CASE NO.:
Appeal (crl.) 607 of 2002

PETITIONER:
JAGGANATH CHOUDHARY AND ORS.

RESPONDENT:
RAMAYAN SINGH AND ANR.

DATE OF JUDGMENT: 09/05/2002

BENCH:
UMESH C. BANERJEE & Y.K. SABHARWAL

JUDGMENT:
JUDGMENT

2002 (3) SCR 936

The following Order of the Court was delivered by BANERJEE, J. Leave granted

A significant departure from the regular norm in the matter of pronouncement of judgment is the key factor in the present appeal. Mentioned hereinbefore a significant departure in the matter of pronouncement of judgment-but what is it so significant so as to warrant interference of this Court under Article 136 of the Constitution-Before adverting to the same, however, a brief factual reference would be convenient and necessary for appreciation of such a departure-against an order of acquittal recorded by 3rd Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 258 of 1992, a revisional application stands filed before the High Court of Judicature at Patna recording therein that on appreciation of evidence the order, as passed by the learned Sessions Judge, was totally perverse on the face of the judgment. It is on the basis aforesaid, the learned Single Judge in the revisional application in his judgment (impugned before this Court) in three different settings in the body of the judgment stated:

(a) "Be it what it may, I am not going into the merit of the case in depth but on perusal of the impugned judgment particularly paragraph 30 and the material on records, I also hold that reasonings of acquittal given by the learned Sessions Judge are definitely not proper and justifiable on the face of it and if not justifiable then it may go to the extent of perversity."

(b) "But in the present case I find that four eye witnesses to the occurrence were found to be present at the scene of occurrent and their presence at the scene of occurrence could not be disbelieved by any plausible or cogent reasons and then discarding the evidence of eye witnesses has been done by the learned Court below on a weak and meek reasons then definitely this Court can interfere as the impugned judgment would affect in the system of delivering justice."

(c) "In that way, without forming an opinion regarding the fate of the case I find that the impugned judgment should not be sustained and must be set aside and the matter be quashed for further consideration in the light of the observation made above. In that way, the impugned judgment is hereby set aside and the matter is sent back to the Court below for writing a fresh judgment by giving proper judicial mind to the evidence on record. (Emphasis Supplied) Opposite party Nos. 2 to 4 are hereby directed to appear before the learned Court below on 2nd August, 2001 and they should be allowed to go on bail to the satisfaction of the learned Sessions Judge and then an opportunity be given for further argument to both the parties writing a fresh judgment on the materials on record."

It is this direction as noticed hereinbefore, for writing out a fresh judgment by giving proper judicial mind to the evidence on record and which stands very strongly criticised by the learned senior advocate, Mr. S.B. Sanyal, appearing in support of the appeal and we do find some justification in regard thereto.

Before delving on to the principal issue as regards the departure and as stated above it would be convenient to note that in count 1, paragraph 30 of the trial Court's judgment has been drawn attention of and for convenience sake para 30 is reproduced hereinbelow for its true scope and effect. The said paragraph 30 reads as below :-

"30. Now on the cool consideration of entire facts, evidence oral and documentary and argument of both the sides, I reach on the following conclusion :-

(A) That according to P.W.5 and P.M. Report (Ext. 2) I find that the doctor conducted post mortem at 11 a.m. on 7.10.91 and had written in the end of post mortem report that the victim died within 24 hours from the time of conduction of post mortem report. This means that the story of prosecution that Ram Binod was caught and shot on 6.10.91 and soon he died is not a fact, because according to medical finding Ram Binod Singh was alive till 10.59 p.m. on 6.10.91 and in such a case the entire story of prosecution becomes unreliable. As such, the Court has no alternative than to declare that the prosecution has not succeeded to prove the case against the accused persons under Section 302/34 of the I.P.C.

(B) Further I find that all the witnesses, P.Ws. 1, 2 and 3 are related and P.W. 4 is the informant himself. The independent witnesses Madan Singh, Rambabu Singh, Raj Kishore Thakur were not examined and no explanation was given.

(C) Chargesheet witnesses Radha Mohan Singh, Sudistha Singh and Madan Singh were not examined and no explanation during argument was placed by the learned Addl. P.P. Chargesheet witness Radha Mohan Singh has deposed for the defence as D.W.7 and supported the defence version of the accused person i.e. occurrence took place at other place by other person and the dead body was brought by Rickshaw and on cot to the bathan of Raghubansh Singh.

(D) The prosecution has miserably failed to establish the P.O. for the P.O. place darwaja of Raghubansh dean of Ranghubansh and bathan and shan of raghubansh were used. Each places possess different boundaries and distance from one another.

(E) The prosecution has further failed to establish the weapons used in inflicting wound on the deceased. For arms words nalkatua, deshi revolver, revolver and nalkatua gun were used by different persons. Each weapon differs from one another. Had the P.Ws. actually seen the occurrence, the P.O. and weapons used could not have been deposed differently.

(F) The stained soil with blood seized by the I.O. was not produced to be marked as material exhibits.

(G) The I.O. (P.W.7) has not seized the cot and the sand smeared with blood, which were concrete and strong proof of murder.

