CRIMINAL APPEAL

Present :

The Hon'ble Mr. Justice Amit Talukdar
And
The Hon'ble Mr. Justice Raghunath Ray

Judgment On: 16.6.2010.

G.A. 13 of 1989

State of West Bengal
Vs.
Narayan Kundu & Ors.

POINTS

ACQUITAL – Order of acquittal –When appellate Court can interfere- Age of the accused whether to be considered– Indian penal Code 1860, S 324.

FACTS

A Division Bench of this Court on 2.8.1989 granted leave to the State of West Bengal to prefer an Appeal against such order of acquittal simply in respect of Respondent nos. 1, 2, 5 and 10. Consequently, when the Appeal was admitted by the same Division Bench on 8.8.1989 an order of rearrest and release on fresh Bail was directed in respect of the Respondent Nos. 1, 2, 5 and 10 and the leave in respect of the other Respondents was refused. Although either a conviction or an order of acquittal in an Appeal cannot be assailed in such a truncated fashion, as already the Division Bench had passed directions to that effect at the stage of hearing and that too after 20 years or more it would not be proper to go into the said issue.

HELD

An order of acquittal unless it is perverse or patently illegal, suffering from some material discrepancies, the Court should not under normal circumstances, interfere with the same. Para 11.

A presumption of innocence subsists even at the stage of Appeal. The test to be applied for the purpose of assailing an order of acquittal is stricter than that of a conviction. Question of perversity should be the main *sine qua non* while considering such case. Broadly it has to be seen that the Trial Court had missed the evidence in material particulars which if having been taken into account, could have rendered the entire finding to a different nature. Unless these criteria are satisfied, it is now a well settled position of law that an order of acquittal should not be ordinarily disturbed. Para 12

The incident took place in the year of 1985, more than 25 years has elapsed in the meantime. From the recording of the age in respondant no.1's examination under Section 313 of the Code of Criminal Procedure, it is found that he was 63 years in 1989 on that reckoning he would be around 88 years presently. As such, he is not sentenced to a substantive term of imprisonment. Para 22

Considering his age and the passage of time, that justice would be done in the event he is directed to pay a token fine in favour of the P.W.2 who had suffered injury and had to be confined in Purulila Sadar Hospital. the Respondent no.1 is directed to pay a fine of Rs.2000/- in favour of P.W.2 in default of which he will suffer simple imprisonment for 7 days. Para 23

For the State/Appellant	:	Mr. Biplab Mitra, Shri Amajit De, Ms. Trina Mitra.
For the Respondent	:	Ms. Archita Sen (Amicus Curiae)

<u>Amit Talukdar,J</u>:

1.This is a Government Appeal. It has been filed on behalf of the State of West Bengal and is directed against the Judgment and Order of Acquittal passed by Sri B.B. Chatterjee, the learned Additional Sessions Judge, Purulia in Sessions Trial No.5 of 1989. By the impugned Judgment and Order under appeal, the learned Additional Sessions Judge on 23.01.1989 in Sessions Trial No.5 of 1989 recorded an order of acquittal in favour of the Respondent No.1 in respect of the charge of Section 324 simpliciter. Whilst the other Respondents were absolved of the charge framed against them in respect of Sections 148/302/149 of the Indian Penal Code which also included the Respondent No.1.

2.A Division Bench of this Court on 2.8.1989 granted leave to the State of West Bengal to prefer an Appeal against such order of acquittal simply in respect of Respondent nos. 1, 2, 5 and 10. Consequently, when the Appeal was admitted by the same Division Bench on 8.8.1989 an order of rearrest and release on fresh Bail was directed in respect of the Respondent Nos. 1, 2, 5 and 10 and the leave in respect of the other Respondents was refused. Although either a conviction or an order

of acquittal in an Appeal cannot be assailed in such a truncated fashion, as already the Division Bench had passed directions to that effect at the stage of hearing and that too after 20 years or more it would not be proper to go into the said issue.

3.Since none appeared on behalf of either the State or the Respondents, although Office Report indicates that the concerned Respondent appeared, we requested Sri Mitra, the learned Panel Lawyer, to act as State Defence and sought the assistance of a young member of the Bar, Ms. Archita Sen, to assist us as *amicus curiae*. With their assistance we have considered the materials and evidence-on-record and proceeded to dispose of the Appeal accordingly. Sri Mitra, the learned State Defence, has taken us elaborately through the entire evidence-on-record. Sri Mitra has particularly pointed out from the evidence of P.Ws.1 and 2, who are the eye witnesses that the learned Trial Court erred in disbelieving their versions of the incident. Furthermore, Mr. Mitra was of the view that even though there was some discrepancy with regard to the earlier version of P.W.1 in his F.I.R, the evidence of P.W.2 who himself was an injured eye witness could not be disbelieved. According to Sri Mitra the evidence of P.Ws. 1, 2, 4 – another brother of P.W.2 including the Investigating officer–P.W.12 shows the presence of the present Respondents along with others at the place of occurrence. As such, the evidence with regard to the assault by the assembled group of persons on the deceased Katla Singh, which resulted in his death, should not have been by-passed by the learned Trial Court simply on the ground that there was a counter incident in which P.Ws.1, 2 and 4 were also accused.

