408. R.C. Mitter J. following the above two decisions held that where all facts stated in a petition are supported by a certified copy of the order-sheet which is attached to the petition, no affidavit in support of such facts is necessary. Rule V of Chapter IV, Part II of the Appellate Side Rules only requires that facts stated in applications shall be verified either by solemn affirmation or by an affidavit. It cannot, therefore, be said on the interpretation of this Rule which was considered by this Court on many occasions that any affidavit was necessary in the present application where, as has been pointed out, no facts beyond records had been stated.

6. The two preliminary points raised by Mr. N.K. Basu appearing on behalf of the opposite parties, do not appear to be justified on facts. It must, however, be ouserved that points like these, extremely technical in nature, are not favourably looked upon after a Court has already issued a Rule and in consequence whereof the entire records are before the Court.

7. The prosecution case against the opposite parties was that there were three clumps of bamboos on c. s. plot No. 1811 of Mouza Sabra. That plot and some other plots belonged to one Hobibullah, grand-father of P. W. 1 Sher Ali. Hobibulla had two sons, Shekabat, the father of P. W. 1 Sher Ali and another so named Telebat, Sk. Hossain was the brother of Sher Ali. Shekabat, the father of Sher Ali executed a Hebauama in favour of opposite party No. 4, Darastulla in respect of about five bighas of iand of Mouza Sabra including .05 acre land within c.s. plots Nos. 1811 and 1812 of that Mouza. The prosecution case is that opposite party No. 4 Sk. Derastulla was never in possession of any share in the three bamboo clumps on c.s. plot No. 1811, although a portion of that land was included in the Hebanama executed by the father of Sher Ali in his favour. There was some golmal between opposite party No. 4 Sk. Derustulla and P. W. 1 Sher Ali in connection with Derastulla's claim in respect of the

disputed clumps. This matter in di pute was settled by a Salish which decided that Derastulla would get five annas share and Moitab Bibi, the step mother of P. W. 1 Sher Ali would get one anna share of the bamboo clumps in c. s. plot No. 1811. At that time it was disclosed that Derustulla had already sold eleven annas share in that plot to the opposite party No. 1 Masud. The Salis, therefore, decided that Derastulla would execute a Nadabi for five annas share in c. s. plot No. 1811 so that the bamboo clumps could be divided after the Nadabi was executed. The bamboo clumps, however, were not partitioned and no Nadabi was executed.

8. The prosecution case then is that on the date of the occurrence, viz., the 21st of Falgun 1363 B.S. P.W. 1 Sher Ali and his brother Sk. Hossain had been to the Government Tahsildar to pay rent. On their return home they found that some of the opposite parties were cutting bamboos from the three bamboo clumps on c.s. plot No. 1811 by axes and opposite party Derastulla and one Nur Hossain were carrying the bamboos to the Khamar of opposite party No. 1 Sk. Masud. The other opposite parties were standing nearby with lathis in their hands. P. W. 1 Sher Ali and his brother Sk. Hossain then challenged the opposite parties and asked them why they were cutting the bamboos. Then there was an exchange of hot words between the parties; some villagers arrived at the scene and asked the parties not to quarrel. The opposite parties paid no heed to those words and wanted to cut away all the bamboos from the three clumps. P. W. 1 Sher Ali and his brother Sk. Hossain protested whereupon opposite party No. 3 Sk. Abdul Hossain alias Abu Hossain gave orders to beat P.W. 1 Sher Ali and his brother Sk. Hossain. All the opposite parties thereupon rushed towards P.W. 1 Sher Ali and his brother, Sk. Hossain. Opposite party No. 1 Sk. Masud threw away the axe which he had in his hand and took up a 'lathi' from opposite party No. 3 Sk. Abdul Hossain and gave a blow on the head of Sher Ali, P. W. 1, by that lathi. Opposite party No. 2, Sk. Mansur also assaulted P. W. 1 Sher Ali who was further assaulted by the other opposite parties. Sk. Hossain, the brother of P. W. I Slier Ali who came to intervene also received a number of blows on his head. Then Azimon Bibi, wife of Sher Ali came to the place of occurrence and she gave a blow on the hand of opposite party No. 8 Sk. Lekhed alias Leakat by an axe which was lying on the ground as Leakat was attempting to give a blow on Sk. Hossain, the brother of Sher Ali. Just then Derastulla gave a lathi blow on the forehead of Azimon Bibi. Abdul Hakim had given blows on opposite party No. 2 Sk, Mansur and opposite party No. 1 Sk. Masud, as they assaulted Azimon Bibi. Sher Ali, P. W. 1, his wife Azimon Bibi and his brother Sk. Hossain all suffered bleeding injuries by the blows given on them. Sher Ali's hand was fractured and his brother Sk. Hossain whose injuries were grave was removed to his house and he succumbed to his injuries about four days later on the 25th of Falgun, 1363 B. S,

9. Charges under Sections 147, 379 and 304/149 of the Indian Penal Code were framed against all the opposite parties of whom opposite party No. 3 Sk. Abdul Hossain alias Abu Hossain was further charged under Section 304 of the Indian Penal Code. Opposite party No. 1 Sk Masud and opposite party No. 2 Sk. Mansur and opposite party No. 4 Sk. Derastulla and opposite party No. 8 Lekhed alias Leakat were also charged under Section 323 of the Indian Penal Code. Opposite party No. 2 Sk. Mansur was further charged under Section 325 of the Indian Penal Code.

