

Hanumant Dass

Vs

Vinay Kumar and Others

And

State of Himachal Pradesh

Vs

Vinay Kumar and Another

Criminal Appeal No. 45 of 1982 and Special Leave Petition (Criminal) No. 2948 of 1981

(O. Chinnappa Reddy, R. B. Misra JJ)

05.04.1982

JUDGMENT

MISRA, J. -

1. The appeal as well as the special leave petition are directed against the judgment of the High Court of Punjab & Haryana at Chandigarh dated July 9, 1981. Criminal appeal has been filed by the complainant while the special leave petition has been filed by the State of Himachal Pradesh. Vinay Kumar and his mother Chhano Devi were convicted for the murder of Asha, the wife of Vinay Kumar by burning her alive and sentenced to life imprisonment by the learned Sessions Judge, Gurdaspur. On appeal by the accused, the High Court acquitted them by the impugned judgment.
2. The prosecution case set up at the trial was that the deceased Asha was married to Vinay Kumar in July 1972. The marriage was an arranged marriage. It did not prove to be a success, the apparent cause for the failure of marriage was that Asha was only a matriculate and not cultured enough to move about in the society with the husband. To make up this deficiency the deceased again resumed her studies and started attending college at Nagrota Bhagwan. While prosecuting her studies she was rebuked and abused and sometimes even thrashed, wherever she visited the house of her in-laws. She however, kept on suffering in the vain hope that in due course of time things might improve. There was, however, no improvement and she was fed up with the maltreatment and cruelty meted out to her in the in-laws house. She left the matrimonial home and started living with her parents sometime in the year 1975 or early 1976.
3. In 1977 Vinay Kumar filed a petition in the Court of the District Judge, Kangra at Dharamshala under Section 13 of the Hindu Marriage Act for the dissolution of his marriage with the deceased on various grounds including one of the desertion. The District Judge in the first instance tried for reconciliation between the spouse and as an interim arrangement Asha returned to her in-laws house in June 1978 on trial basis, while divorce petition was kept pending and adjourned to July 29, 1978. As the parties did not appear in the court on the date fixed, it was presumed that they were living happily and the proceeding were, therefore, consigned to the record.

4. On August 5, 1978 at about 11 a.m. Kanwal Nain PW 4, Bil Bhandur PW 14, employee of the Post Office, which was just in front of the house of the accused at a distance of 10/12 feet, and a number of other persons saw smoke coming out of the window of the house of the accused. When Bil Bhandur and others went to the house, they found the outer door locked. There was no other means of ingress to the house. After a short while one Raj brought the key from Chhano Devi accused with which the lock was opened and entry gained into the house. Asha was found burning and after extinguishing the fire, she was removed to the local hospital.

5. Dr. O.P. Dutta attended her and sent an intimation of the incident to the Incharge local Police Post. He recorded the statement of Asha on the out-patient register Ex. PL. Meanwhile Kesar Singh, Assistant Sub-Inspector, arrived there and after getting a certificate from Dr. Dutta, he also recorded her statement Ex. PU. From Civil Hospital, Kangra Asha was removed in a truck to a Civil Hospital in Dharamshala (H.P.) where she breathed her last.

6. In her statements recorded by Dr. Dutta and Kesar Singh, the deceased disclosed that her clothes caught fire, while she was preparing tea. The police suspected no foul play and did not register any case. The father of the deceased Hanumant Dass, however, made a report on August 7, 1978 and a case was registered on that basis. The accused were sent up for trial. When the case was pending in the Court of Sessions Judge, Dharamshala in Himachal Pradesh, the complainant moved an application to the Supreme Court for transfer of the case from Himachal Pradesh to some other Province. The case was transferred to a court of competent jurisdiction at Gurdaspur in Punjab. The Sessions Judge, Gurdaspur convicted both the accused under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to life imprisonment. The conviction was based only on the circumstantial evidence. Accused went up in appeal to the High Court. The High Court in its turn set aside the order of conviction and acquitted the accused of the charge.

7. The complainant has filed the present appeal, Shri Kohli appearing for the complainant has strenuously contended that the appeal before the High Court has been allowed in the absence of the State of Himachal Pradesh and without any notice to that State and as such the impugned judgment of the High Court is a nullity and should be set aside on that ground alone. The accused had impleaded only the State of Punjab as a party and the High Court has issued notice to the Advocate General of Punjab. As a second limb to this argument it has been contended by Shri Kohli that the appeal was filed in the High Court on June 15, 1981 and while considering the application for bail on June 22, 1981, posted the appeal for hearing on July 6, 1981 after service of notice on the Advocate General of Punjab and the appeal was decided on July 9, 1981 without even summoning the record. Thus the High Court was in a hot haste to dispose of the appeal even without reasonable opportunity being afforded to the counsel for the State and without impleading the appropriate State as a party to the appeal and without notice to the counsel for the State of Himachal Pradesh.

8. We may first deal with the criticism of the learned counsel about the undue haste in the disposal of the appeal by the High Court. It appears that Shri M.R. Mahajan, counsel for the appellant while moving the application for bail made a statement before the High Court and it is on his statement that the case was posted for hearing at the earliest possible. This will be apparent from the order dated June 22, 1981 passed by the High Court while disposing of the application for bail. The order insofar as it is material for consideration of the point reads :

..... Mr Mahajan, Advocate states that on the findings of fact recorded by the learned Trial Judge, the conviction of the appellants cannot be sustained. Notice for July 6, 1981, to the Advocate General, Punjab. Copy of the grounds of appeal and

the judgment rendered by the learned Trial Judge be delivered in the office of the A.G., Punjab within two days. The case is likely to be disposed of on that date.....

