HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

SB : Justice G.S. Ahluwalia

Criminal Revision No.787/2018
Anup Jain and two others
Vs.
State of Madhya Pradesh

Shri Dharmendra Rishishwar, counsel for the applicants.
Shri Pramod Pachauri, counsel for the respondent/State.

Date of hearing : 29.09.2018
Date of order : 29.09.2018
Whether approved for reporting : Yes

O R D E R
(Passed on 29 /09/2018)

This criminal revision under Section 397, 401 of Cr.P.C. has been filed against the judgment and sentence dated 15.11.2017 passed by 5th Additional Sessions Judge, Bhind in Criminal Appeal No. 147/2014 thereby partially modifying the judgment and sentence dated 26.06.2014 passed by the JMFC, Bhind in Criminal Case No. 943/2008, the applicants have been convicted under Sections 452, 323/149 and 147 of IPC and have been sentenced to imprisonment of till rising of the Court and a fine of Rs.5,00/- for offence under Section 452 of IPC and a fine of Rs.500/- for offence under Section 323/149 of IPC and a fine of Rs.1,000/- for offence under Section 147 of IPC with default imprisonment.

(2) At the outset, counsel for the applicants sought time to argue on the question of admission, on the ground that there is a possibility of compromise between the parties and, therefore, some time may be given for filing an

application for compromise.

(3) Considered the prayer made by the counsel for the applicants for adjournment. It is undisputed fact that Ramesh Chandra Jain, the complainant has expired, and some of his legal heirs had filed an application under Section 320 of Cr.P.C. It is also undisputed that one of the co-accused Ashok died during the pendency of the Trial and another co-accused Sushila died during the pendency of the appeal.

(4) It is submitted by the counsel for the applicants that before the appellate Court an application under Section 320 of Cr.P.C. was filed by the parties which was adjourned by the appellate Court by order dated 23.08.2016 on the ground that although Neelam Jain, who is the mother of the victim Yanshika, is competent to compromise on behalf of Yanshika and Neelam Jain was permitted to enter into compromise on behalf of injured Yanshika, but no application was filed by the applicants for compromise on behalf of Neha. As the application did not bear her signature, therefore, an opportunity was granted to the applicants that in case, if the victim Neha wants to compromise the matter, then either she can appear personally or file an application for compromise or the counsel may obtain the written instructions in this regard, thereafter nothing was done by the applicants..Thus, it is clear that Neha was not interested in compromising the matter with the applicants. Further more, it appears from the order dated 23-8-2016 passed by the Appellate Court, that although the legal representatives of Rameshchandra Jain, were present before the Appellate Court, but their statements regarding their willingness to compromise were not recorded. There is nothing in the order dated 23-8-2016 to indicate, that the Appellate Court had ever verified

the contents of the application for compromise, from the legal representatives of the complainant Ramesh Chandra Jain. However,, while deciding the appeal, the incomplete and unverified application filed by the parties for compromise of the case was considered on the question of quantum of sentence.

(5) To consider the prayer for adjournment, it was enquired by the Court that whether the offence under Section 452 of IPC is compoundable or not ? It was fairly conceded by the counsel for the applicants that the offence under Section 452 of IPC is not compoundable.

(6) The Supreme Court in the cases of **Gian Singh Vs. State of Punjab** reported in **(2012) 10 SCC 303,** and **Narinder Singh and others Vs. State of Punjab and another** reported in **(2014) 6 SCC 466,** has held that when a person has been convicted then the matter cannot be compromised at the appellate / revisional stage. In the case of **Narinder Singh (supra)**, the Supreme Court has held as under:-

> "29.7 While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the

> stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

(7) Thus, the offence under Section 452 of IPC is not compoundable and at the revisional stage, the application for compromise cannot be accepted and the applicants cannot be acquitted on the ground of compromise, therefore, prayer for adjournment made by the applicants was rejected and he was heard on the question of admission.

