

**IN THE HIGH COURT OF MADHYA  
PRADESH  
AT INDORE  
BEFORE  
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH  
CRIMINAL REVISION No. 3548 of 2021**

**BETWEEN:-**

1. **DEEPSINGH S/O PREMSINGH,  
AGED ABOUT 29 YEARS,  
OCCUPATION: SERVICE  
R/o. VILL-RICCHODA  
TEH. SHUJALPUR  
(MADHYA PRADESH)**
  
2. **JITENDRA S/O MOTILAL,  
AGED ABOUT 29 YEARS,  
OCCUPATION: SERVICE  
R/O. VILLAGE BAVANHEDA,  
ARAKSHI KENDRA SHUJALPUR  
(MADHYA PRADESH)**

**.....PETITIONERS**

**(SHRI VIVEK PHADKE – ADVOCATE)**

**AND**

**THE STATE OF MADHYA PRADESH  
THROUGH DIST. MAGISTRATE  
DIST.:SHAJAPUR (MADHYA PRADESH)**

**THE STATE OF MADHYA PRADESH  
STATION HOUSE OFFICER  
THROUGH POLICE STATION ARAKSHI  
KENDRA, SHUJALPUR,  
DIST.:SHAJAPUR (MADHYA PRADESH)**

**.....RESPONDENTS**

**( SHRI SURENDRA GUPTA – GOVT. ADVOCATE)**

.....  
*Reserved on* - 10.08.2023

*Delivered on* - 23.08.2023  
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*This revision coming on for hearing this day, the court passed the following:*

**ORDER**

Petitioner has preferred this revision petition under Section 397 read with Section 401 of Cr.P.C., being aggrieved by the judgment dated 14.05.2020 passed by learned Fourth Additional Sessions Judge, Shujalpur, District Shajapur, in Criminal Appeal No.385/2015 whereby learned appellate Court has set aside the judgment dated 08.10.2015 passed by Judicial Magistrate First Class, Shujalpur, District Shajapur, in Criminal Case No.1457/2011 and remitted the case back to the trial Court for re-examining the prosecution witness under Section 311 of Cr.P.C and to pass a reasoned and cogent order.

2. In order to decide this criminal revision, brief facts of the case is that the petitioners were tried by the Judicial Magistrate First Class, Shujalpur, District Shajapur and after considering the evidence available on record the petitioner no.1 was convicted under Sections 419, 120(B) of I.P.C, sentenced to undergo 1 year R.I., and fine of Rs.100/- with default stipulations and petitioner no.2 was convicted for offence under Section 120(B) of IPC, 3(d)4 of M.P. Manyata Prapt Parisksha Adhiniyam 1937, sentenced to undergo 1 year and 1 year R.I. and fine of Rs.100/- under each sections, with default stipulations. Being aggrieved by the aforesaid judgment, the petitioners have filed an appeal

before Fourth Additional Sessions Judge, Shujalpur, District Shajapur, wherein learned Appellate Court in compliance of law laid down by this Court in the Case of *Mussauddin Ahmed vs. State of Assam*, reported as (2009)14 SCC 541 remanded the matter to the trial Court for re-examining the prosecution witness under Section 311 of Cr.P.C and to pass a reasoned and cogent order after affording the opportunity of defence evidence. Being dissatisfied by the impugned order, the petitioner has knocked the portal of this Court by filing this revision petition submitting that the impugned judgment passed by learned appellate Court is neither legal nor proper.

3. The petitioner in his revision memo and during the course of arguments submitted that the impugned judgment of the learned appellate Court is against the fact and also against the settled principle of law. The petitioners have been charged twice for the same offence due to the perverse directions issued vide judgment dated 14.05.2020. It is submitted that first and foremost, it is visualized from the bare perusal of the impugned judgment that learned appellate Court has remitted back the matter for the purpose of filling up the loop holes in the prosecution case, which is wrong and illegal, therefore not sustainable in the eyes of law. It is also submitted that in case, if the incriminating piece of evidence is available against accused and opportunity to explain that evidence has not been afforded to the accused, then on that basis conviction cannot be carried out.

4. In the course of arguments, learned counsel for the appellant relied upon the judgment passed by Hon'ble Supreme Court in the case of *Satyajit Banerjee & Ors. vs. State of West Bengal & Ors.* reported

in *(2005) 1 SCC 115* wherein it has been held that direction for retrial should not be made in all or every case, it is only when the extraordinary situation of the first trial being found to be a farce and a “mock trial” obtains. It is further submitted that the remand of the case for retrial and for fresh decision from stage one is impermissible as there is apprehension on part of the accused that these observations would bias the trial Court. The directions of the learned Appellate Court for retrial and resultantly reinvestigation of the matter would make the earlier investigation and trial futile.

5. Learned counsel further placed reliance upon the judgment delivered by Hon'ble Apex Court in the case of *Rajendra Prasad vs. Narcotic Cell* reported in *(1996)6 SCC 110* and submitted that though the witnesses can be recalled and re-summoned, but power under Section 311 of Cr.P.C., cannot be exercised to fill up lacuna in the prosecution case. Lacuna is inherent weakness or a latent wedge in the matrix of the prosecution case. In the present case, at the time of framing charges, initially the prosecution had opportunity to levy other charges, but they did not do so, which is an inherent weakness, hence power under Section 311 of Cr.P.C cannot be exercised to fill up the lacuna present in the case. On these grounds learned counsel for the petitioner requested to set aside the order of the appellate Court.

