State of U. P.

Vs

Poosu and Another

State of U. P.

Vs

1. Nagau, 2. Rameshwar Prasad

Criminal Miscellaneous Petitions Nos. 1, 243 and 546 of 1975

(CJI A.N. Ray, M.H. Beg, R.S. Sarkaria, P.N. Shinghal, Jaswant Singh JJ)

02.04.1976

JUDGMENT

SARKARIA J. -

1. The common question referred to the Constitution Bench in these two cases is : Whether the Supreme Court while granting special leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-bailable warrant for the arrest and committal to prison of the accused-respondent who had been acquitted by the High Court ?

2. Mr. R. K. Garge, Counsel for the accused-respondents herein, contends that while the Legislature has, in its wisdom, empowered the High Court to cause an accused person to be arrested and committed to prison pending the disposal of the appeal against acquittal, no such power has been conferred on the Supreme Court by the Code or any other statute. According to Counsel, in the absence of a specific statutory provision, the inherent power of the Court to do complete justice under the Code or even under Article 142 of the Constitution cannot be invoked to order deprivation of the liberty of a person who has been found innocent and acquitted by the High Court on all the charges against him because such an order would be violative of Articles 14, 19(1)(a) to (g) and 21 of the Constitution. It is maintained that even after the grant of special leave to appeal under Article 136 against an order of acquittal passed by the High Court, the acquittal and the findings on which it is based, remain fully in force during the pendency of appeal by the State. It is contended that once it is ensured that the accused-respondent will be available to submit himself to the final orders of this Court that may be passed in the appeal under Article 136, the inherent powers of the Court under the Code or under Article 142 exhaust themselves.

3. In support of his contentions, Counsel has referred to State of U. P. v. Mohammad Nooh (1958 SCR 595 : AIR 1958 SC 86); and A. K. Gopalan v. State of Madras (1950 SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383); Lala Jairam Das v. King Emperor (72 IA 120 : AIR 1945 PC 94); Sheo Swarup v. King Emperor (61 IA 398 : AIR 1934 PC 227) and M. G. Agarwal v. State of Maharashtra ((1963) 2 SCR 405 : AIR 1963 SC 200 : (1963) 1 Cri LJ 235); Prem Chand Garg v. Excise Commissioner, U. P. Allahabad (1963 Supp 1 SCR 885 : AIR 1963 SC 996).

4. As against this, Mr. Uniyal and Mr. O. P. Rana, submit that by virtue of Article 142 read with Article 136 of the Constitution, this Court pending disposal of an appeal against an order of acquittal, is competent to exercise the same powers which are conferred on the High Court by the Code of Criminal Procedure. In support of this contention, Mr. Rana has referred to State of U. P. v. Deoman Upadhyaya ((1961) 1 SCS 14 : AIR 1960 SC 1125 : 1960 Cri LJ 1504); Abdul Rehman Mahomed Yusuf v. Mahomed Haji Ahmad Agbotwala ((1960) 1 SCR 749 : AIR 1960 SC 82 : 1960 Cri LJ 158).

5. We are unable to accept the contentions advanced by Mr. Garg.

6. To appreciate the point involved, it will be useful to have a look at the provisions of Section 427 of the Code of Criminal Procedure, 1898 and its historical perspective. This section (which has been re-enacted as Section 390 of the new Code of 1973) provides :

> When an appeal is presented under Section 411A, sub-section (2), or Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

7. It may be noted that this provision was for the first time enacted in the Code of 1882. But even before its enactment the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal, to secure the attendance of the accused-respondent by bailable or non-bailable warrants. As pointed out by Panigrahi, C.J. in State v. Badapalli Adi (ILR 1955 Cut 589)

what was formerly the judicial practice received statutory recognition in the year 1882 when this provision in Section 427, Criminal Procedure Code, was introduced.

In Empress of India v. Mangu (ILR (1879) 2 All 340) (which was decided several years before the addition of this provision in the code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in Queen v. Gobin Tewari (ILR (1876) 1 Cal 281). Again in Queen-Empress v. Gobardhan (ILR (1887) 9 All 528), Sir John Edge, Chief Justice without laying down any inflexible rule, emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in State v. Badapalli Adi (supra).

8. Viewed in this perspective, it is clear that even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused-respondent or his enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

9. As far back as 1824, in the English case, Bana v. Methuen (2 Bens 228), Best, J., following an older precedent, enunciated the rule that when an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence.

10. This is the rationale of Section 427. As soon as the High Court on perusing a petition of appeal

against an order of acquittal, considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more becomes sub judice.

11. Similar is the position when the Supreme Court, in its discretion, grants special leave to appeal under Article 136 of the Constitution, against an order of acquittal passed by the High Court.

12. Article 136 confers on the Supreme Court, the same power which was vested in the Crown to grant special leave to appeal to His Majesty-in-Council (which in practice meant the Judicial Committee of the Privy Council in England) to convicted persons from India. This article is couched in very spacious phraseology. The power under it can be exercised in respect of "any judgment, decree, determination, sentence or order in any cause, matter passed or made by any court or tribunal in the territory of India". As pointed out by this Court in K. M. Nandvati v. State of Bombay ((1961) 1 SCR 497 : AIR 1961 SC 112), this wide and comprehensive power in respect of any determination of any court or tribunal must carry with it the power to pass orders incidental or ancillary to the exercise of that power.

That is why, Article 142 in equally extensive terms gives this Court power to make such order as is necessary for doing complete justice in any cause or matter before it and any decree so passed or order so made shall be enforceable throughout the territory of India.

With the same end in view, clause (2) of that article (subject of course to law, if any, made by Parliament) gives this Court "all and every power to make any order for the purpose of securing the attendance of any person".

13. Thus there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has under Section 427. Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as, the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and State (see State v. Capt. Jagjit Singh ((1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215).

In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in this Court. In the context, it must be remembered that this overriding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice.

14. Nor do we find any merit in the contention that an order directing the rearrest and detention of an accused-respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right guaranteed in Part III of the Constitution. Such an order is made by this Court in the exercise of its plenary jurisdiction conferred by Articles 136 and

142 of the Constitution. By no stretch of imagination can it be said that such an order deprives the accused-respondent of his liberty in a manner otherwise than in accordance with procedure established by law.

15. It is not necessary to burden this judgment with a discussion of the rulings cited by Mr. Garg. Suffice it to say that the facts of those cases were entirely different and they have no bearing on the point in issue before us.

16. For all the foregoing reasons, we answer the question posed at the commencement of this judgment in the affirmative and dispose of the reference accordingly.

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