Shankar Kerba Jadhav and Others

Vs

The State of Maharashtra

Criminal Appeal No. 79 of 1969

(S. M. Sikri, G.K. Mitter, P. Jagmohan Reddy JJ)

08.09.1969

JUDGMENT

MITTER, J. –

1. The six appellants in this appeal were charge-sheeted for having committed offences punishable under Sections 147, 447 and 325, read with Section 149 of the Indian Penal Code in the Court of the Judicial Magistrate, First Class, Deglur, District Nanded. Considering the evidence on record the Magistrate held that the accused were members of an unlawful assembly on September 27, 1965 at the village school Chotwadi with the common object of causing injuries to the complainant. He also found that the accused had committed house trespass into the compound of the school and actually caused grievious hurt to the complainant, a school teacher, in pursuance of the common object of their unlawful assembly. He convicted the accused for offences under Sections 147, 447 and 325, read with Section 149, I.P.C. and sentenced each of them to suffer rigorous imprisonment for 15 days and to pay a fine of Rs. 50/- and in default of payment of fine to suffer further rigorous imprisonment for 15 days on the first count under Section 447, read with Section 149, I.P.C. and sentenced each of them to suffer rigorous imprisonment for six months and to a fine of Rs. 200/- or in default of payment of fine to suffer further rigorous imprisonment for one month on the second under Section 325, read with Section 149, I.P.C. He did not pass any fresh sentence on the third count under Section 147 I.P.C. He directed that the substantive sentences of imprisonment passed against accused on both counts should run concurrently. He also directed that in case the amount of fine was recovered, Rs. 200/- should be paid to the complainant Murlidhar as compensation for the injury sustained by him under Section 545(1)(b) of the Code of Criminal Procedure. The accused went up in appeal which was heard by the Additional Sessions Judge at Nanded. The Sessions Judge allowed the appeal and set aside the orders of conviction and directed the accused to be set at liberty. The order for payment of fine also was set aside. The State went up in appeal against the order of acquittal to the High Court. The appeal was allowed by the High Court and the order of acquittal was set aside. The High Court convicted all the six accused under Sections 147, 447 and 325, read with Section 149, I.P.C. and taking the view that the assault on the village teacher was wanton and unprovoked proceeded to deal with the culprits more firmly than the trying Magistrate. It passed sentence on the second accused holding him to be responsible for the blow which caused the fracture of the left ulna of the complainant, to one year's rigorous imprisonment and a fine of Rs. 300/- and two months' further rigorous imprisonment in default under Section 325, read with Section 149 of the Penal Code. It also held that the remaining accused had played a comparatively minor part and injuries inflicted by them were simple. The sentence passed on each of them was six months' rigorous imprisonment and a fine of Rs. 100 and one month's further imprisonment in default under Section 325, read with Section 149, I.P.C. A further sentence of three months' imprisonment was passed on all the accused for the offence under Section 447, read with Section

149. No separate sentence was passed under Section 147. This Court granted special leave to appeal to the accused "limited to the question of legality of sentence passed by the High Court."

2. Counsel on the behalf of the appellants put forward his argument in a two-fold manner. His first contention was that it was not open to the High Court exercising appellate jurisdiction under section 423(1)(a) of the Code of Criminal Procedure to enhance the sentence passed by the trial Magistrate. The second branch of his argument was that even if the High Court was competent to do so, the appellants should have been asked to show cause why the sentence imposed on them by the Magistrate should not be enhanced and in the absence of such an opportunity, no enhancement of sentence was competent. As the trial was by a Magistrate of the First Class the maximum sentence which could have been imposed on the accused was under Section 32 of the Code limited to a term of imprisonment not exceeding two years and a fine not exceeding Rs. 2,000/-. Under the Indian Penal Code the limit of punishment for an offence under Section 447 is imprisonment for a term which may extend to three months or with fine which may extend to Rs. 500/- or with both, but an offence under Section 325 can be punished with imprisonment of either description for a term which may extend to seven years besides a fine.