(8) According to the prosecution case, the complainant Ramesh Chandra Jain is the owner and in possession of shop ad-measuring 71.5 feet long and 28 feet wide situated at Parade Chauraha, Station Road, Bhind, who got the possession of the said shop from his earlier tenant Anup Chandra Jain under the orders of the Supreme Court of India on 15.05.2008, thereafter he is in possession of the shop in question. The applicants with an intention to grab the property of the complainant were making efforts to let out the shop to the antisocial elements. On 18.06.2018 at about 03:30 PM, the complainant was in his shop along with his daughter Priya and was busy in doing business. At that time the applicants along with Sushila widow of Indrasen,

her son-in-law (Damad) Ashok Jain came there along with 3 to 4 other companions and they were armed with gun and *lathies* and with intention to forcibly take possession of the said shop, entered inside the shop and the complainant was dragged out of the shop and he was beaten by fists and blows, as a result of which, he sustained various injuries and the applicants as well as co-accused persons forcibly closed the shutter of the shop and put two locks and threatened the complainant on the gun point, that now they are in possession of the shop and in case, if he tries to open the shop, then he would be killed. The incident was seen by various witnesses including daughter of the complainant. Complainant thereafter broke open the locks put by the applicants and the co-accused and after leaving his daughter at the shop went to the Police Station Kotwali District Bhind and gave a written application to the said police station and accordingly, Crime No. 165/2008 for offence under Sections 448, 452, 147, 148, 149 323 and 506 (Part-II) of IPC was registered and after completing the investigation, the charge-sheet was filed.

(9) The trial Court framed the charge under Sections 148, 452, 323/149 of IPC and the accused persons abjured their guilt.

(10) Co-accused Ashok Kumar **died** during the pendency of the trial, therefore, proceedings against him were dropped.

(11) The trial Court by judgment dated 26.06.2014 acquitted the co-accused Kallu @ Shivnandan Singh and convicted the applicants for offence under Sections 148, 452 and 323/149 of IPC and sentenced them to undergo rigorous imprisonment of three months, rigorous imprisonment of six months and fine of Rs.500/- and fine of Rs.1,000/- with default imprisonment.

(12) It appears that during the pendency of trial the co-accused Sushila also died and, therefore, her appeal was also dismissed as abated by the Appellate Court by order dated 16.05.2016.

(13) An application under Section 320(4) of Cr.P.C. was filed along with death certificate of the complainant Ramesh Chandra Jain. Since the complainant Ramesh Chandra Jain had expired, therefore, in view of the provision of Section 320(4)(b) of Cr.P.C., his legal representatives were competent to enter into compromise. Accordingly, an application was filed for compromise on behalf of wife and children of the complainant Ramesh Chandra Jain. The Appellate Court in its order has mentioned that the compromise was done only in respect of Anup Jain and Manoj Jain, however, there is nothing in the application to show that compromise was not done in respect of applicant No. 3. It was also mentioned that as Smt. Neha Jain has given birth to a child, therefore, she is not in a position to appear before the Court. Yanshika is minor, therefore, Neelam Jain made a prayer under Section 320(4)(a) of CrPC seeking permission to enter into compromise on behalf of her minor daughter, which was accordingly allowed but the appellate Court found that no application has been filed on behalf of Smt. Neha to enter into compromise and although in application under Section 320(4)(b) of Cr.P.C., her name is mentioned but it does not bear her signature, therefore, an opportunity was granted to the applicants that in case, if Smt. Neha is willing to enter into compromise, then either she should personally file a compromise application or she may obtain the written instructions in this regard. It appears that in spite of the opportunity given by the appellate Court, neither Smt. Neha appeared before the appellate Court nor any written

