RETRIAL: SECTION 386 (b) OF THE CRIMINAL PROCEDURE CODE, 1973

- Advocate Shivam Goel, Delhi High Court and
Advocate Pallavi Goel, Assistant Professor, O.P. Jindal Global Law School

"Court of Error"	While dealing with a criminal appeal, it is to be borne in mind that the appellate court may do what the trial court could do and cannot do what the trial court could not do, because the appellate court is a "court of error". [***Shankar Kerba Jadhav* V/s *State of Maharashtra,*** AIR 1971 SC 840]
Scope of Section 386 (b) (i) of the Cr.P.C., 1973	As per sub-clause (b) (i) of Section 386 of the Cr.P.C., the appellate court has power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. In the matter of: ***Ajay Kumar Ghoshal & Ors* V/s *State of Bihar & Anr,*** 2017 SCC Online SC 74, it was observed that: i. Though the word 'retrial' is used under Section 386 (b) (i) of the Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. ii. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the *court having no jurisdiction*, or trial was vitiated by serious illegality or irregularity on account of the *misconception of nature of proceedings*. iii. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as *wrong admission/ wrong rejection of evidences* or the court *refused to hear certain witnesses who were supposed to be heard*.
"Retrial" means "*De Novo trial*"	"*De Novo*" trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial *failed to make a determination in a manner dictated by law*. Thus, trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold "*de novo*" trial.

When appellate court can direct the lower court to hold "*de novo*" trial?	In the matter of: ***Ukha Kolhe* V/s *State of Maharshtra***, AIR 1963 SC 1531, it was observed that: i. An order for retrial of a criminal case is made in exceptional cases, and not unless: (a) The appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it; or, (b) The trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial; or, (c) The prosecutor or the accused was, for reasons over which he had no control, *prevented from leading or tendering evidence material to the charge*; and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case that the accused should be put on his trial again. ii. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and <u>will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.</u>

"Failure of Justice" and "Demand of Justice"	In the matter of: ***Mohd. Hussain* V/s *State (NCT of Delhi)***, (2012) 9 SCC 408, it was held that: i. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Cr.P.C., 1973. ii. Though power to order retrial exists with the appellate court, but it should not be exercised in a routine manner. iii. A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert "*failure of justice*". iv. Power with the appellate court to order retrial cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. v. A retrial is not the second trial; it is continuation of the same trial and same prosecution. vi. The guiding factor for retrial must always be "*demand of justice*". vii. The exercise of power of retrial under Section 386 (b) of the Cr.P.C., depends on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked. In the matter of: ***Shamnsaheb M. Multtani* V/s *State of Karnataka***, (2001) 2 SCC 577, it was observed that: "*... The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.*"

Whether a retrial under Section 386 of the Cr.P.C. or taking up of additional evidence under Section 391 of the Cr.P.C. is the proper procedure will depend on the facts and circumstances of each case.	In the matter of: ***Zahira Habibullah Sheikh & Anr*** **V/s** ***State of Gujarat & Ors***, (2004) 4 SCC 158, it was held that: i. Section 391 of the Cr.P.C. is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 of the Cr.P.C. envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 of the Cr.P.C. is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 of the Cr.P.C. have to be harmoniously considered, to enable the appeal to be considered and disposed of in the light of the additional evidence as well. For this purpose, it is open to the appellate court to call for further evidence before the appeal is disposed of. ii. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted by arriving at the truth, that is, the prevention of the guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused; and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391 of the Cr.P.C. iii. The necessity for additional evidence arises when the court feels that some evidence which ought to have been before it is not there or that some evidence has been left out or erroneously brought in. iv. In all cases, it cannot be laid down as a rule of universal application, that the court has to first find out whether the evidence already on record is sufficient. The nature and quality of the evidence on record is also relevant. If the evidence already on record is shown or found to be tainted, tailored to suit or help a particular party or side and the real truth has not and could not have been spoken or brought forth during trial, it would constitute merely an

Section 313 of the Cr.P.C. vis-à-vis Section 386 of the Cr.P.C.	In the matter of: ***Nar Singh* V/s *State of Haryana***, (2015) 1 SCC 496, it was observed that: i. Section 313 of the Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. ii. The real importance of Section 313 of the Cr.P.C. lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point. iii. The statutory provision (Section 313 of the Cr.P.C.) is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. iv. There are *two* kinds of examination under Section 313 of the Cr.P.C. The *first* under Section 313 (1) (a) of the Cr.P.C. relates to any stage of the inquiry or trial; while the *second* under Section 313 (1) (b) of the Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. v. The examination of the accused under Section 313 (1) (b) of the Cr.P.C. is not a mere formality. vi. In Para 27 of the report it was observed that: "*... The point then arising for our consideration is, if all relevant questions were not put to the accused by the trial court as mandated under Section 313 Cr.P.C. and where the accused has also shown that prejudice has been caused to him or where prejudice is implicit, whether the appellate court is having the power to remand the case for re-decision from the stage of recording of statement under Section 313 Cr.P.C. Section 386 Cr.P.C. deals with power of the appellate court. As per sub-clause (b) (i) of Section 386 Cr.P.C., the appellate court is having power to order retrial of the case by a court of competent jurisdiction*

Additional Evidence vis-à-vis *Retrial*	Where the end could be achieved by taking additional evidence, the extreme step of retrial should not be taken. [***Rajeswar Prasad Misra* V/s *State of West Bengal,*** AIR 1965 SC 1887] For example, where only one witness, say, the Investigating Officer, is to be examined, the adequate recourse is Section 391 of the Cr.P.C. and not Section 386 of the Cr.P.C. Thus, retrial cannot be ordered when only the Investigating Officer is to be examined. [***Gazib* V/s *State,*** 1974 Cr.L.J. 1215]
Appeal from Conviction: "Reversal of Finding"	In an appeal from conviction under Clause (b) of Section 386 of the Cr.P.C., *reversal of the finding* means that the conviction is wiped off and substituted by *acquittal*, *discharge* or ***retrial***. In an appeal from acquittal under Clause (a) of Section 386 of the Cr.P.C., *reversal* means that the order of acquittal is quashed, followed by a *finding of conviction and sentence*, or a *direction for further inquiry* or ***retrial***.
Exercise of Appellate Powers	In the matter of: ***Ishvarbhai Fuljibhai Patni* V/s *State of Gujarat,*** (1995) 1 SCC 178 (179), it was held that the High Court, while dealing with a first appeal against conviction is expected to briefly consider and discuss the evidence on record and deal with the submissions raised at the Bar. If it fails to do so, it apparently fails to discharge one of its essential jurisdictions under its appellate powers.