Shyam Deo Pandey and Others

Vs

The State of Bihar

Criminal Appeal No. 283 of 1968

(C. A. Vaidialingam, A. N. Ray JJ)

23.03.1971

JUDGMENT

VAIDIALINGAM, J. -

The short question that arises in this appeal, by special leave, is whether the judgment and other of the Patna High Court, dated May 10, 1968, dismissing the Criminal Appeal No. 453 of 1966, are in conformity with Section 2423 of the Code of Criminal Procedure (hereinafter to be referred as the Code).

2. The appellant, who are accused Nos. 2 and 5, along with the first accused Sia Devi (wife of 56th accused) were tried by the learned First Assistant Sessions Judge, Biharsharif, for an offence under Section 363 of the Indian Penal Code. The case of the prosecution was as follows :

3. One Kanta Kumari, an orphan minor and niece of the complainant (P.W. 1) Parmeshwar Pandey was under the lawful guardianship and protection of the latter and residing with him, since the death of her parents. At about 8 p.m. on February 14, 1965, the fifth accused and his wife, the first accused, came to the house of the complainant and called Kanta Kumari. Kanta Kumari responded to the call by coming out. When she was questioned by her uncle as to where she was going out with the two accused, Kanta Kumari replied that she was going out for singing marriage songs. Kanta Kumari went away with the two accused and returned home by about mid-night. In the morning the February 15, 1965, the complainant found that Kanta Kumari was missing from his house. On a search made by him, he came to know that Kanta Kumari was seen early that morning at about 3 a.m. going in the company of the five accused persons for Ganga Ashnan. He was expecting Kanta Kumari to return. But on the evening of February 17, 1965, when he met the first and the fifth accused in the village, he was informed by the fifth accused that his paternal cousins, accused Nos. 2 and 3, had taken away Kanta Kumari with them. On receiving this information, Parmeshwar Pandey lost all hope of his niece Kanta Kumari coming back and on February 18, 1965 he field a complaint before the police alleging that his niece Kanta Kumari, a minor has been kidnapped from his lawful guardianship by the five accused.

4. All the five accused were charged under Section 363, I.P.C. for kidnapping the minor girl Kanta Kumari on February 15, 1965 from the lawful guardianship of her guilty before the Trial Court and stated that they were falsely implicated by Parmeshwar Pandey on account of long standing enmity. In particular they pleaded -

(a) that Parmeshwar Pandey had no niece called Kanta Kumari;

(b) they have not kidnapped Kanta Kumari; and

(c) in any case Kanta Kumari was not a minor as alleged but was a major about 18 years of age.

5. The learned Assistant Sessions Judge by his judgment and order, dated August 31, 1966, substantially rejected all the pleas of the accused. The learned Judge held that the complainant Parmeshwar Pandey, who had given evidence as P.W. 1, had a niece by name Kanta Kumari, who was living with him under his guardianship, as she had lost her parents. Though Kanta Kumari was nottraced and as such she was not before the Court, must have been only 9 or 10 years old. The learned Judge further held that accused Nos. 2 to 5 (appellants herein) have kidnapped Kanta Kumari, a minor girl, on February 15, 1965 from the lawful guardianship of her uncle Parmeshwar Pandey without his consent and as such they were guilty of the offence under Section 363, I. P. C. According he convicted the appellant of the said offence and sentenced them to undergo rigorous imprisonment for five years. Each of them was also fined a sum of Rs. 500/- and in default of payment of fine to undergo further rigorous imprisonment for six month. The learned Judge, however, held that the case against accused No. 1, Sia Devi has not been proved beyond reasonable doubt and as such acquitted her.

6. The appellants filed Criminal Appeal No. 453 of 1966 in the Patna High Court on September 8, 1966 challenging the various findings recorded by the learned Assistant Sessions Judge and contending that those findings were not supported by the evidence adduced. They also pleaded that their conviction is illegal. In particular they have pleaded that the finding regarding the age of Kanta Kumari, when she has not appeared before the Court is based on pure conjecture and surmise and not on any legal evidence.

