

**THE HIGH COURT OF SIKKIM : GANGTOK**

**CRIMINAL REVISION NO. 20 OF 2003**

[Arising out of the judgment dated 31.7.2003 passed by P. W. Pulger, Chief Judicial Magistrate (South & West), Namchi in Criminal Police Challan Case no. 36 of 2003]

Parimal Sarkar,  
S/o Late Tarapada Sarkar,  
Compounder,  
Jorethang Public Health Centre,  
P.O. Jorethang,  
South Sikkim

... **Petitioner**

**VERSUS**

1. Sova Shanker,  
W/o Chandra Kumar Sanker,  
Jorethang Housing Colony,  
P.S. Jorethang,  
South Sikkim.
2. Suren Khati,  
S/o Balbir Khati,  
Yanggang, Rangang Busty,  
Jorethang Housing Colony,  
P.O. Jorethang,  
South Sikkim.
3. State of Sikkim
4. Chandra Kumar Shanker,  
Jorethang Housing Colony,  
P.S. Jorethang,  
South Sikkim.

... **Opposite Parties**

For the petitioner : Nripendra N. Das, Advocate.

For opposite party nos.1 & 2 : K. T. Bhutia, Advocate.

For opposite party no. 3 : J. B. Pradhan, Public Prosecutor.

For opposite party no. 4 : Roshna Barsel, Advocate.

**PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.**

**Date of judgment: 17<sup>th</sup> August, 2004.**

**J U D G M E N T**

**R. K. PATRA, C.J.**

The informant in Jorethang P.S. Case no. 3(2) of 2003 is the petitioner in this revision who seeks to challenge the judgment dated 31.7.2003 passed by P. W. Pulger, Chief Judicial Magistrate, South & West at Namchi in Criminal Police Challan Case no. 36 of 2003 acquitting the opposite party nos. 1 and 2 of the charges under sections 353, 325 read with section 34 IPC. The opposite party no. 1 Shova Shanker is the wife of Chandra Kumar Shanker, opposite party no.4. Her brother is Suren Khati, opposite party no. 2.

**2.** Facts relevant for disposal of this revision are as follows:-

The petitioner at the relevant time was serving as compounder in Jorethang Primary Health Centre (PHC in brief). On 5.2.2003 at about 7.40 p.m. when he was on his way to the PHC to attend his duty he was alleged to have been assaulted by opposite party no.4, Chandra Kumar Shanker (not placed on trial) and his wife opposite party no.1, Shova Shanker. On the basis of FIR lodged by him around 8.30 p.m., Jorethang police station case no. 3(2)03 was registered under sections 341, 353, 323/34 IPC and investigation was taken up. In course of the investigation, it came to light that opposite party no.4 Chandra Kumar

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Shanker was no way involved in the incident but there was some evidence against the opposite party nos. 1 and 2. Accordingly charge-sheet was filed against them who faced the trial and came to be acquitted by the impugned judgment.

**3.** At the time of admission of this revision, learned counsel for the petitioner strenuously contended that opposite party no. 4 Chandra Kumar Shanker was illegally not charge-sheeted on account of which the case has ended in acquittal resulting in mis-carriage of justice. He further submitted that the petitioner was not given any opportunity to file objection to the final report submitted by the police so far as it related to Chandra Kumar Shanker.

In view of the fact that the said Chandra Kumar Shanker was not made a party in this revision and no adverse decision could be taken against him without hearing him, liberty was given to the counsel of the petitioner to array him as one of the opposite parties. The learned counsel accordingly filed an application to implead him as a party which was allowed. Accordingly he was added as opposite party no.4. One being noticed, he appeared through his counsel.

**4.** I have heard learned counsel for the parties.

**5.** Learned counsel for the petitioner submitted that learned Magistrate acquitted the opposite party nos. 1 and 2

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on the ground that the main accused (Chandra Kumar Shanker) having been not charge-sheeted the entire case of the prosecution appeared to be suspicious and the credibility of the petitioner was very much doubtful. Learned counsel submitted that the order acquitting the opposite party nos. 1 and 2 of the charges is wholly illegal and perverse and should be set aside by this Court in exercise of its revisional power.

**6.** Learned counsel firstly contended that the opposite party no.4 Chandra Kumar Shanker should have been summoned by the learned Magistrate under section 319 Cr.P.C. to face the trial along with opposite party nos. 1 and 2. In support of his submission he placed reliance on the decisions of the Supreme Court in Bhagwant Singh vs. Commissioner of Police AIR 1985 SC 1285, Rukhsana Khatoon vs. Sakhawat Hussain AIR 2002 SC 2342 and Jarnail Singh vs. State of Haryana 2003 Criminal Law Journal 2307.