5. On the contrary, learned Govt. Advocate remonstrated that it is duty of the Court to examine the accused and the evidence properly. Learned counsel referring to the judgment passed by Honb'le Apex Court in the case of *Rajendra Prasad (supra)* has held that Lacuna in the prosecution must be understood as the inherent weakness or a latent

wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. Therefore, in view of the aforesaid, counsel submitted that if the appellate Court has remanded back the case for taking additional evidence on record after conclusion of trial, it cannot be regarded as against law. Hence no case is made out for interference in this revision petition.

6. In the back drop of the rival submissions, the conundrum of the case is as to whether the order of Appellate Court remitting back the case to trial Court for taking additional documents and evidence on record after conclusion of entire trial is incorrect in the eyes of law and facts.

7. On this aspect I have gone through the judgment of learned appellate Court and trial Court. It is evident from concluding paras of the impugned judgment, that the applicant Deepsingh, impersonating himself as Jitendra Malviya has appeared in examination and on being apprehended, on the basis of oral evidence, the charges have been framed against the applicants. Learned appellate Court further observed that on considering the FIR (Ex-P/6), it is unfolded that from the beginning the intention of prosecution was to register a case of cheating on the basis of oral version rather than on written version and that is why the offence under Section 467, 468 and 471 of IPC, 1860 has not

been registered against the appellant and initially offence under Section 419 of IPC, was only registered. Further learned appellate Court has pointed out some other defects of investigation and criticized the whole investigation and proceedings of trial. Further in para -10 of the impugned judgment the learned appellate Court concurring the arguments of learned Public Prosecutor held that on technical grounds of not producing the substantial evidence appellant cannot be convicted but rather it would be appropriate to remit the case back to the trial Court for affording opportunity to prosecution to adduce the material documents.

8. Now the question arises as to whether such type of observation can be passed for remanding the case for a fresh trial?

9. In this regard learned trial Court has relied upon the judgment of Apex Court rendered in *Mussaiddin Ahmed (Supra)*, having gone through the facts of the aforesaid precedent, it is elucidated that owing to weakness of prosecution case and after considering other circumstances, the Hon'ble Apex Court opined that prosecution failed to prove its case against the appellant beyond reasonable doubt and accordingly, the appellant was acquitted. However, in the aforesaid precedent, Hon'ble Apex Court has neither remanded the case to the trial Court for a fresh trial nor established any principle with regard to remanding the criminal matters. In addition to that such type of observations made by first Appellate Court in the case at hand, certainly influence the view of the trial Court, which does not suit the principle of the criminal jurisprudence.

10. On this aspect, this Court can profitably rely upon the following excerpts of judgment of Hon'ble Apex Court rendered in *Satyajit Banerjee and Ors. vs. State of West Bengal and Ors.* (2005)1 SCC 115:

“ Since strong reliance has been placed on the Best Bakery Case (Gujarat Riots Case- supra) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a *de novo* trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

The law laid down in the 'Best Bakery Case' in the aforesaid **extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence.** In Best Bakery case, the first trial was found to be a farce and is described as 'mock trial.' Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in the Best Bakery Case(supra).”

11. In view of the aforesaid verdict, the matter can be remitted only in extra ordinary and exceptional circumstances for a *de novo trial* and only to prevent and avert the miscarriage of justice. In this regard, the law laid down in *Nasib Singh vs. State of Punjab* reported in (2022)2 SCC 89 is also worth referring here:-

33.The principles that emerge from the decisions of this Court on retrial can be formulated as under:

- (i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;

(ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-

trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;

(iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

(iv) It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

(v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

(vi) The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:

a) The trial court has proceeded with the trial in the absence of jurisdiction;

b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

12. In view of the aforesaid settled proposition, it is crystal clear that the criminal matter can be remanded back to the trial Court for re-trial only in exceptional conditions and only to eschew the miscarriage of justice. In the case at hand, learned appellate Court has not assigned any reasons as to how the miscarriage of justice is going to happen against any party. The learned appellate Court has also not disclosed anything by which it can be assumed that the trial Court has proceeded with the trial in the absence of jurisdiction or trial has been vitiated by any illegality or irregularity.



13. That apart even assuming the defect or irregularity was curable, the question remains as to whether this case can be remanded back for re trial. Admittedly, nearly about 12 years had been lapsed since the date of incident, so far as the requirement of additional evidence is concerned, the appellate Court is well within the jurisdiction under Section 391 of Cr.P.C to call necessary evidence and examine them in accordance with law.

14. In conspectus of the aforesaid settled prepositions and deliberations in entirety, the impugned order of learned appellate Court qua remanding the case to trial Court for a fresh trial is found perverse and against law.

15. Accordingly, the petition is partly allowed and the impugned order of First Appellate Court is set aside to the extent of remanding the case for a fresh trial to the learned trial Court and in sequel thereof, having remitted the case, the learned appellate Court is directed to decide the appeal on the basis of material available on record and the submissions of both the parties, in accordance with law. Both the parties are directed to appear before the appellate court on 06.09.2023.

16. Pending I.A(s), if any stands disposed of.

17. Resultantly, Criminal Revision stands disposed of.

18. A copy of this order be sent to learned appellant Court as well as to the learned trial Court for necessary compliance.

**(PREM NARAYAN SINGH)**  
**JUDGE**