4.Sri Mitra further submitted that even though there may have been some discrepancies in the evidence, on the whole the prosecution was able to prove its case against all the Respondents and the order of acquittal was vulnerable and required interference.

5.The learned *amicus curiae*, Ms. Archita Sen, assisted us in a very remarkable fashion and have read the entire evidence before us. She has supported the order of acquittal since she was of the view that the same could not be termed as neither perverse nor the result of any material contradiction which would render itself for being set aside in this Appeal. The learned *amicus* has also submitted that once the learned Trial Court has come to a particular finding and disbelieved the entire incident and has found that the death of Katla Singh could have been taken place in a manner other than the one which have been shown by the prosecution and as two views were possible on the basis of which the order of acquittal was recorded, it would not be proper to upset the same in Appeal particularly when the incident related to the year 1989.

6.The learned *amicus* has also shown us the vital contradictions as in the evidence of the principal witnesses (P.Ws.1, 2 and P.W.4). She has pointed out therefrom that from the cross-examination of P.W.4, it can be clearly gathered that he was not present at the relevant time. As such his evidence was required to be quashed from the consideration entirely. She has further submitted since P.W.1 has departed from his earlier version in the F.I.R. where he had named all the accused persons but in Court he could not name them entirely and faultered which we have noticed from his evidence, his version was liable to be disbelieved which has rightly been done by the Trial Court.

7.She has referred to the evidence of P.W.2 in reply to the submission of Sri Mitra that as to why, even though he was an injured witness, his evidence should not be believed. Inviting our attention to the evidence of P.W.7, the Medical Officer of Purulia Sadar Hospital who stated that he could not give the exact decision with regard to the depth of the injury, learned *amicus* submitted that there was dispute with regard to the manner in which the Respondent No.1 had thrown the 'arrow' causing injury on the person of P.W.2.

8.Such being the position, she submitted that it would be unsafe to disturb the finding arrived at by the learned Trial Court in the absence of any patent illegality or any other such infirmity which would render the order of acquittal, as entirely bad in law.

9.Lastly, the learned *amicus curiae* while taking us through the evidence of P.W.1 submitted that it is the prosecution case that the deceased had come to the house of P.W.1 for the purpose of fishing. But there were some basic irregularities in his evidence which the learned *amicus* was of the view was highly irreconcilable. She stated that:

> Firstly, she was of the view that it was late evening and it was not the time for carrying on fishing operation.
>
> Secondly, she took us to the cross-examination of P.W.1 and submitted that it has been taken out from his evidence that neither there was any fishing-net nor other equipments to show that actually the deceased had come to the place for the purpose of assisting P.W.1 in fishing.

Lastly, she submitted that from the evidence it appears that fifty or sixty persons had assembled and P.W.1 witnessed the incident from a distance of 10 cubits. As such, it was not possible for him to give a clear picture of the entire incident.

10.She has summed up her arguments by way of supporting the evidence and maintaining the order of acquittal.

11.After we have had the advantage of the assistance of Sri Mitra the learned State Defence, Ms. Sen, the learned *amicus* for the Respondents, we would now proceed to see as to whether the order of acquittal under Appeal can be sustained. It is by now a well-settled position of law that an order of acquittal unless it is perverse or patently illegal, suffering from some material discrepancies, the Court should not under normal circumstances, interfere with the same.

12.A presumption of innocence subsists even at the stage of Appeal. The test to be applied for the purpose of assailing an order of acquittal is stricter than that of a conviction. Question of perversity should be the main *sine qua non* while considering such case. Broadly it has to be seen that the Trial Court had missed the evidence in material particulars which if having been taken into account, could have rendered the entire finding to a different nature. Unless these criteria are satisfied, it is now a well settled position of law that an order of acquittal should not be ordinarily disturbed.

