

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 719 OF 2009
(Arising out of SLP(Crl.) No. 7576/2008)**

Ajay Kumar Garg

.. Appellant(s)

Versus

Gaurav & Anr.

.. Respondent(s)

ORDER

Leave granted.

This appeal is directed against order dated 21st August, 2008, passed by the High Court of Judicature at Allahabad in Capital Case No. 3261 of 2007. By the impugned order, during the course of hearing of the appeal preferred by the convict, respondent No. 1 in this appeal, the High Court has ordered that Kalicharan, who according to the evidence of P.W. 2 and P.W. 6 had apprehended the said respondent be summoned for giving evidence. The High Court has also summoned the officer-in-charge of Pushpanjali Hospital where the two deceased ladies had been examined/treated, with all the material records for its examination. Aggrieved by the order, the complainant is before us in the appeal.

We have heard learned counsel for the parties.

Learned counsel for the appellant has submitted that while exercising its power under Section 391 of the Code of

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Criminal Procedure, 1973 (for short "the Code"), the High Court has failed to record any cogent reasons necessitating recording of additional evidence at this stage, particularly where the said Kalicharan has filed an affidavit before the High Court, in favour of the convict, *inter alia* stating that he had not seen any incident and had been wrongly made an eye-witness. Learned counsel for the State supports the stand of the appellant.

Having perused the impugned order, we are of the opinion that the impugned order, cannot be sustained.

Section 391 of the Code, insofar as relevant for the purpose of this appeal reads as follows :

"Appellate Court may take further evidence or direct it to be taken-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2)-(4)....."

A bare reading of the provision makes it clear that the Section invests the appellate Court with the power to record additional evidence, provided it is satisfied, for the

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reasons to be recorded, that additional evidence in the matter is necessary. Since

Section 391 of the Code is an exception to the general rule that an appeal should be decided on the evidence which was before the Trial Court, power under the Section has to be exercised with caution and circumspection so as to meet the ends of justice and not as a matter of course.

In Rambhau and Another vs. State of Maharashtra, (2001) 4 SCC 759, this Court has held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. Admission of additional evidence should not operate in a manner prejudicial to the prosecution or the defence. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the legislature had put the safety valve by requiring recording of reasons. Thus, recording of reasons is a condition precedent for exercise of power under Section 391 of the Code and an order bereft of reasons would tantamount to non-application of mind, rendering the exercise of power under the Section, bad in law.

Having gone through the order, we are convinced that the aforementioned salutary principles have not been kept in view by the High Court while issuing the impugned directions.

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The question of summoning of Kalicharan for recording his evidence at this juncture, particularly, when he is stated to have filed an affidavit, refuting the stand of the prosecution, in our view, is a serious issue insofar as criminal jurisprudence is concerned and therefore required deeper consideration, which is missing in the

impugned order under challenge. In our opinion, the impugned order suffers from the vice of non-application of mind and deserves to be set aside on that short ground only.

Consequently, the appeal is allowed; the impugned order is set aside and the matter is remanded to the High Court for fresh consideration of the issue regarding additional evidence.

.....J.

[D.K. JAIN]

.....J.

[R.M. LODHA

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NEW DELHI,
APRIL 13, 2009.

