SUPREME COURT OF INDIA

Nlrbhay Singh

Vs.

State of M.P.

(J.C.Shah, V. Ramaswami-I and A.N.Grover JJ.)

30.10.1968

JUDGMENT

SHAH, J.

The appellant Nirbhay Singh was tried before the Court of Session, Ujjain, for causing the death of Bhagwanti his mother--by inflicting injuries to her with a spear. The Sessions Judge convicted the appellant of the offence of culpable homicide not amounting to murder, and sentenced him to suffer rigorous imprisonment for seven years. An appeal preferred by the appellant from jail was summarily dismissed by the High Court of Madhya Pradesh on March 16, 1965. Thereafter the State of Madhya Pradesh preferred an appeal on March 31, 1965, against the order acquitting the' appellant of the offence of murder. The High Court issued notice to the appellant and after hearing counsel for the State and the appellant set aside the order of acquittal and convicted the appellant of the. offence of murder, and in substitution of the order of sentence imposed by the Court of Session sentenced him to suffer imprisonment for life. The appellant has appealed to this Court with special leave.

Counsel for the appellant urged that the judgment of the High Court dated March 16, 1965, dismissing the appellant's appeal from the order of conviction under s. 304 Part II I.P. Code became final, and that the judgment of the Court of Session got merged into the judgment of the High Court and thereafter the High Court was incompetent in an appeal filed by the State to modify that order and convict the appellant for the offence of murder. Counsel relied in support of his contention upon ss. 369 and 430 of the Code of Criminal Procedure. Section 369 provides: "Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court, no court, when it has signed its judgment, shall alter or 'review the same except to correct a clerical error." Section 430 provides:

"Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII."

We are unable to hold that the High Court was in the circumstances of the case debarred by the

provisions relied upon from entertaining an appeal by the State against the order of acquittal of the offence of murder passed by the Court of Session. The right to appeal against the order of. acquittal is expressly conferred upon the State by s. 417 of the Code, and s. 369 does not purport to place any restriction upon the exercise of that right. Section 369 occurs in Ch. XXV/and prima facie applies to judgments of the courts of first instance. Section 430 applies to judgments of appellate Courts; it declares the judgment of an appellate Court final except in the cases provided for in s. 417 and Ch. XXXII. In terms the 'provision applies to. all judgments of Appellate Courts-Courts of the District Magistrate, Courts of Session and the High Courts. Finality of the judgment of the Appellate Court declared by s. 430 is subject to. two restrictions, i.e. the judgment may be set aside or modified in an appeal under s. 417 of the Code by the High Court, and in exercise of the power conferred upon the Courts under Ch. XXXII which deals with the exercise of power to entertain references and revisions. Judgment of a High Court in appeal is not subject to the exercise of any appellate or revisional power exercisable under the Code. The exception declared in s. 430 therefore only applies to judgment of a court subordinate to the High Court exercising appellate power.

There is however no warrant for the argument that when an appeal preferred by a person convicted of an offence is dismissed summarily by the High Court under s. 421 of the Code of Criminal Procedure, the judgment of the trial court gets merged in the judgment of the High Court and it cannot thereafter be modified even at the instance of any other party affected thereby, and in respect of matters which were not and could not be dealt with by the High Court when summarily dismissing the appeal. When the High Court dismisses an appeal of the person accused summarily and without notice to the State, the High Court declines thereby to entertain the grounds set up for setting aside the conviction of the accused. That judgment undoubtedly binds the accused and he cannot prefer another appeal to the. High Court against the same matter in respect of which he had earlier preferred an appeal. But it is a fundamental rule of our jurisprudence that no order to the prejudice of a party may be passed by a court, unless the party had opportunity of showing cause against the making of that order. When an appeal of a convicted person is summarily dismissed by the High Court the State has no opportunity of being heard. The judgment summarily dismissing the appeal of the accused is a judgment given against the accused and not against the State or the complainant. If after the appeal of the accused is summarily dismissed, the State or the complainant seeks to prefer an appeal against the order of acquittal, the High Court is not prohibited by any express provision or implication arising from the scheme of the Code from entertaining. the appeal. Where, however, the High Court issues notice to the State in an appeal by the accused against the order of conviction, and the appeal is heard and decided on the merits, all questions determined by the High Court either expressly or by necessary implication must be deemed to be finally determined, and there is no scope for reviewing those orders in any other proceeding. The reason of the rule is not so muck the principle of merger of the judgment of the trial court into the judgment of the High Court, but that a decision rendered by the High Court after hearing the parties on a matter in dispute is not liable to the reopened between the same parties in any subsequent enquiry.

Cases do frequently arise where a person is charged at the trial with the commission of a grave or major offence and he is convicted of a minor offence, the conviction for the minor offence amounting to his acquittal for the major offence. Where an appeal against the order of conviction for the minor offence at the instance of the convict is entertained and decided, the State having opportunity of being heard on the merits of the dispute., in an appeal subsequently filed at the instance of the State against the order of acquittal, the High Court is precluded from reconsidering all those matters which were expressly decided or flow as a neces sary implication of the earlier judgment. Any other view is likely to cause the gravest inconvenience in the administration of

justice and the principle of finality of judgments would be sadly disturbed. If, for instance, against an order of acquittal passed for a grave offence, the State prefers an appeal and the appeal is summarily dismissed, it would be impossible to contend that thereby the accused is prevented from filing an appeal against the order of conviction. Similarly where the accused prefers an appeal against the order of conviction of a minor offence and that appeal is summarily dismissed, the accused cannot prefer another appeal, but the State will not be precluded from preferring an appeal against the order of acquittal because the State had no opportunity of being heard at the earlier stage. Where, however, notice had been issued in an appeal at the instance of the accused and the State had art opportunity of being heard, the decision of the Court will be regarded as a decision on the merits of the transaction which resulted in the conviction of the accused and that decision cannot be reopened in any subsequent enquiry. These principles are, in our judgment, supported by abundant authority.