7. On September 9, 1966 the High Court admitted the appeal and passed the following order :

"September 9, 1966, this appeal will be heard. Issue notice.

Pending the hearing of this appeal the appellants will continue on bail to the satisfaction of the District Magistrate.

The realisation of fine also will remain stayed during the pendency of this appeal."

8. The appeal was posted for hearing on May 10, 1968. On that date neither the appellants nor their counsel seems to have appeared and the Court dismissed the appeal and passed the following order and judgment :

"May 10, 1968. No one appears to press this appeal. On perusal of the judgment under appeal, I find no merit in the case. It is accordingly dismissed."

9. The appellants on the same day filed Criminal Miscellaneous Application No. 556 of 1968 praying for restoration of the Criminal Appeal which had been dismissed by the Court. After issuing notice in the said application, the High Court on July 12, 1968, dismissed the application for restoration on the ground that no sufficient cause has been shown by the appellants. The appellants filed an application for grant of a certificate under Article 134(1)(c) of the Constitution to appeal to this Court together with an application to excuse delay in filing the application. The High Court dismissed this application on August 2, 1968. This Court, however, on December 11, 1968, granted special leave to appeal against the judgment and order of the High Court, dated May 10, 1968.

10. Mr. S. N. Prasad, learned counsel for the appellants, raised two contentions : (i) that the disposal of the appeal by the High Court on May 2o, 1968, is contrary to the terms of Section 423 of the Code; and (ii) that the order pronounced by the High Court is not a judgment as understood in law as it does not contain the point or points for determination, the decision thereon and the reasons for the decision.

11. Mr. R. C. Prasad, learned counsel for the State, has urged that the order, dated May 10, 1968, complies in all respects with Section 423 of the Code. He has further urged that Section 367 of the Code relating to the contents of the judgment does not apply to the High Court and in this connection he relied on Section 424 of the Code.

12. In the view that we take regarding the first contention of Mr. S. N. Prasad, that the judgment is not in compliance with Section 423 of the Code, we do not think it necessary to express any opinion as to whether Section 367 applies to the judgment delivered by the High Court as also the scope of Section 424 of the Code. The question whether the High Court has got jurisdiction to restore a criminal appeal has also not been agitated before us.

13. The contention of Mr. S. N. Prasad is that the High Court having admitted the appeal on September 9, 1966 and issued notice to the State, it has no power under Section 423 of the Code to dismiss the appeal summarily as it has done on May 10, 1968. The manner of disposal of the appeal the counsel pointed out, shows a complete disregard by the High Court of the provisions of Section 423 of the Code enjoining the Appellate Court to look into the entire record and giving reasons for the decision arrived at. According to the counsel, this approach should be made by the Appellate Court irrespective of the fact whether the appellant or his pleader or the public prosecutor for the State appears or not.

14. Mr. R. C. Prasad, learned counsel for the State, on the other hand, pointed out that the impugned order clearly shows that the High Court has gone through the judgment of the Trial Court, which was under appeal and as it found no merit in the case, it dismissed the same. There is no illegality or any violation of Section 423 of the Code in the manner of disposal of the appeal by the High Court.

15. In order to appreciate the contentions taken by the counsel of both sides, it is necessary to advert to the material provisions of the Code bearing on the point arising for consideration.

16. Part VII deals with Appeal, Reference and Revision. Chapter XXXI in the said part deals with Appeals. Section 410 of the Code gives a right to any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge to appeal may lie on a matter of fact as well as a matter of law, excepting where the trial was by the Jury, in which case the appeal shall lie on a matter of law only. The Explanation provides that the alleged severely of a sentence shall for the purpose of Section 418 be deemed to be a matter of law. Under Section 419, the appeal is to be made in the form of a petition in writing presented by the appellant or his pleader. Unless the Court otherwise directs, the petition of appeal shall be accompanied by a copy of the judgment or order appealed against. Section 420 provides for the manner of filing an appeal when the appellant is in jail. Sections 421, 422 and 423, which, in our opinion, are important are as follows :

> "Section 241. Summary dismissal of appeal. - (1) On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall persue the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call, for the record of the case, but shall not be bound to do so.