(H) The accused have succeeded to establish through informatory petition (Ext. D) the suspicion on the part of informant and witnesses and others and also Jagannath Choudhary was a witness in a case against Sudhistha while Chandra Prakash is son of Sudistha, Ramesh too is inimical with the accused persons. Thus, it comes to finding that previous enmity has played great part in implication of the accused persons while the prosecution has totally failed to prove charge against the accused persons.

(I) The prosecution story as told by Ramayan Singh is itself unbelievable because if the accused persons will catch Ram Binod from back and front portion, no firing on Binod can be done because in such circumstances, Ram Binod will not remain like statute, but to save himself, he will try his best to be immune and thus all the four might be in an inconsistent position, so a fire on Binod could injure any accused.

(J) According to the I.O. in his case diary he opined contact shot of Ram Binod, which is the case of prosecution to, but P.W. answered that the shot of firing might have been done with a distance of 6 to 7 feet away. This also falifies the prosecution case.

(K) According to some of the P.Ws. Ram Binod received fire wound. When he was freed by accuses persons he fell down on the surface and died soon. When his body was kept on a cot, his pulse beat stopped, but according to P.W.7 the nature of injury is such that victim might have remained alive for 3 to 4 hours. This also falsify the prosecution story.

(L) P.Ws. 1, 2, 3 and 6 had not seen the alleged story of snatching watch and money of Ramayan by Bhav Chandra Choudhary alone or in combination with his brother Chunchun and father Jagannath. So, the motive behind such murder by the alleged accused is not brought before the Court. According to 1966 BI, JR page 786 to 790 "statement made under Section 164 cannot be used as a substantive evidence. It can be used to cross-examine the persons who made it." In this case P.W. 1 and P.W. 2 have contracted such statement, such statements Exts. 7 to. 7/3 have been recorded not in accordance with law and are defective."

It is on the basis aforesaid that the learned Sessions Judge thought it fit to acquit the accused upon recording a finding to that effect. The second count as noticed above, if read with count (3), the order impugned cannot but be stated to be a mockery of justice delivery system.

Writing of a fresh judgment by giving proper judicial mind to the evidence on record has been the observation of the High Court - and what would be the consequences - would the learned trial Judge be ever able to apply the judicial mind in the matter of dispensation of justice - We are afraid, our answer cannot but be in the negative.

Let us now, however, concentrate ourselves on to the procedural aspect of the matter - and it is in this aspect of the matter, Section 401 be considered at the initial stage. The Section reads as below :

"401. High Court’s powers of revision - (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercised any of the powers conferred on a Court of Appeal by Section 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under the Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is

satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

More than four decades ago, this Court in K. Chinnaswamy Reddy v. State of Andhra Pradesh and Anr., AIR (1962) SC 1788 very succinctly formulated the extent of jurisdiction by the revisional Court upon reliance on two oft-cited decisions of this Court as mentioned therein in the manner following :

"4. The extent of the jurisdiction of the High Court in the matter of inferring in revision against an order of acquittal has been considered by this Court on a number of occasions. In D. Stephens v. Nosibolla, [1951] SCR 284 : AIR (1951) SC 196, this Court observed -

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

(5) Again in Logendrathan Jha v. Shri Polailal Biswas, [1951] SCR 676 : AIR (1951) SC 316, this Court observed -

"Though subs-s. (1) of S.439 of the Criminal Procedure Code authorises the High Court to exercissd in its discretion any of the powers conferred on a Court of appeal by S.423, yet sub-S. (4) specifically excludes the power to 'convert a finding of acquittal into one of conviction'. This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court can in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stops short of finding the accused guilty & passing sentence on him by ordering a re-trial."

(6) These two cases clearly lay down the limits of the High Court's jurisdiction on interfere with an order of acquittal in revision : in particular, Logendranath Jha's case [1951] SCR 676 : AIR (1951) SC 316 stresses that it is not open to a High Court to convert a finding of acquittal into one of conviction in view of the provisions of S.439(4) and that the High Court cannot do this even indirectly by ordering retrial. What had happened in that case was that the High Court reversed pure findings of facts based on the trial court's appreciation of evidence but formally complied with sub-s.(4) by directing only a retrial of the appellants without convicting them, and warned that the court retrying the case should not be influenced by any expression of opinion contained in the judgment of the High Court. In that connection this court observed that there could be little doubt that the dice was loaded against the appellants of that case and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to the credibility of the prosecution witnesses and the circumstances of the case in general.

(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 S.439 forbids a High Court from converting a finding of acquittal into one of the 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 limitation 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 S.439(4). We have therefore to see whether the order of the High Court setting aside the order acquittal in this case can be upheld on these principles.