instruction was filed. Although the appellate Court by- itself came to a conclusion that the application for compromise is incomplete and has not been filed on behalf of all the legal heirs of the complainant Ramesh Chandra Jain and had granted liberty to the applicants either to file an application for compromise on behalf of Smt. Neha Jain or to seek written instructions, but nothing was done. Thus, it is clear that Neha was not interested in compromising the matter with the applicants. Further more, it appears from the order dated 23-8-2016 passed by the Appellate Court, that although some of the legal representatives of Ramesh Chandra Jain, were present before the Appellate Court, but their statements regarding their willingness to compromise were not recorded. There is nothing in the order dated 23-8-2016 to indicate, that the Appellate Court had ever verified the contents of the application for compromise, from the legal representatives of the complainant Ramesh Chandra Jain. Under the facts and circumstances of the case, this Court is of the considered opinion that incomplete and unverified compromise application cannot be said to be a valid application in the eyes of law. However, the appellate Court has considered the effect of the said application and has interfered with the sentence passed by the trial Court.

(14) Be that as it may.

(15) So far as the merits of the case are concerned, the injured Ramesh Chandra Jain (PW-1) has stated that under the orders of the Supreme Court, he had got the possession of the shop on 15.05.2008 through the Nazir of the Executing Court. On 18.06.2008 the applicants and co-accused Sushila @ Daku and Ashok Kumar, Kallu Bhadoriya, along with 3 to 4 persons entered inside the shop and started abusing him and the applicants were having *lathies*, whereas co-accused Sushila was having *Danda*, the

acquitted co-accused Kallu was having *lathi,* whereas other persons were armed with firearms and started assaulting him. On the gun point, he was assaulted by all the accused persons and was dragged out of the shop, thereafter, the shop was closed and the accused persons put the locks and also extended a threat that in case, if the complainant Ramesh Chandra Jain (PW-1) tries to enter inside the shop, then he would be killed. With the help of police, the locks of the shops were broke open and he went to the police station after leaving his daughter in his shop. The entire incident was narrated to the police. The FIR Ex. P-1 was lodged. Panchnama of the spot Ex. P-2 was prepared. Written complaint Ex. P-3 was made by him. Accused persons had taken away certain stocks as well as the cash amount of Rs.5000 to 7000/- and he had lost one gold chain. This witness was cross-examined in detail. It is the case of the complainant Ramesh Chandra Jain (PW-1) that he had got the possession of the shop in execution of an order passed by the Supreme Court, which has not been challenged by the applicants except by suggesting that no order has been placed on record. However, surprisingly, the applicants on their own have proved the order of the Supreme Court, as well as the proceedings of the Executing Court, and also the order of the High Court. It appears that the father of the complainant, namely Nirmal Chand Jain, had filed a suit for eviction against one Anoop Kumar Jain. It appears that a decree for eviction was passed, and Anoop Kumar Jain, the judgment debtor, filed a S.L.P.(C) No. 20294/2007 before the Supreme Court. The said S.L.P. was dismissed, however, the judgment debtor was granted 6 months time to vacate the premises. The copy of the order dated 12-11-2007 passed by Supreme Court in S.L.P.(C) No. 20294/2007 is Ex. D/18. It appears that thereafter,

certain objections were raised by the applicants in the execution proceedings and the judgment debtor had also raised an objection that although he is ready and willing to vacate the premises, but he is not sure that to whom the vacant possession is to be given. Accordingly, it appears that under the orders of the Executing Court, the father of the complainant, namely Nirmal Chand Jain, got the vacant possession of the shop on 15-5-2008 and the acknowledgment of receipt of vacant possession of the shop given by Nirmal Chand Jain is Ex. D/20. It appears that the applicants were of the view that the possession should have been given to them, therefore, they approached this Court by filing a Civil Revision which was registered as C.R. No. 118/2009 which was dismissed by this Court by order dated 12-10-2009, with liberty to the revisionist to take any other appropriate legal recourse available to her. The certified copy of the order dated 12-10-2009 is Ex. D/5. Thus, it is clear that the applicants, themselves have proved that Shri Nirmal Chand Jain, the father of the complainant Late Shri Ramesh Chandra Jain, had got a decree of eviction in his favour and in execution of the said decree, the vacant possession was handed over to him on 15-5-2008 and the Civil Revision filed by the deceased co-accused Smt. Sushila was dismissed by this Court. Thus, if the complainant Ramesh Chandra Jain was in possession of the shop in question under the decree/judicial order and if the applicants were of the view that they also have some title or share in the said shop, then only option available to them was to file a civil suit. It is well established principal of law that a civil dispute cannot be given a colour of criminal case. Even otherwise, if a person has a civil remedy, then he cannot be allowed to take law in his hands and by show off muscle power, he cannot be allowed to settle his scores.