3. Under Section 417(1) of the Criminal Procedure Code an appeal against acquittal lies only to a High Court. Under Section 418 an appeal lies on a matter of fact as well as on a matter of law except in cases where the trial is by a jury. Sections 419 and 420 deal with the procedure for lodging an appeal and Section 421 gives the Appellate Court the power to dismiss the appeal summarily on receiving the petition of appeal if it considers that there is no sufficient ground for interfering with the impugned order. Under Section 422 it is obligatory on the Appellate Court if it does not dismiss the appeal summarily to cause notice to be given to the appellant or to his pleader of the time and place at which the appeal will be heard and a like notice to be given to the accused.

4. The powers of the Appellate Court in disposing of the appeal are contained in Section 423 of the Code. The Court after giving the notice of appeal under Section 422 has to send for the record of the case and after perusing such record and hearing the appellant or his pleader if he appears and the Public Prosecutor if he appears and in case of appeal under Section 417 the accused if he appears, it may dismiss the appeal in case it is satisfied that there is no sufficient ground for interfering it. Where the appeal is from an order of acquittal it may under Section 423(1)(a) reverse such order and direct that further enquiry be made or that the accused be retired or committed for trial as the case may be and find him guilty and pass a sentence on him according to law. No limits are here set to the sentence which may be passed by the Appellate Court except that it must be "according to law". This power may be contrasted with the power under clause (b) of Section 423(1) dealing with appeals from a conviction. For such appeals the Legislature specified the powers of the Appellate Court with a good deal of precision. Under sub-clause (b) a Court can -

> "(1) reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
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> (2) after the finding, maintaining the sentence, or with or without altering the finding reduce the sentence, or
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> (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but subject to the provisions of Section 106, sub-section (3), not so as to enhance the sentence."

It would appear from the above that wide though the powers of the Appellate Court be in dealing with an appeal from a conviction, it has no jurisdiction, to enhance the sentence even if it alters the finding, or without altering the finding takes the view that greater punishment than what was meted is called for.

5. Sub-clause (1)(b) however is not the last word clause (1-A) introduced in the section in the year 1955 expressly provides that a High Court exercising jurisdiction under clause 1(b) may enhance the sentence notwithstanding anything inconsistent therewith contained in the said clause provided the accused has had an opportunity of showing cause against such enhancement.

6. Section 423, clause (1)(b) is based on the principle that where it is the convicted person who complains against the punishment given to him, he should not be put in peril of a greater punishment if the State takes no exception to the order impugned by the convicted person. The insertion of clause (1-A) makes it clear that although the powers of courts subordinate to the High Court are limited under clause (1)(b) the High Court may in a proper case enhance the sentence after giving an opportunity to the accused to show cause against the proposal.

7. Apart from the powers under Chapter XXXI of the Code (containing Sections 404 to 431) which principally deals with appeals, the High Court has powers inter alia of revision under Chapter XXXII of the Code. Under Section 435 not only the High Court but even courts subordinate to it may call for and examine the record of any proceeding before any inferior criminal court for the purpose of satisfying itself as "to the correctness legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior court". Section 439 deals exclusively with the High Court's powers of revision. Under this section the High Court is empowered in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, to exercise the powers conferred on a court of appeal by Sections 423, 426, 427 and 428 or on a court by Section 338 (power to direct tender of pardon) and may enhance the sentence, but sub-section (2) of the section lays down that such an order is not to be made to the prejudice of the accused unless he has an opportunity of being heard either personally or by a pleader in his own defence. Further when an accused is called upon to show cause why his sentence should not be enhanced he has a right to challenge his conviction under sub-section (6).

8. Referring to the above provisions of the Code, counsel for the appellants argued that in all cases where it was considered necessary the Legislature was careful to provide that the accused should never be subjected to a greater punishment by a superior court unless he was asked to show cause against the proposed enhancement. As there was no such provision in Section 423(1)(a) the Legislature must be taken to have contemplated that in any case of an appeal against acquittal the accused should not be subjected to a punishment greater than what had been meted out to him by the punishing court. It was also argued that the words in Section 423(1)(a) empowered the Appellate Court (the High Court in this case) to pass sentence on the accused according to law which is in contrast to the words used in Section 31(1) of the Code under which a High Court may pass "any sentence authorised by law". It was argued that Section 423(1)(a) thus cuts down the power which the High Court might otherwise have had under Section 31(1).