In U.J.S. Chopra v. State of Bombay(1), the appellant Chopra was convicted by the Trial Magistrate of an offence under . the Bombay Prohibition Act. His appeal to the High Court of Bombay was summarily dismissed. Thereafter the State of Bombay applied to the High Court of Bombay for an order for enhancement of sentence, and notice was issued to Chopra to show cause against enhancement of the sentence. Chopra pleaded that he was entitled to show cause against the order of conviction. This Court held that the summary dismissal of the appeal preferred by Chopra did not preclude him from showing cause against his conviction under s. 439 (6) of the Code of Criminal Procedure, even though his appeal was summarily dismissed. The case, in our judgment, involves two propositions--that after the dismissal of the appeal of Chopra, an application at the instance of the State for enhancement of sentence was maintainable, and that Chopra could canvass the correctness of his conviction, summary dismissal of his appeal notwithstanding. If the principle of merger of judgment by a summary dismissal of the appeal of the accused is valid, the State could not in U.J.S. Chopra's case(1) have been permitted to exercise the right to apply for enhancement of the sentence. Bhagwati, J., speaking for the majority of the Court expressed the view that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties is a final judgment which replaces the judgement of the Court of first instance, thus constituting the only (1) [1955] 2 S.C.R. 94. 4 Sup. C.I./69&#65533;4 final judgment to be executed in accordance with law. When, however, a petition or appeal presented by a convicted person from jail is summarily dismissed under s. 421 or a revision application made by him is dismissed in limine the order passed by the High Court does not amount to an expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments. In Pratap Singh v. The State of Vindhya Pradesh (Now Madhya Pradesh)(1) this Court held that where a person convicted has exercised the right of presenting an appeal from jail and that appeal has been summarily dismissed under s. 421 of the Code of Criminal Procedure, no further appeal lies at his instance through an Advocate. The distinction between U.J.S. Chopra's case(2) and Pratap Singh's case(1) is clear: summary dismissal of the appeal filed by the accused does not bar any proceeding which the State may be competent to initiate against the order passed in favour of the accused, but another appeal by the accused after summary dismissal of his earlier appeal is barred. In The State v. Babulal and Bherumal,(3), a Division Bench of the Rajasthan High Court held that where the accused charged under s. 302 I.P. Code was convicted under s. 324 J.P. Code and the appeal of the accused against his conviction under s. 324 I.P. Code was dismissed by the High Court on his own prayer that he did not desire to press it and there was no hearing given to. the State, the order of the High Court was not such a judgment as would preclude the High Court from hearing an appeal by the State against the acquittal of the accused for the offence under s. 302 J.P. Code.

In State v. Kalu(4) a Full Bench of the Madhya Bharat High Court held that where after an appeal against conviction under s. 423 (1)(b) of the Code of Criminal Procedure by the accussed has been dismissed by an appellate Bench of the High Court, an appeal filed against an order of acquittal of the accused of other charges by the State under s. 417 is not competent. In the view of the High Court the reason of the rule is that the earlier decision was final, and if the appeal of the State against acquittal was heard on merits, it might disturb the finality of the earlier judgment.

In The State v. Mansha Singh Bhagwant Singh(5) the Punjab High Court expressed a similar view. In that case also the accused at the trial charged with the offence punishable under s. 302 was convicted by the Sessions Judge of the offence under s. 304 Part II I.P. Code. In appeal against the order of conviction by the accused the High Court after hearing 'the State confirmed the (1) [1961] 2 S.C.R. 509. (2) [1955] 2 S C.R. 94. (3) A.I.R. 1956 Raj. 67. (4) A.I.R. 1952 M.B. 81. (5) I.L.R. (1958) Punjab 1475. order. An appeal filed by the State against the order of acquittal of the accused for murder was held not maintainable.

In State v. Diwanji Gardharji and others(1) a Division Bench of the High Court of Gujarat apparently held--after discussing many other points not relevant here--that when an appeal of time accused against the order of conviction and sentence for the offence under s. 304 Part II I.P. Code has been dismissed after a hearing, in an appeal by the State against the order of acquittal for the offence under s. 302, the question of the accused having committed an offence of culpable homicide not amounting to murder cannot be allowed to be canvassed.

In the present case the order passed by the High Court at the earlier stage w,rs an order of summary dismissal of the appeal flied by the accused. No notice of appeal flied by the accused was given to the State, and the State had no opportunity of being heard thereon. It is true that the High Court had at the earlier hearing called for the record of the case from the Court of Session in exercise of the power under s. 421 (2) and after persuing the record had dismissed the appeal. But that is not relevant in determining the legal effect of the order of the High Court. The appeal fails and is dismissed.

G.C. Appeal dismissed.

3 Guj. L.R. 882.