CASE NO.:
Appeal (crl.) 499 of 1994

PETITIONER:
Narendra Nath Khaware

RESPONDENT:
Parasnath Khaware and ors.

DATE OF JUDGMENT: 17/04/2003

BENCH:
M.B. SHAH & ARUN KUMAR.

JUDGMENT:

J U D G M E N T

ARUN KUMAR, J

The complainant Narendra Nath Khaware filed a Special Leave Petition in this court under Article 136 of the Constitution of India seeking leave to appeal against the judgment dated 6th April, 1993 of the High Court of Judicature at Patna. Leave to appeal was granted by this court vide order dated 4th August, 1994 and the matter was registered as Criminal Appeal No.499 of 1994. The said appeal has come up for final hearing and disposal before this court. At the time of hearing, the learned counsel appearing for the respondents raised a preliminary objection about the maintainability of this appeal. In order to appreciate the objection, brief facts of the case are required to be stated. The respondents were charged for offences under Sections 148 and 302 read with Section 149 IPC. The incident for which these accused were charged is the murder of Diwakar Khaware, son of the complainant Narendra Nath Khaware (appellant) on 13th June, 1982. As per the case of the prosecution, the complainant along with his son Diwakar Khaware (deceased) was getting his maize field weeded through the help of a few labourers on the morning of 13th June, 1982. His real brother Parasnath Khaware came on the spot and forbade the complainant from doing so. The complainant insisted that he had right to carry on the work in the field which belonged to him. On this Parasnath Khaware, who was accompanied by his son accused Bishwanath Khaware and Shrinath Khaware abused the labourers and drove them away from the field. The complainant took strong objection to this but the accused party started abusing the complainant and his son and started pelting stones on them. The complainant and his son also threw stones on the opposite party in their defence. In the meantime, some villagers came and intervened in the fight. As a result of this, the accused persons went away. The complainant and his son Diwakar Khaware continued with the work in the field. After a few hours, that is about 10.00 a.m., few villagers informed the complainant that the accused persons were coming back armed with weapons. The complainant did not pay heed to this warning thinking that the accused persons were his close relations. Within a short time, all the seven accused persons reached the spot. Seeing them, the complainant and his son Diwakar Khaware ran for their safety and entered the nearby house of Ramdhani Jha. They hid themselves in a room by bolting the room from inside. However, as the main gate of the house had remained open, the accused persons rushed inside the house and broke open the door which had been bolted from inside. They entered the room where the complainant and his son Diwakar Khaware were hiding. Diwakar Khaware was dragged

outside the room in the courtyard of the house where accused Bishwanath Khaware is said to have given a bhala blow on his stomach. As a result of the blow, Diwakar Khaware fell down. Accused Parasnath Khaware gave a pharsa blow on the head of Diwakar Khaware. The other accused persons also assaulted Diwakar with their weapons. The complainant tried to save his son but he was also assaulted by accused Saroj Jha and Srinath Khaware. While this was going on, the villagers accompanied by Ram Dhani Jha, Basant Kumar Jha, Surendra Jha and Sachidanand Jha came and intervened and saved the victims from further assault. However, Diwakar Khaware died on the spot. Police came in the village at about 1.00 p.m. when statement of the complainant Narendra Nath Khaware was recorded. On the basis of the said statement, an FIR was recorded and the seven accused persons were charge-sheeted and tried for the aforesaid offences. The sessions court by its judgment dated 19th June, 1992 while giving benefit of doubt to the accused persons and finding fault with the investigation acquitted all the accused persons. The State of Bihar filed an appeal against the said judgment of the Sessions Court. The High Court dismissed the appeal in limine making the following observations :

"As regards merits, it is clear from the perusal of the record that the witness named in the fardbayan have not been examined by the prosecution and also that the witnesses examined in Court were examined by the police after eight months from the date of occurrence. It is also clear that the Investigating Office of the case has not been examined. Therefore, there are no merits. Further the appeal is barred by limitation also, which cannot be considered."

Against the said judgment of the High Court, the complainant filed a Special Leave Petition in this Court. Leave was granted. Hence the present appeal. The appeal has been registered for final hearing.

Learned counsel for the respondents contends that only the State of Bihar had the right to file Special Leave Petition or an appeal in this Court. The State having failed to do so, an appeal at the instance of the complainant is not maintainable. The complainant had no right of appeal before the High Court. However, the complainant could have filed a Criminal Revision which he did not do and for this reason also the complainant had lost the right to file any appeal.

We have heard the learned counsel for the parties. So far as the objection regarding maintainability of the appeal is concerned, the learned counsel for the appellant submitted that the power of this Court under Article 136 of the Constitution of India are very wide and once this court has granted leave to appeal in exercise of that power such an objection, as is being raised on behalf of the respondents, is not available. The consequence of granting leave to appeal is that this court has considered it fit to hear appeal against the impugned judgment. Therefore, the appeal has to be heard and decided on merits. In this connection, our attention has been invited to Arunachalam versus P.S.R. Sadhanantham and Another [(1979) 2 SCC 297]. It was observed that "appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by the appellate courts and appellate tribunals under specific statutes. It is a plenary power 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice. Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme

Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice the Supreme Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction."