10. The opposite parties all pleaded not guilty and their case was that the opposite party No. 4 Derastulla was in possession in his eleven annas share of the disputed bamboo clumps and he had sold his eleven annas share of the disputed clumps to opposite party No. 1 Sk. Masud who was

cutting the bamboos from those clumps. It was the defence case that the men of Sher Ali's party had attacked the petitioners as a result of which the opposite parties suffered bleeding injuries. They also stated that the story of Salish and Nadabi as introduced by the prosecution was entirely false. Their case was that they were attacked by Sher AH, his wife and his brother, the deceased, Sk. Hossain and they acted only in self-defence.

11. As a result of the trial, the Jury unanimously found the opposite parties not guilty of all the charges and the learned Assistant Sessions Judge agreeing with and accepting the same acquitted the opposite parries.

12. Against this order of acquittal as passed by the learned Assistant Sessions Judge, Sher All moved this Court and obtained the present Rule.

13. Mr. S.S. Mukherjee appearing in support of the Rule, has pointed out a number of passages from the learned Assistant Sessions Judge's summing up to show that he had misdirected the Jury throughout his charge with the result that the Jury had no other option than to follow the direction of the Judge, and returned verdicts of not guilty. His submission, therefore, is, that in view of the misdirection the whole trial was vitiated and as a matter of fact there was not even a pretence of a trial.

14. Mr. N.K. Basu, who has appeared on behalf of the opposite parties has, in substance, replied to the arguments of Mr. Mukherjee by pointing out that the actual summing up by the Asst Sessions Judge in this case was in Bengali. The charge that he delivered, which was in Bengali, is not what is placed on records but as usual what he stated to the Jury was placed on records being translated into English and even then only the Heads of charges were noted. Mr. Basu submitted that if there were misdirections and errors in the summing-up they were in favour of the prosecution and as such, there was no reason for Mr. Mookherjee to complain against them. Mr. Basu thereafter submitted that if the directions complained of by Mr. Mukherjee be looked at with reference to the evidence and in their proper context, those directions would be found to be proper directions. It is necessary now to examine the arguments raised in the case by the respective parties.

15. Mr. Mukherjee has, first of all, complained that the learned Judge's summing-up as can be seen from page 16 of the certified copy of the heads of charge attached to the petition is that he had assumed the property or the disputed portion of it to be in the joint possession of the parties and on this assumption, his direction was that P. W. 1 Sher Ali could bring a civil action against Derastulla or Masud if any one of them had cut and removed the bamboos from the clumps in excess of his or their shares. The next misdirection, according to Mr. Mukherjee, was with regard to the common object of the unlawful assembly. The common object as mentioned in the charge under Section 147 of the Indian Penal Code is mat the opposite parties were members of an unlawful assembly and in prosecution of the common object of such assembly, viz., by means of criminal force to enforce the supposed right on the bamboo clumps standing on plot No. 1811, they committed rioting. The common object mentioned in the third charge was "that the opposite parties being members of an unlawful assembly with the common object of assaulting Sher Ali and his brother Sk. Hossain if they would obstruct to the taking away of the bamboos and the said Abu Hossain and unlawful assembly

in prosecution of the said common object cause death of Hossain Ali by assaulting him with lathi blows etc."

Mr. Mukherjee complains with regard to the charges framed that the common object mentioned in the first charge under Section 147 of the Indian Penal Code was entirely different from the common object that was alleged to the assembly that caused the death of Sk. Hossain for which they had been charged under Section 304/149 of the Indian Penal Code. Mr. Mukherjee has further, in connection with how the learned Assistant Sessions Judge has dealt with the common object, drawn my attention to several passages from the summing up where the learned Judge had repeatedly told the Jury that there was no legal evidence to connect the opposite parties with the unlawful assembly. To quote one of the few instances, the learned Judge at page 25 of the certified copy of the summing up has said, "There is no legal evidence in this case regarding the common object which is an essential ingredient of an offence under Section 141 of the Indian Penal Code. There is, therefore, no legal evidence in this case that the ten accused persons or any five or more of them formed an unlawful assembly."