Section 319 Cr.P.C. lays down that if the Court while trying certain accused finds from the evidence that some other person had also committed the offence along with the accused facing the trial, it can proceed against such person for the offence which he seems to have committed.

Let me at this stage examine if the ratio of the judgments of the Supreme Court referred to by the learned

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counsel for the petitioner would be applicable to the present facts and circumstances.

In Bhagwant Singh (supra) the question that came up for consideration before the Supreme Court was whether the Court can accept the police report saying that no offence was committed by the person mentioned in the FIR without giving an opportunity of hearing to the informant. Their Lordships held that the informant does not fade away with the lodging of the FIR and he cannot be deprived of the opportunity of being heard at the time when the report submitted by the investigating agency is considered by the Magistrate.

In Rukhana Khatoon (supra) it was held by the Supreme Court that even though a person is not charge-sheeted, he can be summoned to be arraigned as accused if the evidence of prosecution discloses his involvement in the alleged incident.

In Jarnail Singh (supra) the Supreme Court held that the provision of section 319 Cr.P.C. would be applicable even to a person who is already an accused in respect of the same offence but in a different case.

On careful consideration of the above decisions, I have no hesitation to hold that the ratio laid down therein is not applicable to the facts and circumstances of this case.

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In the present case, the stage for invoking section 319 Cr.P.C. was long over. The petitioner could have taken appropriate steps in this regard when opposite party nos. 1 and 2 were facing the trial which he failed to do. It is relevant to note here that prosecution has examined Chandra Kumar Shanker as PW7 in this very case. In his evidence he denied his knowledge about the occurrence. He deposed that he came to know of the occurrence in which the petitioner was assaulted but he did not know as to who assaulted him. Now the trial has ended and therefore there is no scope to arraign the opposite party no. 4 Chandra Kumar Shanker as an accused to face trial along with opposite party nos. 2 and 3.

7. Learned counsel for the petitioner next contended that the impugned order of the learned Magistrate suffers from perversity and the reasons given for acquittal are unsustainable in law. The law relating to the power of the High Court in revision filed at the instance of the informant or private parties questioning the order of acquittal in a case where the State could have appealed is now well-settled. In *K. Chinnaswamy vs. State of Andhra Pradesh* AIR 1962 SC 1788, the Supreme Court held as follows:-

“Sub-section (4) of S.439 (of the old Code) 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

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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. Some cases of this kind however may be indicated, which would justify the High Court in interfering with a finding of acquittal in revision. These cases 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 S.439(4).”

[emphasis supplied]

On careful perusal of the impugned judgment, I have no hesitation to hold that it does not come within any of the exceptions enumerated by the Supreme Court. The order of acquittal is purely based on appreciation of evidence. The learned Magistrate has considered all the evidence on record. It is not a case of non-consideration of material

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evidence. The petitioner was examined as PW1. The learned Magistrate found that in the FIR lodged by him he stated that Chandra Kumar Shanker and his wife Shova Shanker assaulted him near the PHC gate. Chandra Kumar Shanker as PW7 deposed that on the day of occurrence when he arrived home at about 6 p.m. he found his mother, children and his sister were there whereas his wife opposite party no. 2 and his brother-in-law opposite party no.3 were not there. PW7's presence at home at the relevant time is corroborated by the evidence of PW6 who stated that when she went to PW7's house, she found him present. In the cross-examination, PW7 clarified that he returned home from his duty and did not go anywhere in the evening and remained at home. The prosecution examined PW3 to corroborate the evidence of PW1. PW3 stated that in the night of occurrence she heard someone shouting for help and when she came out with a kerosene lamp she saw PW1 being assaulted by two persons but she could not identify the assailants. Besides this, the medical evidence goes against the petitioner. On the basis of the x-ray report exhibit P4, PW14 the Medical Officer of the PHC recorded fracture of right clavicle. Petitioner as PW1 on the other hand stated that he was assaulted with a danda blow on his head and hand but he did not state that he was assaulted on his shoulder which could have corroborated the medical report.

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In view of such evidence, the learned Magistrate rightly recorded the order of acquittal.

**8.** It is also not correct, as argued on behalf of the petitioner, that the order of acquittal was based solely on the ground that Chandra Kumar Shanker was not charge-sheeted along with opposite party nos. 1 and 2. The learned Magistrate while assessing other evidence, merely took into account the fact of 'non-charge sheeting' of Chandra Kumar Shanker.

For the foregoing reasons, the impugned judgment does not called for interference.

**9.** In the result, there is no merit in this revision which is accordingly dismissed.

  
**( R. K. Patra )**  
**Chief Justice**  
17.08.2004

Dictation taken  
&  
typed by me  
Dipak Saha