A

SATYENDRA NATH DUTTA & ANR.

v.

RAM NARAIN

November 18, 1974

[Y. V. CHANDRACHUD AND P. N. BHAGWATI, JJ.]

B *Section 439 (4)—Appeal against acquittal by private complainant—State not prefering appeal under sec. 417—interference with the order of acquittal—Sessions Court judgment not suffering from any manifest illegality—Acquittal not resulting in any miscarriage of justice—High Court, if could order retrial.*

The appellants Satyendra Nath Dutta and Subhash Mauzumdar were tried by the learned Civil and Sessions Judge, Lucknow, for offences in connection with the death of one Nanhey Lal and injuries to his son, Raj Kishore. C Satyendra Nath Dutta was charged under section 302 and section 307 read with section 34 while the other appellant was charged under section 307 and section 302 read with section 34 of the Penal Code. The learned Sessions Judge acquitted the appellants upon which Ram Narain, a brother of the deceased Nanhey Lal, filed a revision application in the High Court of Allahabad under section 439, Code of Criminal Procedure, challenging the order of acquittal. The High Court allowed the revision application, set aside the order of acquittal and directed that the appellants be retried by the Sessions Court. This appeal by special leave has been preferred against the judgment of the High Court D ordering re-trial.

Allowing the appeal,

HELD: The revisional jurisdiction of the High Court cannot be invoked merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record. [745A]

D. Stephens v. *Nosibolla*, [1951] S.C.R. 284, *Logendranath Jha and Ors.* v. E *Polailal Biswas*, [1951] S.C.R. 676, *K. Chinnaswamy Reddy* v. *State of Andhra Pradesh* [1963] 3 S.C.R. 412, *Mahendra Pratap Singh* v. *Sarju Singh & Anr.* [1968] 2 S.C.R. 287 and *Khetrabari Samal etc.* v. *State of Orissa etc.* [1970] 1 S.C.R. 880 referred to

While applying the principles laid down by this Court in this respect, the High Court has fallen precisely into the error which was corrected by this Court in these decisions The error which the High Court committed is that in the first place it blamed the accused for not demanding an identification parade, F secondly it held by examining a few aspects of the evidence that the accused were previously known to the eye-witnesses and thirdly it assumed wrongly that the conclusion of the Sessions Court that Nanhey Lal had made a dying declaration was based on inadmissible evidence. The Sessions Court considered the various circumstances and came to the conclusion that Nanhey Lal had made a dying declaration. That conclusion may be wrong but that cannot justify setting aside the order of acquittal and directing a re-trial of the appellants. The dominant justification of the order of acquittal recorded by the Sessions Court is the view it took of the evidence of the eye-witnesses. If that evidence was G unacceptable, there were no circumstances in the case on which the appellants could be convicted. [748B-C]

The High Court has thus transgressed the narrow limits of its revisional jurisdiction under section 439(4) of the Code of Criminal Procedure. The judgment of the Sessions Court did not suffer from any manifest illegality and the interests of justice did not require the High Court to interfere with the order of acquittal passed by the Sessions Court. Any fair assessment of the H evidence of the eye-witnesses would show that the acquittal of the appellants led to no miscarriage of justice. [748D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 55 of 1971.

Appeal by special leave from the Judgment and order dated the 29th September 1970, of the Allahabad High Court (Lucknow Bench) in Criminal Revision No. 364 of 1966. A

Debabrata Mukherjee Manoj Swaroop and *U. S. Prasad,* for the appellants.

Shivpujan Singh, for respondent.

The Judgment of the Court was delivered by B

CHANDRACHUD J. The appellants Satyendra Nath Dutta and Subhash Mauzumdar were tried by the learned Civil and Sessions Judge, Lucknow, for offences in connection with the death of one Nanhey Lal and injuries to his son, Raj Kishore. Satyendra Nath Dutta was charged under section 302 and section 307 read with section 34 while the other appellant was charged under section 307 and section 302 read with section 34 of the Penal Code. The learned Sessions C Judge acquitted the appellants upon which Ram Narain, a brother of the deceased Nanhey Lal, filed a revision application in the High Court of Allahabad under section 439, Code of Criminal Procedure, challenging the order of acquittal. It is said that the State of U.P. wanted to file an appeal against the order of acquittal but it could not do so as the record of the case was missing. The High Court allowed the revision application, set aside the order of acquittal and directed D that the appellants be redirected by the Sessions Court. This appeal by special leave is directed against the judgment of the High Court ordering the re-trial.

Section 417(1) of the Code of Criminal Procedure, 1898 provides that the State Government may direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any court other than the High Court. By sub-section (3) the High Court E is empowered to grant special leave to the complainant to appeal from the order of acquittal if such an order is passed in a case instituted upon a complaint.

Section 439(1) of the Code, which deals with the revisional powers of the High Court provides that in the exercise of revisional jurisdiction the High Court may exercise any of the powers conferred on a court of appeal. As the court of appeal is entitled under section 423(1)(a) F to reverse an order of acquittal or to direct a re-trial. The High Court in the exercise of its revisional powers would also be entitled to record a conviction by reversing the order of acquittal. But sub-section (4) of section 439 provides expressly that nothing contained in the section "shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction." This provision has been judicially interpreted and it is necessary to refer to the decision of this Court G bearing on the construction thereof.

