

**IN SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.165 OF 2018
(Arising out of SLP(Crl.) No. 9571 of 2012)

ISSAC @ KISHOR

.....Appellant

Versus

RONALD CHERIYAN AND ORS.

....Respondents

ORDER

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 25.07.2012 passed by Kerala High Court at Ernakulam allowing Criminal Revision Petition No.3413 of 2008 preferred by respondent no.1 herein thereby setting aside the acquittal of the appellant-accused no.1 for the offences punishable under Section 302 IPC and Section 394 IPC read with Section 34 IPC and further remitting the matter back to the trial Court for retrial.

3. Briefly stated case of the prosecution is that, the deceased-Brijitha was sixty three years old widow and used to stay

alone in her house which was situated in five acres of agricultural land. Natarajan, father of accused no.1 used to stay in the same house where Brijitha was staying. He was a permanent employee of Brijitha. Respondent no.1-Ronald Cheriyan, son of the deceased, for some reasons, directed Natarajan not to stay in the house and therefore, Natarajan discontinued his employment. Thereafter, for helping the deceased in agricultural work, the appellant-accused no.1 started staying with the deceased in her house. On 06.02.2006 in the midnight, sister-in-law of deceased who was staying at a distance of 50 meters from the house of the deceased, heard cries from the house of deceased. On hearing the cries of deceased, sister-in-law of deceased got awaken her son Cheriyan @ Shabin (PW-1). Then, PW-1 went to the house of deceased and asked the appellant-accused no.1 to open the door of the kitchen; but the appellant-accused no.1 told him that he being tied with rope could not open the door and asked PW-1 to take entry from the front door. PW-1, on entering the house from front door, found the deceased lying in unconscious state in the front room of the house and the appellant-accused no.1 being tied with rope in the kitchen. The appellant-accused no.1 told PW-1 that five thieves had entered the house and after suffocating the

deceased took away all the valuable gold ornaments and cash from the house. PW-1 informed about the incident to respondent no.1-Ronald Cheriyan, eldest son of the deceased, and then they took the deceased to the St. John Hospital, Kattappana where she was declared dead. At about 04.00 a.m., PW-1 went to Kattappana police station and his statement (Ex.P1) was recorded by PW-22-Sub-Inspector of Police, on the basis of which, case in Crime No. 49 of 2006 was registered against five identifiable persons under Section 396 IPC.

4. After registration of FIR, the Inspector of Police, during investigation prepared the spot panchnama (scene mahazar) and also taken the finger prints from the scene of crime. The appellant-accused no.1 was arrested on 07.02.2006 at 06.20 p.m. who gave a disclosure statement; based on which, accused no.2 was located and arrested on the same day at 08.00 p.m. Confession statement of accused no.2 led to recovery of gold ornaments, currency notes and shawl which was used to suffocate the deceased, from the house of accused no.2. Also, the grey hair found on the shawl were preserved for further investigation. The post-mortem report disclosed that death of the deceased was caused due to smothering. After completion of the

investigation, charge-sheet was filed against the appellant-accused no.1 under Section 394 IPC and Section 302 IPC read with Section 34 IPC.

5. The trial court convicted accused no.2 under Sections 302 and 394 IPC *inter alia* on the following grounds:- a) presence of accused no.1 has been confirmed in the house of the deceased due to the fact that finger prints of the accused were found on the objects recovered from the place of crime; b) ornaments of the deceased and the currency notes were recovered from the house of accused no.2; c) recovery of shawl which was used in the commission of offence containing hair of the deceased, from the house of accused no.2; and d) that accused no.2 was in dire need of money to pay back his debts. The trial court has acquitted the appellant-accused no.1 holding that the disclosure statement given by the appellant regarding involvement of accused no. 2 and location of the house of accused no.2, are not sufficient grounds to establish the guilt of appellant. The trial court held that the chance finger prints of the appellant-accused no.1 collected from the place of occurrence was immaterial as he was working as domestic help in the house of deceased.