9. In our view the difference in the wording of Section 31(1) and Section 423(1)(a) is a matter of no moment. The expression "authorised by law" means sanctioned by law while "according to law" means in conformity with law. The question remains as to what would be a sentence according to law when a High Court sets aside an order of acquittal when the same is preceded by a sentence of

an inferior court. Is the High Court empowered to award any sentence which the law allows under the relevant section of the Indian Penal Code, or is its jurisdiction limited to such a sentence as was within the competence of the court punishing the offenders or again, is it to restore the sentence originally passed ?

10. Let us look at the question apart from the authorities. An appeal is a creature of a statute and the powers and jurisdiction of the Appellate Court must be circumscribed by the words of the statute. At the same time a court of appeal is a "court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial court. It cannot and ought not to do something which the trial court was not competent to do. There does not seem to be any fetter to its power to do what the trial court could do. In this case the trial Magistrate was competent to pass a sentence of imprisonment up to two years and the High Court's jurisdiction hearing an appeal would therefore be limited to a sentence up to that period and no more.

11. A special provision for asking the accused to show cause when the appeal is from an order of conviction or when the High Court exercises its revisional jurisdiction is not in derogation of the above rule. As already indicated, when the accused prefers an appeal and the State is satisfied with the punishment meted out it is only logical to hold that the appellant should not stand in peril of something to his further detriment unless he is put on notice that the power of enhancement may be exercised. The same applies to the High Court's power of revision under Section 439. The Legislature felt that when the High Court is exercising powers in this regard, it should be given all the powers of a court of appeal including the power to enhance the sentence. Sub-section (2) of Section 439 is only meant to give an opportunity to the accused so that he be not condemned unheard and sub-section (6) is only an amplification of that principle and gives him a right to challenge his conviction if he is put in peril of enhancement of sentence.

12. Where however the appeal is from an order of acquittal the matter is at large. There is no sentence which is binding on a person who was once an accused. He comes before the court with the presumption of innocence. If the court finds that the acquittal was not justified and that he was guilty of the offence with which he was charged, it is for the appeal court to order punishment to fit the crime. If the appeal is from an order of acquittal with no prior order of sentence, the punishment must be commensurate with the gravity of the offence. But if the order of acquittal is preceded by an order of conviction the court hearing the appeal from acquittal should not impose a sentence greater than what the court of first instance could have imposed inasmuch as if the trial court had given him the maximum sentence which it was competent to give and no appeal was preferred by the accused, the State could not have approached the High Court under any provision of the Code for enhancement of the sentence. The interposition of the order of an intermediate court of appeal and acquittal of the accused by it should not put the accused in a predicament worse than that before the trial court.

13. We may now proceed to examine the earlier authorities. In re Ramaswami Chetty and Another, ((1902) 2 Weir 487) the action of the appellate Magistrate enhancing a fine of Rs. 50/- to Rs. 65/- was held to be illegal by the Madras High Court. In Muthiah v. Emperor, (29 Mad 190) it was said that an Appellate Court has not an unlimited power but was only empowered to do which the lower court could and should have done. In Sita Ram v. Emperor, (11 Indian Cases 788) which went up to the Nagpur Judicial Commissioner's Court by way of revision, the appellants had been convicted under Section 324, I.P.C. and sentenced to rigorous imprisonment for a term of four months each by a Magistrate of the Second Class. On appeal the District Magistrate maintained the convictions but altered the sentences on each of the accused to one of fine only; and in default rigorous

imprisonment was ordered for four months. Before the Judicial Commissioner it was contended that the sentence of fine imposed on the applicants was illegal so far as it exceeded the maximum fine which could have been inflicted by the Magistrate by whom they were tried. The Court held that when the District Magistrate decided that the case one punishable with fine only he should have inflicted a fine which was within the jurisdiction of the trying Magistrate. The learned Judge relied on the decisions in Mahmudi Sheik v. Aji Sheik (21 Cal 48), Muthiah v. Emperor (supra), Parameswara Pillay v. Emperor (30 Mad 48) and observed that alike in civil and in criminal cases the power of the Appellate Court was measured by the power of the court from whose judgment or order the appeal before it had been made.