In *D. Stephens* v. *Nosibolla*(1) it was held by this Court that the revisional jurisdiction conferred by section 439 of the Code ought not to be exercised lightly when it is invoked by a private complainant against an order of acquittal which could have been appealed against by the Government under section 417. "It could be exercised only H in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of

(1) [1951] SCR 284.

A a gross miscarriage of justice." In other words, the revisional jurisdiction of the High Court cannot be invoked merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record. In *Logendranath Jha & Others* v. *Polailal Biswas*(1) the High Court, at the instance of private complainant, set aside the order of acquittal passed by the Sessions Court and directed that the accused be retried. This Court held that the provision contained in
B section 439(4) of the Code cannot be construed to mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could, in the absence of any error on a point of law, re-appraise the evidence and reverse the findings of facts, provided only it stops short of finding the accused guilty and passing sentence on him. The order of re-trial based on a re-appraisal of evi-
C dence was characterised by this Court as a formal compliance with the requirements of section 439(4). In *K. Chinnaswamy Reddy* v. *State of Andhra Pradesh*(2) the Court while emphasising that the revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in a flagrant miscarriage of justice observed that it was not possible to lay down the criteria for
D determining such exceptional cases which would cover all contingencies. The Court, however, indicated, in order to illustrate, a few of the cases in which the revisional jurisdiction could properly be used. An acquittal by a court lacking jurisdiction or excluding evidence which was admissible or relying on inadmissible evidence or where material evidence has been overlooked are some of the cases indicated by this Court as justifying the exercise of revisional powers. In
E *Mahendra Pratap Singh* v. *Sarju Singh & Anr.*(3) where the High Court in exercise of its revisional powers had, at the instance of a private party, directed re-trial of the accused, this Court on a review of the previous decisions re-affirmed that the High Court was wrong in entering into minute details of evidence, while examining the decision of the Sessions Court under section 439(4) of the Code. The last decision to which reference may be made is *Khetrabasi Samal etc.* v.
F *State of Orissa etc*(4). The High Court while exercising its revisional jurisdiction had set aside the order of acquittal on the ground that the Magistrate should not have disbelieved the three eye-witnesses. The High Court sought justification for the course it adopted by observing that the Magistrate had not taken the trouble of sifting the grain from the chaff. The order of the High Court was set aside by this Court.

G The attention of the High Court was drawn to these decisions and after referring to the principles laid down therein it observed that the complainant's revision application before it had to be decided in the light of those principles. But while applying those principles the High Court has fallen precisely into the error which was corrected by this Court in the decisions referred to above.

The deceased Nanhey Lal was running a grocery shop at Hewett
H Road, Lucknow. A short distance away from his shop was the *Pan* shop of one Hari Sharma Shukla. On September 4, 1965 the deceas-

(1) [1951] S.C.R. 676.
(2) [1963[3 S.C.R. 412.
(3) [1968] 2 S.C.R. 287.
(4) [1970] 1 S.C.R. 880.

ed Nanhey Lal, his brother Ram Narain, his sons Raj Kishore and Bijay Kishore and relation called Sheetal Prasad were having chat at about 11 p.m. Ram Narain sent Raj Kishore to fetch a *Pan* from Hari Sharma's shop. When Raj Kishore went to bring the *Pan*, the appellant Subhash is alleged to have given a blow with a cane to him. On hearing the shouts of Raj Kishore, Nanhey Lal went to the *Pan* shop. In the meantime, the appellant Satyendra Nath Dutta snatched the cane from Subhash's hand. When Nanhey Lal tried to disarm Satyendra Nath Dutta, Subhash is alleged to have caught hold of Nanhey Lal facilitating a knife attack by Satyendra Nath on Nanhey Lal. Raj Kishore intervened to save his father but Subhash is alleged to have given him two knife blows. At about 5 a.m. the next morning Nanhey Lal succumbed to his injuries.

The prosecution examined five eye-witnesses, Ram Narain, Barati Lal, Bijay Kishore, Kallu and Raj Kishore. The prosecution also relied on the circumstance that a cycle taken on hire by Subhash was found at the scene of occurrence.

The learned Sessions Judge examined with care the evidence of the eye-witnesses observing that the mere fact that the witnesses were related to the deceased would be no ground to reject their evidence. He also referred to what clearly was an important, circumstance that the First Information Report, which was lodged without delay, mentioned the names of Ram Narain and Bijay Kishore as eye-witnesses. But the learned Judge found the evidence of these and other eye-witnesses unacceptable for a variety of reasons. Raj Kishore who was also injured during the incident had made a "dying declaration" at the Balrampur Hospital, Lucknow, at about 2-30 p.m. on September 5. He had mentioned the names of persons who had witnessed the incident but did not refer to Ram Narain. The statement made by Raj Kishore could not be treated as a dying declaration because he survived the attack. But he was cross-examined in reference to that statement and he explained his omission to refer to Ram Narain's presence by saying that since Ram Narain was a close relation he did not refer to his presence. The Sessions Court rejected this explanation because Raj Kishore had mentioned the name of Sheetal Prasad as eye-witness though he was related to him. Ram Narain was the elder brother of the deceased and yet he did not remove either the deceased or Raj Kishore to the hospital. They were removed to the hospital by Bijay Kishore, hardly 12 or 13 years of age.