(16) Priya Jain (PW-3) has supported the evidence of Ramesh Chandra Jain (PW-1). Dr. J.S. Yadav (PW-4) had medically examined the complainant Ramesh Chandra Jain (PW-1) and had found that on the right side of jaw and mandible bone, there was a tenderness. One contusion was on 5 cm below the injury No. 2 and all the injuries were caused by hard and blunt object. MLC report is Ex. P-5.

(17) Munna Singh (PW-5), Ulaft Rai Jain (PW-6), P. Jatav (PW-7), Ugrasen Jain (PW-9) and S.K. Jain (PW-10) have not supported the prosecution case and they have turned hostile. Govind Singh Yadav (PW-8) is the Investigating Officer, who has stated that the spot map Ex. P-2 was prepared. The statements of the witnesses were recorded. Two broken locks were seized from the spot vide seizure memo Ex. P-9. The applicants and co-accused persons were arrested vide arrest memo Ex. P-10 to P-14.

(18) Thus, entire prosecution is based on the testimony of Ramesh Chandra Jain (PW-1) and Priya (PW-3).

(19) It is well established principle of law that while exercising the powers under Sections 397 and 401 of Cr.P.C., the revisional court cannot interfere with the findings of the fact unless and until the same are found to be perverse and contrary to record.

(20) Counsel for the applicants could not point out even a single circumstance to show any perversity in the judgments passed by the Courts below. He could not point out anything from the record to show that the applicants were falsely implicated by the complainant Ramesh Chandra Jain (PW-1) and Priya Jain (PW-3). Co-accused Kallu has been acquitted in view of the admission made by the injured Ramesh Chandra Jain (PW-1) that the name of Kallu was mentioned in the complaint on the basis of the name

disclosed by the neighbourers. However, he admitted that the accused Kallu, who is present in the Court, was not present at the time of the incident. The fact that the father of the complainant Ramesh Chandra Jain (PW-1) was given the possession of the shop under the orders of the Supreme Court by Executing Court has not been challenged by the applicants, on the contrary, they themselves have proved those documents. As already pointed out that if the applicants were of the view that they had any right or title in the shop, then they had remedy to get their title declared from the civil Court but the applicants cannot be allowed to take law in their hands and by-passing the civil remedy, they cannot be allowed to take the possession of the shop by show of muscle power. The applicants have not come up with the case that they had tried to take the possession of the shop under any order.

(21) Under the facts and circumstances of the case, after appreciating the evidence, which has been led by the prosecution, the Courts below have given a concurrent finding of fact that prosecution has succeeded in establishing the guilt of the applicants for offence under Sections 452, 323/149 and 148 of IPC. This Court does not find any reason to interfere with the said concurrent findings of the fact. Even otherwise, this Court has also gone through the evidence of Ramesh Chandra Jain (PW-1) and Priya Jain (PW-3) and nothing could be elucidated by the applicants from the cross-examination of these witnesses to show as to why the applicants have been falsely implicated by these two witnesses. The medical evidence MLC report Ex. P-5 corroborates the evidence of Ramesh Chandra Jain (PW-1) and Priya Jain (PW-3). When the ocular evidence of injured witness is corroborated by the medical evidence, then merely because the independent

witnesses have chosen not to support the prosecution case and they had decided to turn hostile, then that by itself cannot be a ground to discard the evidence of injured witnesses, specifically when not only his evidence is corroborated by the medical evidence, but the FIR was also lodged promptly within less than two hours. Thus, considering the evidence, which is available on record as well as concurrent findings of facts given by the Courts below as well as after going through the record of the Courts below to find out any perversity in the findings and considering the inability of the counsel for the applicants to point out any such perversity, this Court is of the considered opinion that the prosecution has succeeded in establishing the guilt of the applicants for offence under Sections 452, 323/149 and 147 of IPC.