Section 422. Notice of appeal. - If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appointed in his behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under Section 411-A, sub-section (2) or Section 417, the Appellate Court shall cause a like notice to be given to the accused.

Section 423(1). Powers of Appellate Court in disposing of appeal. -

(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. 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 an appeal under Section 411-A, sub-section (2) or Section 417, the accused, if the appears the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction : (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appeal Court or committed for trial, or (2) alter the finding, maintaining the sentence or, with or without altering the finding, reduce the sentence, or (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 same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(1-A) Where an appeal from a conviction lies to the High Court, it may enhance the sentence, notwithstanding anything inconsistent therewith contained in clause (b) of sub-section (1) :

Provided that the sentence shall not be so enhanced, unless the accused has had an opportunity of showing cause against such enhancement.

(2) Nothing herein contained shall authorities the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection

by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him".

17. From the scheme of the sections referred to above, the following facts emerge : The appellants had a right under Section 410 to file an appeal to the High Court against their conviction. Under Section 418 they were entitled to challenge the correctness of the finding of the Trial Court, both on facts and law, as admittedly their trial was not by the Jury. They were also entitled as a matter of law to urge the severely of the sentence imposed on them. The appellants had filed the appeal in due form as required by Section 419 accompanied by a copy of the judgment or order appealed against. Under Section 421 the Appellate Court is bound to peruse the appeal petition and the copy of the judgment or order appealed against. If the Appellate Court, on perusal of the same, considers that there was no sufficient ground for interfering with the judgment and order appealed against, it can dismiss the appeal summarily. Under sub-section (2) of Section 421, it is open to the Appellate Court before dismissing the appeal to call for the record of the case; but it is not mandatory that the Appellate Court should call for the record. The stage under Section 421 is to enable the Appellate Court to decide whether the appeal should be admitted or dismissed summarily. In the case before us on September 9, 1966, when the High Court ordered "this appeal will be heard. Issue notice", it is clear that on perusal of the petition of appeal and the judgment of the Sessions Court, the High Court did not take the view that there was no sufficient ground for interference so as to dismiss the appeal summarily. On the other hand, the order of the High Court, extracted above, clearly indicates that the appeal is to be heard and disposed of on merits and for that purpose it issued notice to the State. In fact the provisions regarding issue of notice as provided under Section 422, has also been followed by the High Court. The procedure under Section 422 has to be followed only when the appeal is not dismissed summarily under Section 421. In this case the stages envisaged by Sections 421 and 422 have passed. The appeal has been admitted and taken on file and notice must have been also issued to the appellants or their counsel, as envisaged in the section.

18. Coming to Section 423, which has already been quoted above, it deals with powers of the Appellate Court in disposing of the appeal on merits. It is obligatory for the Appellate Court to send for the record of the case, if it not already before the Court. This requirement is necessary to be complied with to enable the Court to adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. The correctness or otherwise of the finding recorded in the judgment, on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for by the Appellate Court.

19. A reading of Section 423 makes it clear that a criminal appeal cannot be dismissed for default or appearance of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal in order to enable them to appear or it should consider the appeal or merits and pass final orders. The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits so as to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the record are before the Court and the appeal is set down for hearing, it is essential that the Appellate Court should : (a) peruse such record; (b) hear the appellant or his pleader, if he appears, and (c) hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section. It is to be noted that if the appellant or his pleader is not present or if the public prosecutor is not present it is not obligatory on