In regard to the evidence of Bijay Kishore, though Ram Narain had mentioned the names of eye-witnesses in the First Information Report he did not mention the name of Bijay Kishore. In fact, Ram Narain did not refer to Bijay Kishore's presence even in the committing Court. His explanation that he forgot to mention Bijay Kishore's name in the F.I.R. and that he was not questioned in the committing Court about Bijay Kishore's presence was rejected by the Sessions Court. Bijay Kishore's presence at the time of occurrence was not referred to by Raj Kishore in the so-called dying declaration though the names of others who had seen the incident were mentioned.

The evidence of the other witnesses was also rejected by the Sessions Court. Barati Lal was a chance witness. His conduct in not

A talking to anyone at the spot was unnatural and his claim that his statement was recorded by the Investigating Officer the same night was belied by the evidence of the officer himself. Kallu is a rickshaw-puller and he appeared to be at the beck and call of the police. He had given evidence in three or four police cases.

B In regard to Raj Kishore the Sessions Court referred to the contradiction between the statement he made in the hospital and the case of the prosecution bearing on the sequence of events. Raj Kishore's evidence that he was given a cane blow was not corroborated by medical evidence though he was examined by the doctor within half an hour after the incident.

C The recovery of the bicycle which was relied upon by the prosecution as connecting the appellant Subhash with the crime was discarded by the Sessions Court as an incriminating circumstance as it was recovered not from near Hari Sharma's *Pan* shop but from another place called Bengali Sweet House which was some distance away.

Finally, the Sessions Court concluded that none of the eye-witnesses
D knew the appellants and therefore the Investigating Officer ought to have held an identification parade. In the absence of the parade the claim of the witnesses that they could indentify the appellants was difficult to test.

The High Court dismissed the last ground that no identification parade was held by saying that the appellants did not ask for an identi-
E fication parade and therefore the benefit of that omission could not go to them. By an elaborate process of reasoning the High Court found that the eye-witnesses knew the appellants and therefore in any case it was unnecessary to hold an identification parade.

The High Court set aside the acquittal principally on the ground that the learned Sessions Judge was in error in holding that the dying
F declaration of Nanhey Lal was also recorded but that it was suppressed by the prosecution. According to the High Court the finding that Nanhey Lal's dying declaration was recorded "is not based on any legally admissible evidence but wholly on inadmissible evidence". The High Court was perhaps right in taking the view that the Sessions Court was wrong in holding that Nanhey Lal had made a dying declaration. There is documentary evidence to show that though at one
G stage the Investigating Officer had stated in a remand application that the dying declaration was recorded, it was in fact not recorded. But the judgment of the Sessions Court is not based on the suppression of Nanhey Lal's dying declaration' The Sessions Judge examined the evidence of the eye-witnesses critically and came to the conclusion that it was unsafe to act on that evidence. The High Court adverted merely to a part of the reasoning of the Sessions Court leaving wholly
H untouched the conclusion recorded by it in regard to the evidence of the eye-witnesses. Being aware of the limitations or the powers of a revisional court the High Court perhaps did not consider the reasons which influenced the Sessions Court in discarding the evidence of the

eye-witnesses. In doing so the High Court was right because it could not merely re-appreciate evidence in the exercise of its revisional powers. But the error which the High Court committed is that in the first place it blamed the accused for not demanding an identification parade, secondly it held by examining a few aspects of the evidence that the accused were previously known to the eye-witnesses and thirdly it assumed wrongly that the conclusion of the Sessions Court that Nanhey Lal had made a dying declaration was based on inadmissible evidence. The Sessions Court considered the various circumstances and came to the conclusion that Nanhey Lal had made a dying declaration. That conclusion may be worng but that cannot justify setting aside the order of acquittal and directing a re-trial of the appellants. The dominant justification of the order of acquittal recorded by the Sessions Court is the view it took of the evidence of the eye-witnesses. If that evidence was unacceptable, there were no circumstances in the case on which the appellants could be convicted.

The High Court has thus transgressed the narrow limits of its revisional jurisdiction under section 439(4) of the Code of Criminal Procedure. The judgment of the Sessions Court did not suffer from any manifest illegality and the interests of justice did not require the High Court to interfere with the order of acquittal passed by the Sessions, Court. Any fair assessment of the evidence of the eye-witnesses would show that the acquittal of the appellants led to no miscarriage of justice.

We therefore allow the appeal, set aside the judgment of the High Court and confirm the order of acquittal passed by the Sessions Court in favour of the appellants

V.M.K. *Appeal allowed.*