PETITIONER:
K. CHINNASWAMY REDDY

Vs.

RESPONDENT:
STATE OF ANDHRA PRADESH

DATE OF JUDGMENT:
25/07/1962

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
SINHA, BHUVNESHWAR P.(CJ)
SHAH, J.C.

CITATION:
1962 AIR 1788 1963 SCR (3) 412
CITATOR INFO :

R	1968 SC 707	(8)
R	1970 SC 272	(11)
RF	1970 SC1934	(7)
F	1973 SC 84	(6)
R	1973 SC1274	(17)
RF	1973 SC2145	(4,8)
R	1975 SC 580	(4)
R	1978 SC 1	(15)
E	1981 SC1415	(1,2)
R	1986 SC1721	(9)

ACT:
Acquittal--Power of High court in revision--Retrial--Admissibility of statement made by accussed during Police investigation--Code of Criminal Procedure, 1898 (Act V of 1898), s. 439--Indian Evidence Act, 1872 (1 of 1872), s. 27.

HEADNOTE:
The appellant, tried with another, was convicted under s. 411 Indian Penal Code while the other was convicted under ss. 457 and 380 of the Code by the Assistant Sessions judge. The appellant had stated to the police during investigation that she would show the place where he had hidden them (the ornaments)" and thereafter went to the garden and dug out two bundles containing the ornaments. The other accused person had also similarly stated that he had given the
413
ornaments to one Bada Sab, took the police party to Bada Sab and asked him to return the ornament which he did. The Sessions Judge on appeal took the view that that part of the statement of the appellant where he said that he 'had hidden the ornaments was not admissible in evidence and in the absence of any other evidence possession of the ornament could not be said to have been proved. He, therefore, held that the appellant was entitled to the benefit of doubt and acquitted him. He also took a similar view with regard to the other accused person and acquitted him. The order of acquittal was set aside by the High Court in revision under s. 439 of the Code of Criminal Procedure and a retrial was directed. It was against the order of retrial that the appeal was directed.

Held, that it was open to a High Court in revision and at the instance of a private party to set aside an order of acquittal though the State might not have appealed. But such jurisdiction should be exercised only in exceptional cases, as where a glaring defect in the procedure or a manifest error of law leading to a flagrant miscarriage of justice has taken place. When s. 439(4) of the Code forbids the High Court from converting a finding of acquittal into one of conviction, it is not proper that the High Court should do the same indirectly by ordering a retrial. It was not possible to lay down the criteria for by which to judge such exceptional cases. It was, however, clear that the High Court would be justified in interfering in cases such as (1) where the trial court had wrongly shut out evidence sought to be adduced by the prosecution, (2) where the appeal court had wrongly held evidence admitted by the trial court to be inadmissible, (3) where material evidence has been overlooked either by the trial court or the court of appeal or, (4) where the acquittal was based on a compounding of the offence not permitted by law and cases similar to the above.

D. Stephens v. Nosibolla, [1951] S.C.R. 284 and Logendra-nath Jha, v. Shri Polailal Biswas, [1951] S.C.R. 676, referred to.

There could be no doubt in the instant case that the entire statements of the appellant as well as of the other accused person would be admissible tinder s. 27 of the Indian Evidence Act and the Sessions judge was in error in ruling out parts of them and the High Court was clearly justified in setting aside the acquittal in revision.

Pulukuri Kotayya v. King Emperor, (1946) L.R. 74 I.A. 65, referred to.

414

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Apeal No. 6 of 1960.

Appeal by special leave from the judgment and order dated July 1, 1959, of the Andhra Pradesh High Court in Cr. Revision Case No. 403 of 1958 and Criminal Revision Petn. No. 337 of 1957.

P. Ram Reddy, for the appellant.

K.R. Choudhuri, and P. D. M for respondent No. 1.

K. R. Chaudhuri, for respondent No. 2.

1962. July 25. The Judgment of the Court was delivered by

WANCHOO, J.-This is an appeal by special leave against the judgment of the Andhra Pradesh High Court. The appellant was convicted under s. 411 of the Indian Penal Code by the Assistant Sessions Judge of Kurnool. Along with him, another person Hussain Saheb was also tried and was convicted under so. 457 and 380 of the Indian Penal Code. The case for the prosecution briefly was that the house of Rahayya in Dudyia was burgied on the night of April 20, 1957. Ramayya and his wife were sleeping outside and on waking in the morning they found that the house had been burgled and valuable property stolen. The matter was reported to the police and during the course of investigation the police recovered 17 ornaments on the information given by the appellant. The other accused had also given information on the basis of which another stolen ornament was recovered. The Assistant Sessions Judge on a consideration of the evidence came to the conclusion that the other accused had actually committed house breaking and