The decision in Arunchalam (Supra) was challenged through a petition under Article 32 of the Constitution of India. It was contended that the Supreme Court had no power to grant special leave to the brother of the deceased. A Constitution Bench of this Court in P.S.R. Sadhanantham versus Arunachalam and another [(1980) 3 SCC 141] dismissed the Writ Petition upholding the right of a private person to file petition under Article 136 of the Constitution of India against an order of acquittal. It was observed "in express terms Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme court to interfere in suitable cases. It is residuary power and is extraordinary in its amplitude. But the Constitution makers intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence."

In view of the aforesaid decisions of this court, we find no merit in the objection raised by the learned counsel for the respondents to the maintainability of the present appeal.

Coming to the merits of the appeal, we find that the High Court disposed of the appeal in a very casual and cavalier manner. Before the High Court, it was an appeal against acquittal involving seven accused persons and the offence they were charged with was under Sections 148 and 302 IPC read with Sections 149 IPC. The High Court being the Court of first appeal, was required to consider and re-appreciate the evidence on record. We fail to appreciate the manner in which the High Court disposed of the appeal on basis of some general observations without making any effort to go into the evidence on record. The learned counsel appearing for the appellant before us particularly drew our attention to the evidence of P.W.1, the complainant, who is also the father of the deceased. The complainant was an injured eye witness. Therefore, there could not be any doubt about his presence on the spot. It was the grievance of the complainant that the accused party were influential people and they had managed to ensure that the prosecuting agency adopts a lackadaisical approach in investigation. This has lead the complainant to file a protest petition before the Additional Chief Judicial Magistrate complaining the manner in which investigation in the case was being carried out. In fact this explains the non-examination of the Investigating Officer as a witness in the case. Regarding the observation of the High Court that other witnesses were not examined, the counsel submitted that at the time of actual occurrence only the complainant and his son Diwakar Khaware were present. The others came on the spot after the injuries had already been caused on the victim party. Diwakare Khaware having died at the spot, complainant was the only eye witness of the murder. The evidence of the complainant is corroborated by the medical evidence as well as by P.Ws. 2,3 and 4. The approach of the courts below on the other hand was of finding fault with the prosecution case, that is, non-examination of the Investigating Officer and non-examination of Ram Dhani Jha etc. The prosecution case was thrown overboard on such grounds. We have been taken through the statement of the complainant P.W.1. The statement shows that at the time of the actual occurrence only the complainant and deceased Diwakar

Khaware were present. Diwakar Khaware having died on the spot, complainant was the only actual eye-witness. Ram Dhani Jha etc. came on the spot, may be immediately after the event, and were therefore not eye-witnesses of the incident. So far as the non-examination of the Investigating Officer is concerned, it is settled law that the same is not fatal to the prosecution case. It has been often found that in order to help the accused party, specially in case where Investigating Officers are won over for whatever consideration, the Investigating Officers absent themselves and do not appear as witness in court. Another factor which had weighed with the courts below is the absence of blood on the spot. This was explained as wholly of no consequence in the facts of the present case where there is no doubt about the actual occurrence having taken place and about the spot where it took place. It is also emerging from the record that the courtyard where the incident took place was open to sky and it was a rainy day. Therefore, as argued by the learned counsel for the appellant, the blood stains might have been washed away.

The High Court was the first court of appeal. It did not even refer to the evidence of P.W.1. We also find from the judgment of the trial court that the evidence of P.W. 1 has not been given the attention it deserved. It will be seen from the order of the High Court. We really feel sad about the manner in which the High Court has disposed of the appeal. None of the three grounds mentioned by the High Court in its impugned judgment are really determinative of the fate of the appeal. In our view, the fact is that the High Court has failed to discharge its function. We feel it is a fit case for remand so that the High Court can go into the evidence on record in detail and come to definite finding on the facts in issue in the present case. Accordingly, we set aside the decision of the High Court and direct the High Court to hear the appeal on merits and decide the same in accordance with law.

We are constrained to observe a growing tendency with the High Courts in disposing of Criminal Appeals involving vexed questions of law and fact in cursory manner without going into the facts and the questions of law involved in the cases. May be this approach is gaining ground on account of huge pendency of cases. But such a summary disposal is no solution to the problem of arrears of cases in courts. Disposal of appeals where the High Court is the first court of appeal in such a manner results in denial of right of appeal to the parties. So long as the statute provides a right of appeal, in our view the court will be failing in its duty if the appeal is disposed of in such a casual and cavalier manner as the High Court has done in the present case.

Let the High Court decide the appeal on proper appreciation of facts and evidence on record in accordance with law after giving due opportunity of hearing to the parties. Since the matter is quite old, the High Court should endeavor to decide the case expeditiously on a priority basis. Any observation made in this judgment will not come in the way of the High Court in deciding the appeal on merits.

The appeal stands disposed of.