(8) A perusal of the judgment of the High Court shows that the High Court has gone into the evidence in great detail so far as the case against the appellant was concerned. In our opinion, the High Court should not have death with evidence in such detail when it was going to order a retrial, for such detailed consideration of evidence, as pointed out in Logendranath's case, 1951 SCR 676 AIR (1951) 316 amounts to loading the dice against the appellant, when the case goes back for retrial. If the matter stood at this only, we would have no hesitation in setting aside the order of the High Court directing retrial; but there is one important circumstance in this case to which the High Court has adverted in passing, which, in our opinion, was sufficient to enable the High Court to set aside the acquittal in this case. It would then have been unnecessary to consider the evidence in that detail in which the High Court has gone into it, and thus load the dice against the appellant, when the case goes back for retrial. That circumstance is that the Assistant Sessions Judge had admitted in evidence that part of the statement of the appellant in which he stated that he would show that place where he had hidden the ornaments and relying on it he held that the appellant was in possession of the seventeen ornaments, he had dug out from the garden which he owned along with others. The Sessions Judge however held that part of the statement of the appellant where he stated that he had hidden the ornaments was inadmissible in evidence. The same applies to the case against the other accused, who had stated that he had given one ornament to Baba Sab and would get it recovered from him. Though the Sessions Judge has not in specific terms ruled out that part of the other accused's statement where he said that he had given the ornament to Baba Sab, he did not consistently with what he said with respect to the appellant, attach importance to this statement of the other accused. If therefore this part of the statement of the appellant and the other accused which led to discovery of ornaments is admissible, it must be held that the appeal court wrongly ruled out evidence which was admissible. In these circumstances, the case would clearly be covered by the principles we have set out above in as much as relevant evidence was ruled out as inadmissible and the High Court would be justified in interfering with the order of aquittal so that the evidence may be re-appraised after taking into account the evidence which was wrongly ruled out as inadmissible. It seems that the High Court was conscious of this aspect of the matter, for it says in one part of the judgment that the only possible inference that could be drawn was that the appellant was in possession of stolen goods before they were put in that secret spot, as admitted by the appellant in his statement part of which is

admissible under S.27 of the Indian Evidence Act. If the High Court had confined itself only to the admissibility of this part of the statement, it would have been justified interfering with the order of acquittal. Unfortunately, the High Court went further and appraised the evidence also which it should not have done, as held by this Court in Longendranath's case, 1951 SCR 676 : AIR (1951) SC 316). However, if admissible evidence was ruled out and was not taken into consideration, that would in our opinion be a ground for interfering with the order of acquittal in revision."

Incidentally the object of the revisional jurisdiction as envisaged under Section 401 was to confer upon superior criminal court a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions of apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some underserved hardship to individuals. (See in this context the decision of this Court Janata Dal v. H.S. Chowdhary and Ors., [1992] 4 SCC 305). The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. If however, the same has been an appeal, the applicant would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, but in revision the only question is whether the court should interfere in the interests of justice. Where the court concerned does not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction.

While it is true and now well-settled in a long catena of cases that exercise of power under Section 401 cannot but be ascribed to be discretionary - this discretion, however, as is popularly informed has to be a judicious exercise of discretion and not an arbitrary one. Judicial discretion cannot but be a discretion which stands "informed by tradition, methodised by analogy and disciplined by system" - resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law and thus a flagrant miscarriage of justice, exercise of revisional jurisdiction under this statute ought not to be called for. It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla : Logendranath Jha and Chinnaswamy Reddy (supra) as also in Thakur Das (Thakur Das (Dead) by Lrs. v. State of Madhya Pradesh and Anr., [1978] 1 SCC 27 this Court with utmost clarity and in no uncertain terms recorded the same. It is not an appellate forum wherein scrutiny of evidence is possible neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being other wise possible. It is restrictive in its application though in the event of there being a failure of justice there can said to be no limitation as regards the applicability of the revisional power.

The High Court possesses a general power of superintendence over the actions of court subordinate to it. On its administrative side, the power is known as the power of superintendence. On the judicial side, it is known as the duty of revision. The High Court can at any stage even on its own motion, if it so desires, and certainly when illegalities or irregularity resulting in injustice are brought to its notice call for the records and examine them. This right of the High Court is as much a part of the administration of justice as its duty to hear appeals and revisions and interlocutory applications - so also its right to exercise its powers of administrative superintendence. Though however, the jurisdictional sweep of the process of the High Court, however, under the provisions of Section 401 is very much circumscribed, as noticed hereinbefore.

Having regard to the aforesaid, we do feel it expedient to record that in the contextual facts presently under consideration before this Court, the High Court cannot but be said to have exceeded its revisional jurisdiction in setting aside the order of acquittal.

In any event, writing of a fresh judgment as directed by the Court is rather a significant departure in the normal disposal of revisional applications. Opportunities have been given for further argument but would that by itself tilt the scale - this aspect of the matter has already been noticed earlier, as such we need not dilate thereon excepting recording that an extremely significant departure from the normal form of Court orders stands challenged in this Court.

We have had the opportunity of going through the judgment of the learned Sessions Judge and paragraph 30 thereof has already been noticed in extenso and a perusal thereof would not justify the comments of the learned Single Judge of the High Court, neither it world be said to be within the jurisdiction of the High Court to pass the order impugned in exercise of revisional jurisdiction under Section 401 of the Code.

In the view as above, the order impugned cannot be sustained and as such the appeal is allowed. The order impugned is set aside and the order of the learned Sessions Judge stands restored. The bail bonds, if any, stand discharged.