

**Present:**

Mr. Justice Md. Shohrwardi

Criminal Revision No. 540 of 2009

Md. Nurnabi Sarkar and others

...Convict-petitioners

-Versus-

The State

...Opposite party

No one appears.

...For the convict-petitioners

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Heard on 29.05.2024

**Judgment delivered on 05.06.2024**

On an application filed under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 04.01.2009 passed by Sessions Judge, Joypurhat in Criminal Appeal No. 47 of 2006 convicting the petitioners under Section 297 of the Penal Code, 1860 and sentencing them thereunder to suffer imprisonment for 1(one) year and fine of Tk. 1,000, in default, to suffer imprisonment for 3(three) months setting aside the judgment and order of acquittal dated 19.09.2006 passed by Magistrate, Second Class, Joypurhat in C.R. Case No. 203 of 2004 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that on 12.03.2004 at 10.00 am the accused persons armed with lathi, spade, etc entered the family graveyard of the complainant P.W. 1 Mohammad Rafiqul Islam to destroy the sanctity of the graveyard and started cutting drain and thrown the cow dung in the graveyard. The accused persons also constructed a boundary wall within the graveyard and destroyed the sanctity of the graveyard.

After filing the complainant petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to send the case for inquiry through the concerned Chairman. After completing the inquiry a report was submitted on 16.05.2004 and the learned Magistrate was pleased to take cognizance of the offence against the accused persons under Sections 295 and 297 of the Penal Code, 1860. After that, the case was sent to the Court of Magistrate, Second Class, Joypurhat for trial.

During trial, the charge was framed under Section 297 of the Penal Code against the accused persons which was read over and explained to them and they pleaded not guilty to the charge and claimed to be tried in accordance with law. The prosecution examined 03(three) witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and after concluding the trial, the trial Court by judgment and order dated 19.09.2006 acquitted the accused persons from the charge framed against them against which the complainant Md. Rafiqul Islam filed Criminal Appeal No. 47 of 2006 before the Sessions Judge, Joypurhat and the appellate Court below by impugned judgment and order dated 08.01.2009 set aside the judgment and order of acquittal passed by the trial Court and was further pleased to convict the petitioners under Section 297 of the Penal Code, 1860 and sentenced them thereunder to suffer imprisonment for 1(one) year and fine of Tk. 1,000, in default, to suffer imprisonment for 3(three) months against which the convict-petitioners obtained the Rule.

I have perused the evidence, impugned judgments and orders passed by the Courts below and the records.

On perusal of the judgment and order passed by the trial Court, it appears that the trial Court acquitted the convict-petitioners

holding that there was a dispute between the accused and the complainant before filing the case regarding the land of the graveyard and the complainant was an accused in a criminal case filed by the accused party and the informant party was convicted by the trial Court and the complaint petition was filed due to enmity between the parties and there is a doubt about the truth of the allegation made against the accused-persons and that there is a graveyard of the grandfather and mother of the accused Nos. 2 to 4 in the disputed land. Therefore it is not possible to destroy the sanctity of the graveyard by the accused-persons. The prosecution failed to prove the charge by adducing neutral witnesses and there is material contradiction in the evidence of the prosecution witnesses.

On perusal of the judgment and order passed by the appellate Court, it transpires that the impugned judgment was passed considering the inquiry report submitted by P.W.3. Md. Rakibuddin who is a local Chairman of the concerned Union Parishad. Although P.W. 3 Md. Rakibuddin stated that he found the truth of the allegation made in the complaint petition and submitted the report but the said inquiry report was not proved.

P.W. 2 Md. Mahbul Haque Sarkar admitted that his sister's husband mutated 13 decimals of land of the disputed graveyard. P.W. 1 admitted that there is no grave of his parents in the disputed land. There is a grave of the grandfather and mother of the accused Nos. 2 to 4 in the disputed land. In view of the above evidence, I am of the view that the dispute between the parties has arisen due to the mutation of 13 decimals of land in the name of the informant party and earlier the informant party were convicted in a criminal case filed by the accused-persons in connection with same graveyard. There is a civil dispute between the parties regarding the place of occurrence. The prosecution failed to prove the charge against the accused persons beyond all reasonable doubt by adducing trustworthy, credible and reliable witnesses.

The appellate Court below failed to apply the correct principle of law regarding setting aside the judgment and order of acquittal passed by the trial Court. The appellate Court shall only set aside the judgment and order of acquittal if the evidence adduced by the prosecution is found trustworthy, credible and unimpeachable.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgment and order of conviction and sentence passed by the appellate Court below are hereby set aside.

Send down the lower Court's records at once.