At page 27 he said, "it is evident, therefore, that the ten accused persons had no common object to kill Sk. Hossain or to cause grievous hurt to him or to cause any hurt to him".

Then at pages 28 and 29, he repeatedly was harping on the same vein. Even he went on to inflict his own opinion on the Jury more than once by saying that in his opinion, the Jury would not be justified in saying that the accused persons formed an unlawful assembly. At no place where the learned Judge gave such positive direction or expressed his opinion did he think of cautioning the Jury that they were not bound to accept his opinion. At pages 29 and 30 in more than half a dozen instances he went on directing the Jury that there was no evidence that some of the accused persons went to beat the deceased, that at the time of assault on the deceased all the accused persons or any five or more of them combined together or helped one another and after giving positive directions in that manner he charged the Jury by saying and without giving them any caution whatsoever that it was clear to him that the Jury would not be justified in coming to the conclusion that ten accused persons or any five or more of them formed an unlawful assembly drawing an inference even from the acts done by the five accused persons. Even more serious was his telling the Jury that "even assuming that the Jury believed every word of the prosecution evidence, in that case also they would not in my opinion be justified in convicting the ten accused persons for an offence of forming an unlawful assembly or in coming to the conclusion that any five or more of them formed the unlawful assembly."

Then the learned Judge went on repeating that according to him there was no legal evidence in this case and eventually he directed the Jury to return a verdict of not guilty under Section 147 of the Indian Penal Code or under any other section read with Section 149 of the Indian Penal Code.

16. Mr. Basu, however, had made no particular reference to any of the above passages in the charge beyond saying that read in their proper contexts those passage were harmless.

17. It is not possible for me to accept such a general statement as in my opinion, there is no doubt that the learned Judge's summing up regarding the liability of a person under Section 149 of the Indian Penal Code has been thoroughly misunderstood by him. It is not correct to say, as the learned Assistant Sessions Judge has done, when dealing with an offence under Section 149 of the Indian Penal Cods that all the persons must combine together or help one another at the time of the assault. I have therefore no doubt in my mind that in the present case, the learned Judge thoroughly misdirected the Jury as a result of which a perverse verdict has been obtained.

18. To the list of misdirections already referred to by Mr. Mukherjee I have also added a few more. With regard to the statement made by P. W. 1 that he went to the Government office to pay rent, the learned Judge has referred to the absence of that statement from the "First Information Report" and has thought from such absence that the prosecution, story has become shaken. When the prosecution story should be shaken for such absence is not easy to appreciate specially in view of the fact that the 'First Information Report' was no substantive evidence in the case and could only be used to contradict its maker. Many other instances of mis-directions could be multiplied to show that there has been no proper trial although there might have been a pretence of a trial in the present case but since the matter is essentially one to be tried by a Jury, it will serve no useful purpose by pointing out such mis-directions. It is unfortunate that the opposite parties have to be put on trial again but it cannot be helped as the more I wade through the 58 pages of the Heads of the charge, the more I am inclined to think what the learned Assistant Sessions Judge had actually told the Jury contained many more mis-directions.

19. Mr. Basu's submission that the errors, if any, committed by the learned Assistant Sessions Judge in this case were in favour of the prosecution, do not appear to me to be correct and I cannot see how these mis-directions from whatever angle they might be approached could be said to be in favour of the prosecution. It is not necessary for mo to go into the facts of the case with reference to the evidence but from those portions of the evidence to which my attention has been drawn by the learned Advocates appearing for the parties, I am not at all convinced that there is no evidence to go to the Jury in the case as has been told by the learned Assistant Sessions Judge to the Jury in the case or the evidence, if believed, would make out no offence. In the interest of justice, therefore, it is necessary that this order of acquittal brought out as a result of mis-direction cannot be allowed to stand.

20. The argument that an order of acquittal should not ordinarily be set aside does not appeal me in all instances. I am fully aware of the limitation of a Revisional Court so far as acquittal matters are concerned but at the same time no Court has yet said that where the verdict has been brought out by serious mis-directions resulting in a mis-trial and where as a consequence of the order of acquittal there has been a failure of justice, the High Court will not interfere simply because an order of acquittal has been passed and that the order has been challenged by a private complainant. The revisional power could be exercised for the interest of public justice requiring interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. The jurisdiction, however, is not ordinarily invoked or used merely because the lower Court had taken a wrong view of the law or mis-appreciated the evidence on records. The present case is one in which in my view, it can clearly be said that there has been a gross-miscarriage of justice.

21. The result, therefore, is that the Rule is made absolute. The order of acquittal is set aside and it is ordered that the opposite parties be tried by a Court of Sessions to be presided over by a Judge other than Shri K.M. Das to be nominated by the Sessions Judge. Fresh charges, if necessary, may be framed.