the Appellate Court to postpone the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the appeal; but that disposal must be after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the fact whether the appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits. Under Section 421 the Appellate Court has to decide whether the appeal is to be taken on file or dismissed summarily. The obligation of the Court at that stage is only to persue the petition of appeal and the copy of the order or judgment appealed against. A summary dismissal of the appeal will then be legal if the Appellate Court considers that there is no sufficient ground for interference. But even in such circumstances it has been held that a summary decision is a judicial decision which vitally affects the convicted appellant and in a fit case, it is also open to be challenged on an appeal before this Court. Though a summary rejection, without giving any reasons, is not violative of any statutory provisions, such a manner of disposal removes every opportunity for detection of errors in the order. It has been further held that when an appeal in the High Court raises a serious and substantial point, which is prima facie arguable it is improper for an Appellate Court to dismiss the appeal summarily without giving some indication of its view on the point. The interest of justice and fair play require that in such cases an indication must be given by the Appellate Court of its views on the point argued before it. The earliest decision on this aspect is the one reported in Mushtak Hussein v. The State of Bombay. ((1953) SCR 809 : AIR 1953 SC 282 : 1953 SCJ 338.) The entire case law has been referred to and reiterated in Govinda Kadtuji Kadam and Others v. The State of Maharashtra. (1970 (1) SCC 469 : 1970 SCC (Cri) 204 : AIR 1970 SC 1033.) The recent decision on this aspect is of Challappa Ramaswami v. State of Maharashtra. (1970 (2) SCC 426 : 1970 SCC (Cri) 472 : AIR 1971 SC 64.) We have referred to the above decisions of show that though a summary rejection by an Appellate Court under Section 421 may be not be violative of the section, nevertheless when an arguable or substantial question arises for consideration, the Appellate Court in its order should indicate its views on such point. If the position is an indicated above that even under Section 421, which contemplates dismissal of an appeal summarily, under Section 423, in our opinion, a very rigorous test must be applied to find out whether the Appellate Court has complied with the provisions contained therein. There is no emphasis on the perusal of the record in Section 421, whereas under Section 423 one of the essential requirements is that the Appellate Court should peruse the record. There cannot be any controversy that Section 423 applied to cases in which appeals have been presented and admitted. Though Section 423 does not provide any limitation on the power of the Appellate Court that it is incompetent to dispose of the appeal, if the appellant or his pleader is not present, nevertheless there is a limitation. That limitation, which is provided by the section is that the Appellate Court, before disposing of the appeal, must peruse the record. No doubt if the appellant or his pleader is present, he must be heard. Similarly, if the public prosecutor is present he to must be heard. The Legislature in Section 423 contemplates clearly that in certain cases a criminal appeal might be disposed of without hearing the appellant or any one on his behalf or the public prosecutor. The expression "after perusing such record" in the section is, in our opinion, a condition precedent to a proper disposal of an appeal either by dismissing the same or in any other manner contemplated in the said section. The powers which the Appellate Court in criminal appeals possesses are depicted in Section 423. It has power not only to dismiss the appeal but also pass any one of the orders enumerated in clauses (a), (b), (c) and (d) and sub-section (1-A). These provisions show the enormous powers which the Appellate Court possesses in regard to a criminal appeal. These powers, it cannot be gainsaid are very vast. Any one of the orders, mentioned above, could be passed by the Appellate Court whether the appeal is disposed of on hearing or without hearing the appellant or his pleader. These provisions, in our opinion, clearly

indicate the nature of a judgment or orders that is expression "after perusing such record" assumes great importance. Absence of those words in Section 421, brings out in bold contrast the difference in the nature of jurisdiction exercised under the two sections.

20. It is not necessary to deal exhaustively with the connotation of the expression "after perusing such record" occurring in Section 423(1). That will depend upon the nature of the order or judgment appealed against as well as the point or points that are taken before the Appellate Court. But one thing is clear. There must be a clear indication in the judgment or order of the Appellate Court that it has applied its judicial mind to the particular appeal with which it was dealing. Section an indication will be available when the Appellate Court has considered the material on record, which means not only the judgment and petition of appeal, but also the other relevant materials. The Appellate Court is bound to have looked into the judgment of the lower court appealed against. The petition of appeal must have also been looked into to know the nature of the attack that is made against the judgment. There will be other materials on record and they will have to be perused by the Appellate Court. The nature of such perusal to be indicated in the appellant judgment may also differ under different circumstances.