had removed ornaments from the house of Ramayya and had handed over 17 ornaments out
415
of that property to the appellant. He also came to the conclusion that the seventeen ornaments recovered at the instance of the appellant were in his possession and he therefore found him guilty under s. 411 of the Indian Penal Code. The appellant and the other accused went in appeal to the Sessions Judge. The Sessions Judge held that the appellant had not been proved to be in possession of the seventeen ornaments which were recovered at his instance from a garden. The statement of the appellant in this respect was that "he would show the place where he had hidden them (the ornaments)". Thereafter he went to the garden and dug out two bundles containing the seventeen ornaments from there. The Sessions Judge held that the recovery of ornaments from the garden at the instance of the appellant was proved; but he further held that that part of the statement of the appellant where he said that he had hidden the ornaments was not admissible in evidence. Therefore, he took the view that as the ornaments were recovered from a place which was accessible to all and sundry and there was no other evidence to show that the appellant had hidden them, it could not be held that the ornaments were in the appellant's possession. He therefore gave the benefit of doubt to the appellant and ordered his acquittal. He also acquitted the other accused at whose instance one of the stolen ornaments was recovered. This accused had stated that he given the ornaments to Bada Sab (P. W. 5) and took the police party to Bada Sab and asked him to return the ornaments, which Bada Sab did. The Sessions Judge, however, on a consideration of the evidence against the other accused thought the case against him was also doubtful and ordered his acquittal, though he ordered the return of ornaments to Ramayya.
This was followed by a revision by Ramayya against the appellant and the other accused. The
416
High Court has allowed the revision and directed that the matter should go back to the Sessions Judge so that the accused should be re-tried on the charges on which they had been brought to trial on the former occasion. It is against this order of the High Court directing retrial that the present appeal by special leave is directed. It may be mentioned, however, that only Chinnaswamy Reddy has appealed while the other accused has not appealed against the order of the High Court.
The main contention of the appellant before us is that this was a revision by a private party. There were no exceptional circumstances in this case which would justify the High Court in interfering with an order of acquittal at the instance of a private party. Further, it is urged that a. 439 (4) of the Code of Criminal Procedure specifically forbids the High Court from converting a finding of acquittal into one of conviction and that a reading of the judgment of the High Court shows that by the indirect method of retrial the High Court has practically directed the Sessions Court to convict the appellant and thus indirectly converted finding of acquittal into one of conviction, through it has not been done and could not be done directly. The extent of the jurisdiction of the High Court in the matter of interfering in revision against an order of acquittal has been considered by this Court on a number of occasions. In D, Stephens v. Nosibolla (1) 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 in invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under a. 417. It could be exercised only
> (1) [1951] S.C.R. 284.
> 417
> in exceptional 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 the record."
>
> Again, in Logendranath Jha v. Shri Polailal Biswas(1), this Court observed-
>
> "Though sub-s. (1) of s. 439 of the Criminal Procedure Code authorises the High Court to exercise in its discretion any of the powers conferred on a court of appeal by s. 423, yet sub-a. (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 and passing, sentence on him by ordering a re-trial."

These two cases clearly lay down the limits of the High Court's jurisdiction to interfere with an order of acquittal in revision; in particular, Logendranath Jha's case (1) 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 re-trial. 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
(1) (1951) S.C.R. 676.
418
complied with sub-a. (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.

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 a. 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

419

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 a. 439 (4). We have therefore to see whether the order 'of the High Court setting aside the order of acquittal in this case can be upheld on these principles. 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 dealt 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 (1) 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 a 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

(1) [1951] S.C.R.676.

420

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 the 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 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 Bada Sab and would get it recovered from him. Though the

Sessions Judge has not in specific trems ruled out that part of the other accused's statement where he said that he had given the ornament to Bada Sab, he did not consistently with what be 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 acquittal so that the evidence may be reappraised 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

421

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 in 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 Logendranath's case. 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.

Let us then turn to the question whether the statement of the appellant to the effect that ,he had hidden them (the ornaments)" and "would point out the place" where they were, is wholly admissible in evidence under s. 27 or only that part of it is admissible where he stated that he would point out the place but not that part where he stated that he had hidden the ornaments. The Sessions Judge in this connection relied on Pulukuri Kotayya v. King-Emperor (2) where a part of the statement leading to the recovery of a knife in a murder case was held inadmissible by the Judicial Committee. In that case the Judicial Committee considered s. 27 of the Indian Evidence Act, which is in these terms :-

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

This section is an exception to ss. 25 and 26, which prohibit the proof of a confession made to a police officer or a confession made while a person is in

(1) [1951] S.C.R. 676.
(2) [1946] L.R. 74 I.A. 65.