14. The decisions in Maung E. Maung v. The King, (AIR 1940 Rang 118) Emperor v. Md. Yakub Ali, (45 All 594), Lakshminarayana v. Apparao (AIR 1950 AP 530) and Emperor v. Abbas Ali, (AIR 1935 Nag 139) are on the same lines. A different note was however struck in Public Prosecutor v. Annamalai. (AIR 1955 Mad 608). This was a case of an appeal preferred by the State against the acquittal of two accused by a Magistrate. The High Court finding the accused guilty took the view that "passing sentence according to law" meant passing any sentence that could be given for the offence. According to the learned single Judge the powers of an Appellate Court in hearing an appeal against acquittal were not in any way restricted or limited to the powers of the trial court. He said :

> "Though there is no such limitation or restriction, still there is one circumstance which altogether cannot be ignored and which must indeed be considered before imposing the sentence and that is, what is it that the accused would have got if he was convicted by the Magistrate. He would not have got more than six months, the maximum the Second Class Magistrate who tried him can give.
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> The fact that he has been acquitted should not place him in a more disadvantageous position than if he were convicted. The sentence should not therefore be more severe than what he should have got in a case of conviction."

Accordingly the accused were sentenced to six months' rigorous imprisonment. In an earlier decision of the same High Court in re Tirumal Raju, (AIR 1947 Mad 368) another learned single Judge though disposed to accept the contention that the appellate Magistrate had no jurisdiction to enhance the fine beyond the powers of the trial Magistrate, maintained the order sought to be revised by exercising powers under Section 439(3) of the Code. Running through the web of the above decisions the principle almost universally accepted is that in exercise of its appellate powers the High Court should not award a sentence which is beyond the jurisdiction of the trial court and in our opinion this is the principle which should be adopted.

15. Our attention was however drawn to certain observations in Jagat Bahadur Singh v. State of Madhya Pradesh (1966-2 SCR 822) where a good many of the above authorities were taken note of by this Court. Referring inter alia to the cases of Emperor v. Abasali Yusufali (ILR 39 Cal 157), Emperor v. Mohammad Yakub Ali (supra), Maung E. Maung v. The King (supra) and in re Tirumal Raju (supra) it was said that these cases laid down the correct law. The Court also added :

> "..... both on principle and authority it is clear that the power of the Appellate Court to pass a sentence must be measured by the power of the Court from whose judgment an appeal has been brought before it."

16. The question is, can this observation be pressed into service by the appellants on the ground that as the Sessions Judge hearing the appeal from the order of the Magistrate could not have enhanced the sentence, it was not open to the High Court to do so when hearing an appeal from the order of acquittal by the Sessions Judge. In other words, could the High Court have done what the Sessions Judge was not empowered to do ? In our opinion, the answer must be in the affirmative. When the order of the Magistrate was set aside by the Sessions Judge the matter became one at large and the High Court hearing an appeal therefrom was empowered under Section 423(1)(a) to pass a sentence according to law. It could therefore pass any sentence which the Magistrate trying the case was empowered to pass and the High Court in this case did not exceed that limit. A strange result would follow if we were to accept the contention. If the accused had been acquitted by the Magistrate and the State had filed an appeal against the order of acquittal, the High Court would no doubt have had power to impose any sentence, which the Magistrate would have been entitled to impose. But if the accused is acquitted on appeal by the Sessions Judge, the power of the High Court would be limited. Surely the Code does not contemplate this difference in the appeals under Section 417, Cr. P.C.

17. Further the Sessions Judge would have been entitled to recommend enhancement of sentence to the High Court if he had maintained the conviction. And the High Court could suo motu have issued notice for enhancement. If we were to accept the contention, finality is attached to the sentence given by the Magistrate. We do not think this is the scheme of the Code. On the other hand the scheme of the Code seems to be to confer final authority on the High Court. The first contention therefore fails and we hold that in disposing of an appeal from an order of acquittal the High Court is competent to pass a sentence which the trial Court was empowered to pass.

18. The second branch of the argument is without any merit. Where the accused is given notice of appeal and actually takes part in the hearing before the High Court, it would be superfluous to give him notice to show cause why a sentence within the competence of the trial Magistrate should not be passed. The accused knows or ought to know that the High Court was bound to form its own conclusions on the material before it and award a sentence which the merits of the case demanded within the limit of the trial Court's jurisdiction. The absence of a show cause notice does not violate any known principle of natural justice.

19. On the facts of the case, we are of the view that the sentence imposed by the High Court should be reduced to that originally imposed by the trial Magistrate. The appeal is allowed in part to this extent.

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