13.With regard to the evidence of P.W.1 which has been rightly pointed out by Ms. Sen that he had mentioned the names of the accused persons in the F.I.R. but in his substantive evidence

before the Court he had failed to name the entire lot of accused. That too, we find from his evidence that he faultered in his evidence at the time of naming the accused persons and after naming the Respondent Nos.1 and 2 he kept quiet. Thereafter he gave out the name of Respondent Nos.4, 6, 8, 10, and 13. This is the conduct which has been rightly taken into account by the learned Trial Court who had the advantage of watching the demenour of all the witnesses and in Appeal it would be inappropriate for us to reassess such finding.

14.That apart, we find that even though the evidence of P.W.1 contradicting his earlier version in the F.I.R. would at best be a contradiction within Section 145 of the Evidence Act and nothing more but the effect remains that entire tenor of the evidence where it has been shown that there has been an existence of a counter case where he himself along with his two sons, P.Ws.2, 4 and 3 were also accused and the F.I.R. of the same has also been brought-on-record by way of a '**Firisty'**. The finding of the learned Judge to this effect that the manner in which the death of the deceased took place has not been suitably established, cannot be disputed at this present stage.

15.Furthermore, we find that the charge against all the Respondents related to an unlawful assembly being armed with deadly weapons. From the entire evidence we find there has been an assembly of more than fifty to sixty persons. The individual role of the various Respondents including those against whom leave was granted by the Division Bench earlier could not be fixed with specific responsibility even though they were charged under Section 149 of the Indian Penal Code.

16.We would be afraid that by way of applying the provisions of **Common Object** the implication of these Respondents would be difficult to achieve. Considering the entire nature and impact of the evidence that we have reassessed in our own way, at the instance of Sri Mitra for the Appellant, we would be of the view that the order of acquittal recorded by the learned Trial Court in respect of the charge of Section 148/302 read with Section 149 of the Indian Penal Code needs no interference. We have arrived at our conclusion on the basis of the fact that neither did we notice any perversity or patent illegality in the Judgment.

17.However, this would bring us to one important point which the learned Trial Court has discussed and we are afraid on this limited score we would be making departure from his views which he has arrived in concluding in favour of the Respondents.

18.Respondent No.1 who although stands absolved from the parent charge of Section 302 read with Section 149 has been charged simpliciter under Section 324 for causing an Arrow injury on the person of P.W.2.

19.This part of the evidence is quite distinct and has to be segregated from the other part of the evidence which we have already noticed hereinabove. The injury which we have noticed on the person of P.W.2 has been spoken by P.W.7, the Surgeon of Sadar Hospital, Purulia who removed the arrow from the person of P.W.2. He is a Government Medical Officer. The probity of his findings in the absence of any material illegality should be taken by the Court to be of high value. Such position with regard to the injury suffered by P.W.2 has also been spoken by the Investigating Officer, P.W.12, who came to the spot immediately after the occurrence and found that there was

an arrow pierced into the person of P.W.2. Even if we disbelieve this part of the evidence as spoken by P.W.1 with regard to his son receiving an injury to that extent, it would be difficult to disbelieve the main evidence of P.W.2 followed by the medical evidence of P.W.7 and the Investigating Officer, P.W.12 himself.

20.As such, we would not be in a position to persuade ourselves with regard to the finding of the learned Trial Court with regard to the acquittal of Respondent No.1 in respect of Section 324 of the Indian Penal Code. In view of the evidence that we have noticed, we feel that the order of acquittal in respect of the charge of Section 324 simpliciter for the Respondent no.1 was not a justified order.

21.Accordingly, we would set aside the same and convict him in respect of the charge of Section 324 of the Indian Penal Code.

22. This would now bring us to the question of sentence. The incident took place in the year of 1985, more than 25 years has elapsed in the meantime. From the recording of the age in his examination under Section 313 of the Code of Criminal Procedure, we found he was 63 years in 1989 on that reckoning he would be around 88 years presently. As such, we do not wish to sentence him to a substantive term of imprisonment.

23.Considering his age and the passage of time we feel that justice would be done in the event he is directed to pay a token fine in favour of the P.W.2 who had suffered injury and had to

be confined in Purulila Sadar Hospital. We would direct the Respondent no.1 to pay a fine of Rs.2000/- in favour of P.W.2 in default of which he will suffer simple imprisonment for 7 days.

24.With this modification, we dispose of the Appeal. Respondent Nos. 2,4,5 and 10 would outright stand discharged from their Bail Bonds, while Respondent No.1 would discharged only after compliance of the aforesaid order.

25.Before parting we would record our very deep appreciation of the valuable assistance received from Ms. Archita Sen, learned *amicus* who argued the Appeal on the very first day on our request.

26.Department is directed to send down the Lower Court Records of this case along with a copy of this judgment to the learned Court below forthwith.

(Raghunath Ray, J.) :

I agree.