422

police custody, unless it is made in immediate presence of a magistrate. Section 27 allows that part of the statement made by the accused to the police "whether it amounts to a confession or not" which relates distinctly to the fact thereby discovered to be proved. Thus even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under s. 87. The Judicial Committee had in that case to consider how much of the

information given by the accused to the police would be admissible under a. 17 and laid stress on the words "so much of such information as relates distinctly to the fact thereby discovered" in that connection. It held that the extent of the information admissible must depend on the exact nature of the discovered to which such information is required to relate. It was further pointed out that "the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact." It was further observed. that-

> "Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered."
>
> This was exemplified further by the Judicial Committee by observing-
>
> "Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence., the fact discovered is very relevant. If however to the statement the words be added with which
>
> 423
>
> I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

If we may respectfully say so, this case clearly brings out what part of the statement is admissible under a. 27. It is only that part which distinctly relates to the discovery which is admissible; but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not. Now the statement in this case is said to be that the appellant stated that he would show the place where he had hidden the ornaments. The Sessions Judge has held that part of this statement which is to the effect 'where he had hidden them" is not admissible. It is clear that if that part of the statement is excised the remaining statement (namely, that he would show the place) would be completely meaningless. The whole of this statement in our opinion relates distinctly to the discovery of ornaments and is admissible under s. 27 of the Indian Evidence Act. The words "where he had hidden them" are not on a par with the words "with which I stabbed the deceased" in the example given in the judgment of the Judicial Committee. These words (namely, where he had hidden them) have nothing to do with the past history of the crime and axe distinctly related to the actual discovery that took place by virtue of that statement. It is however urged that in a case where the offence consists of possession even the words "where he had hidden them " would be inadmissible as they would amount to an admission by the accused that he was in possession. There are in our opinion two answers to this argument. In the first place,

424

s 27 itself says that where the statement distinctly relates to the discovery it will be admissible whether it amounts to a confession or not. In the second place, these words by

themselves though they may show possession of the appellants would not prove the offence, for after the articles have been recovered, the prosecution has still to show that the articles recovered are connected with the crime, i. e. in this case, the prosecution will have to show that they are stolen property. We are therefore of opinion that the entire statement of the appellant (2) as well as of the other accused Who stated that he had given the ornament to Bada Sab and would have it recovered from him) would be admissible in evidence and the Sessions Judge was wrong in ruling out part of it. Therefore, as relevant and admissible evidence was ruled out by. the Sessions Judge, this is,% fit case where the High Court would be entitled to set aside the finding of acquittal in revision, though it is unfortunate that the High Court did not confine itself only to this point and went on to make rather strong remarks about other parts of the evidence.

The next question is what order should be passed in a case like the present. The High Court also considered this aspect of the matter. Two contingencies arise in such a case. In the first place there may be an acquittal by the trial court. In such a case if the High Court is justified, on principles we have enunciated above, to interfere with the order of acquittal in revision, the only course open to it is to set aside the acquittal and send the case back to the trial court !or retrial. But there may be another type of case, namely, where the trial court has convicted the accused while the appeal court has acquitted him. In such a case if the conclusion of the High Court is that the order of the appeal court must be set aside, the question is whether the appeal court should be

425

ordered to re-hear the appeal after admitting the statement it had ruled out or whether there should K necessarily be a retrial. So far asthis is concerned, we are of opinion that it in open to the High Court to take either of the two courses. It may order a retrial or it may order the appeal court to re-hear the appeal. It will depend upon the facts of each case whether the High Court would order the appeal court to re-hear the appeal or would order a retrial by the trial court. Where, as in this case, the entire evidence is there and it was the appeal court which ruled out the evidence that had been admitted by the trial court, the proper course in our opinion is to send back the appeal for rehearing to the appeal court. In such a case the order of the trial court would stand subject to the decision of the appeal court on re-hearing. In the present case it is not disputed that the entire evidence has been led and the only defect is that the appeal court wrongly ruled out evidence which was admitted by the trial court. In the circumstances we are of opinion that the proper course is to direct the appeal court to re-hear the appeal and either maintain the conviction after taking into consideration the evidence which was ruled out by it previously or to acquit the accused if that is the just course to take. We should like to add that the appeal court when it re-hears the appeal should not be influenced by any observations of the High Court on the appreciation of the evidence and should bring to bear its own mind on the evidence after taking into consideration that part of the evidence which was, considered inadmissible previously by it. We therefore allow the appeal subject to the modification indicated above.

This leaves the case of the other accused. We are of opinion that as we are directing the appeal court to re-hear

the appeal with respect to the appellant it is only proper that the order relating to the
426
other accused should also be set aside and his appeal should also be re-heard in the manner indicated above. We therefore set aside the order of the High Court with respect to the retrial of the other accused and direct that his appeal will also be re-heard along with the appeal of the appellant.

Appeal allowed.