6. Being aggrieved by acquittal of appellant, respondent no.1-eldest son of the deceased filed a criminal revision challenging the acquittal of the appellant-accused no.1. Accused no.2 also filed a criminal appeal before the High Court challenging his conviction and sentence.

7. The High Court held that the trial court has committed irregularity in omitting to frame charges under Section 34 IPC, even though the trial court itself has framed an issue on the point of sharing of common intention of accused nos.1 and 2 in committing robbery and murder of the deceased which has materially affected the trial. The High Court further held that the fingerprint expert who had prepared the report (Ex.P8) ought to have been examined before the trial court and non-examination of that witness has caused prejudice. The High Court has taken note of that the trial court has failed to evaluate the possibility of accused no.2 in committing the crime alone without the aid of the appellant and also that there was no injury on the appellant when he was found tied with the rope in the house of deceased.

8. We have heard learned counsel for the parties and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in setting aside the

judgment of the trial court and remitting the matter back to the trial court for retrial.

9. Section 386 Cr.P.C. defines the powers of the Appellate Court in dealing with the appeals. The powers enumerated thereon are vested in all courts, whether the High Court or subordinate courts, except that Clause (a) of the section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that court, while Clause (b) of the section is not so restricted and embraces all courts. The power to direct the accused to be retried has been conferred on the High Court not only when it deals with an appeal against acquittal but also when it deals with an appeal against conviction. Section 386 Cr.P.C. reads as under:-

"Section 386:- 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 of 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;
....."

10. Under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

11. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate

Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

12. In *K. Chinnaswamy Ready v. State of Andhra Pradesh and Another*, AIR 1962 SC 1788, the accused had been convicted by the trial court. The Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the *de facto* complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however

indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....." **(underlining added)**

The same principle was again reiterated in *Mahendra Pratap Singh v. Sarju Singh and Another* AIR 1968 SC 707.

13. In *Matukdhari Singh and others v. Janardan Prasad*, AIR 1966 SC 356, accused was tried for offences under Sections 420, 466, 406 and 465/471 IPC and acquitted. The trial court did not frame charge under Section 467 IPC regarding which there were *prima facie* materials available, that is an offence triable exclusively by the Sessions Court. The High Court, in appeal, set aside the acquittal and ordered retrial. The Supreme Court dismissed the appeal preferred before it. The court referred to earlier decisions in *Abinash Chandra Bose v. Bimal Krishna Sen and Another* AIR 1963 SC 316 and *Rajeshwar Prasad Misra v. State of West Bengal and Another* AIR

1965 SC 1887 with reference to the facts of those cases and emphasized that wide discretion available with the Appellate Court in ordering retrial.

14. In appeal against acquittal, in exceptional circumstances, the High Court may set aside the order of acquittal even at the instance of private parties, though the State may not have thought it fit for appeal. But it is to be emphasized that this jurisdiction is to be exercised only in exceptional circumstances when there is glaring defect in the conduct of trial which has materially affected the trial or caused prejudice. In the present case, the High Court found that even though the trial court has framed an issue on the point of sharing of common intention of accused Nos. 1 and 2 in committing the offence, the omission to frame charges under Section 34 IPC has materially affected the trial. The High Court further observed that the fingerprint expert who prepared Ex. P8 ought to have been examined and other circumstances emerging out of evidence ought to have been examined by the trial court. The High Court further observed that because of the omission to frame the charges under Section 34 IPC, in spite of framing the issue of common intention, the trial court has not examined the evidence in proper perspective, which according to the

High Court has materially affected the trial which is called for retrial. The discretion exercised by the High Court under Section 386 (a) Cr.P.C. directing retrial with certain directions cannot be said to be erroneous warranting interference.

15. In the result, the appeal is dismissed. The trial court shall proceed with the matter as per the directions of the High Court and dispose of the matter as expeditiously as possible. No costs.

.....J.
[RANJAN GOGOI]

.....J.
[R. BANUMATHI]

**New Delhi;
January 23, 2018**