(22) So far as the question of sentence is concerned, the trial Court had awarded the jail sentence of rigorous imprisonment of three months, rigorous imprisonment of six months for offence under Sections 148, 452 of IPC respectively, no jail sentence was awarded for offence under Section 323/149 of IPC. The Appellate Court after considering the incomplete and unverified application for compromise has extended the benefit of compromise to the applicants on the question of quantum of sentence.

(23) However, it is clear from the material available on record, that the complainant got possession of the shop in execution of the order of the Supreme Court, and continued to remain in possession and on the date of incident, the complainant was in possession of the shop, and the applicants did not have any decree in their favor, and even then, they tried to forcibly take possession of the shop. Further “deterrence” is one of the key factor of sentencing policy, and where the applicants had not shown any regards

for the Courts, and by show of muscle power, they have tried to take possession of the shop, and the Appellate Court, while ignoring the above mentioned facts and circumstances, has reduced the jail sentence awarded by the Trial Court, on the basis of incomplete and unverified application for compromise. The next question for consideration is that in absence of any challenge to the inadequacy of sentence awarded by the appellate Court, whether this Court can suo-moto exercise power to reconsider the sentence awarded by the Appellate Court or not?

(24) Section 401 of Cr.P.C. reads as under :

> **"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, exercise any of the powers conferred on a court of appeal by Sections 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.
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> (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.
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> (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 this 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."

Thus, it is clear that in exercise of power under Section 401(1) of Cr.P.C., the High Court, can exercise the power under Section 386(e) of Cr.P.C.

(25) The Supreme Court in the case of **Pirthipal Singh Vs. State of Punjab** reported in **(2012) 1 SCC 10** has held that the High Court has suo moto powers to enhance the sentence after giving notice to the accused. The Supreme Court has held as under:-

> **"35.** In *Eknath Shankarrao Mukkawar* v. *State of Maharashtra* this Court held: (SCC p. 28, para 6)
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> "*6*. We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, suo motu. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. The High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under Section 397 read with Section 401, Criminal Procedure Code, 1973, inasmuch as the High Court can 'by itself' call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code."
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> **36.** In *Surendra Singh Rautela* v. *State of Bihar* this Court reconsidered the issue and held: (SCC p. 271, para 8)
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> "*8*. … It is well settled that the High Court, suo motu in exercise of revisional

> jurisdiction can enhance the sentence of an accused awarded by the trial court and the same is not affected merely because an appeal has been provided under Section 377 of the Code for enhancement of sentence and no such appeal has been preferred."
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> [See also *Nadir Khan* v. *State (Delhi Admn.)*, *Govind Ramji Jadhav* v. *State of Maharashtra* and *K. Pandurangan* v. *S.S.R. Velusamy*.]
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> **37.** In *Jayaram Vithoba* v. *State of Bombay* this Court held that the suo motu powers of enhancement under revisional jurisdiction can be exercised only after giving notice/opportunity of hearing to the accused.
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> **38.** In view of the above, the law can be summarised that the High Court in exercise of its power under Section 386(*e*) CrPC is competent to enhance the sentence suo motu. However, such a course is permissible only after giving opportunity of hearing to the accused."

(26) Therefore, issue notice to the applicants, to show cause, as to why the jail sentence awarded to them by the Trial Court be not restored, after setting aside the modified sentence awarded by the Appellate Court. The office is directed to register the case separately. The notices be issued to the applicants. The notices be made returnable within 3 weeks.

(27) Accordingly, the conviction of the applicants for offence under Sections 452, 323/149 and 147 of IPC is hereby affirmed. Resultantly, the judgment dated 15.11.2017 passed by 5th Additional Sessions Judge, Bhind in Criminal Appeal No. 147/2014 is hereby affirmed.

(28) Thus, the revision fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

Abhi