21. Applying the above tests, we find that the order passed by the High Court in the case before us does not satisfy the above requirement. There is no indication in the order that it was passed "after perusing the record" that it must have sent for as required in the earlier part of Section 423(1). Admittedly the order does not state that the Court has perused "such record" meaning the record sent for by it. On the other hand, the recital in the judgment is "on a perusal of the judgment under appeal, I find no merit in the case". Under Section 421, as we have already pointed out, the High Court should peruse the petition of appeal and the copy of the judgment or order appealed against. Even for a summary rejection under Section 421, apart from perusal of the judgment, it is obligatory for the Appellate Court to peruse the petition of appeal also. The High Court in this case has admitted the appeal under Section 421 and issued notice. By this it is clear that the High Court was of the opinion that there were arguable points raised in the appeal, which required consideration on merits under Section 423. Under Section 421 one of the important requirements is that the Appellate Court must peruse the record. Record of the case does not mean only the judgment, because that must have already been perused on September 9, 1966, under Section 421, when the High Court admitted the appeal. We have already pointed out that there is no indication in the order of the High Court that it has perused any record. Without a perusal of the record of a particular case and giving any indication of such perusal in the appellate order or judgment, an order, similar to the one in question could be passed in any criminal appeal in a routine manner, when the appellant or his pleader does not appear or even in appeals where parties have been heard. From the mere recital in the High Court's order that there is no merit in the case, it is not possible to infer that the High Court has come to that conclusion after applying its judicial mind and after perusing the record. In fact the conclusion that there is "no merit in the case" is arrived at, as the High Court itself says, only on the basis of its "perusal of the judgment under appeal". The requirement regarding the perusal of the record that has been sent for and received in Court, before disposing of an appeal, is not to be treated as an empty formality, as is evident by the vast powers conferred on the Appellate Court to pass the various types of orders enumerated in the section. We are of the opinion, that in passing the impugned order the High Court has not considered the material on record before coming to the conclusion that there was no case for interference. As the order is not in conformity with Section 423 of the Code; hence it has to be set aside.

22. Mr. R. C. Prasad, learned counsel for the State, drew our attention to the decision of this Court report in Sankatha Singh v. State of U.P. ((1962) Supp (2) SCR 817 : AIR 1962 SC 1208 : (1963) 2

SCJ 374 : (1962) 2 Cr LJ 288 : 55 Bom LR 338.) and urged that a similar order has been sustained by this Court. We have gone through the said decision and it does not support the respondent. This Court was not dealing with an order passed by the High Court as an Appellate Court. On the other hand, the Sessions Judge had dismissed a criminal appeal stating that the appellants and their counsel were absent and that he has perused the judgment of the Trial Court and seen the record and that it finds no ground for interference. This order was passed on November 30, 1956. Later on the appellants had filed an application to the Sessions Judge for restoring the appeal to file. On July 2, 1957, the Sessions Judge allowed the application and restored the criminal appeal to file the appeal which had been dismissed on November 30, 1956. But when the criminal appeal so restored came up for hearing before the successor Sessions Judge, he took the view that the order of restoration passed on July 2, 1957, by his predecessor was illegal and without jurisdiction. This order was challenged in revision and the High Court agreed with the view of the Sessions Judge that the original order of restoring the criminal appeal to file was illegal. This Court held that the order of the High Court holding that the criminal appeal should not have been restored, was correct. Therefore, this Court was only dealing with the correctness of the view of the High Court recording the legality of the order of restoration passed by the Sessions Judge. This Court has, no doubt, observed that the order passed on November 30, 1956, by the Sessions Judge after perusing the record and judgment without giving any other reasons may not be a strict compliance with the provisions of Section 367 of the Code and that it may be set aside by a superior Court, but the point that was emphasised was that the nature of the order passed by the Sessions Judge on November 30, 1956, will not give power to the Sessions Judge, an Appellate Court, to set aside the said judgment for the purpose of rehearsing the appeal. Therefore, the above facts clearly show that the point that we have decided in this appeal never arose for consideration in that decision.

23. To concluded the appeal is allowed. This judgment and order of the High Court, dated May 10, 1968, in Criminal Appeal No. 453 of 1966, are set aside and the said appeal in remanded to that Court for hearing and disposal according to law and in the light of the observations contained in the judgment.

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