Therefore, the charge levelled against the High Court that it was in a hot haste to decide the appeal at the earliest possible appears to be uncalled for.

9. This leads us to the main contention raised by Shri Kohli that the transfer of the case from Dharamshala lying within the territorial jurisdiction of the High Court of Himachal Pradesh to Gurdaspur lying within the jurisdiction of the Punjab & Haryana High Court, does not change the parties and the parties remain the same even after the transfer of the case from Dharamshala to Gurdaspur. In this view of the legal position, the State of Himachal Pradesh where the offence was committed was a necessary party and should have been impleaded in appeal. In the absence of the State of Himachal Pradesh as a party and in the absence of notice to the counsel for the State of Himachal Pradesh, the High Court was not justified in disposing of the appeal and its judgment is only a nullity.

10. This contention is based on Section 385 of the Code of Criminal Procedure. Insofar as it is material for the purpose of the case it reads :

385. (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given -

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that court, and hear the parties :

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

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There is no denying the fact that Section 385 of the Code is a mandatory provision and the requirement of the section must be satisfied. In the appeal before the High Court, State of Punjab was made a party and notice of the appeal was also given to the Advocate General of Punjab. According to Shri Kohli this does not satisfy the requirement of law.

11. It would be appropriate at this stage to refer to other relevant provisions of the Code :

Section 225 provides that :

In every trial before a Court of Session, the prosecution shall be conducted by a

Public Prosecutor.

Section 2(u) defines 'Public Prosecutor' :

'Public Prosecutor' means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor.

Section 24 deals with "Public Prosecutors in the High Court" :

24. Public Prosecutors. - (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

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Section 378 talks of an appeal in case of acquittal. Insofar as it is material it reads thus :

378. (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court (or an order of acquittal passed by the Court of Session in revision).

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

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Section 432 authorises the appropriate Government to suspend or remit sentences :

432. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Wherever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion.....

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(6) The provisions of the above sub-sections shall also apply to any order passed by a

Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression 'appropriate Government' means, -

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government :

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

From the various provisions extracted above it is evident that there shall be a Public Prosecutor for conducting any prosecution appeal or other proceeding on behalf of the Central Government or State Government in the High Court. If notice has been given to the Public Prosecutor viz. the Advocate General of Punjab the requirement of law to our mind has been fulfilled.

12. Shri Kohli, however, contends that occurrence in the instance case took place within the territorial limits of Himachal Pradesh. That State, therefore, will continue to be a necessary party in the appeal irrespective of the fact that the appeal was filed in the Punjab & Haryana High Court.

13. Section 432(7) extracted above defines 'appropriate Government'. 'Appropriate Government' means, - (a) in cases where the sentence is for an offence against, or the other referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

14. According to this section the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence was committed. A somewhat similar question came up for consideration in the State of M.P. v. Ratan Singh (1976 Supp SCR 552 : (1976) 3 SCC 470 : 1976 SCC (Cri) 428 : AIR 1976 SC 1552 : 1976 Cri LJ 1192), where the respondent was convicted and sentenced to imprisonment for life by a court in the State of Madhya Pradesh. At his report he was transferred to a jail in the State of Punjab, to which State he belonged. He applied to the Government of Punjab that under the Punjab Jail Manual he is entitled to be released since he had completed more than 20 years of imprisonment. The application was sent to the Government of Madhya Pradesh, which rejected it. In a writ petition filed by him the High Court of Punjab & Haryana held that the State of Punjab was the appropriate authority to release him and directed the State of Punjab to consider the matter. This court in appeal observed "a perusal of this provision clearly reveals that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of Section 401 of the Code of Criminal Procedure. Thus since the prisoner in the instant case was tried, convicted and sentenced in the State of Madhya Pradesh, the State of Madhya Pradesh would be the appropriate Government to exercise the discretion for remission of the sentence under Section 401(1) of the Code of Criminal Procedure....." That was a case based on Section 401 of the old Criminal Procedure Code, but the Code of Criminal Procedure, 1973 has put the matter completely beyond any controversy and reiterated the provision of Section 402(3) in sub-section (7) of Section 432.

15. Lastly it was contended that the appeal was disposed of by the High Court even without summoning the record. There is no warrant for this assumption. No specific allegation has been made in the special leave petition that the record was not summoned. We have perused the judgment of the High Court and the tenor of the judgment indicates that the record must have been there before the court. There is copious reference to the materials on the record which could be possible only when the record was there before the court. Besides, the counsel for the appellant made a statement before the court that on the finding of fact recorded by the High Court he was entitled to an acquittal and in this view of the matter even if the record had not been summoned (for which there is no basis) that would not be fatal. Proviso to sub-section (2) of Section 385 itself provides "..... the court may dispose of the appeal without sending for the record" in a certain situation. The rigour of sub-section (2) of Section 385, which provides that "the Appellate Court shall then send for the record of the case,....." has been taken away by the proviso in a certain situation. If the appellant himself says that the appeal can be allowed on the findings recorded by the Sessions Judge, the non-summoning of the record, if it was at all so, would not to our mind be fatal. The complainant was present with his counsel, the State Advocate General was also present. If there had been any grievance about the record, they would have raised an objection. Their non-objection on this point is also an indicator that the record was there or in any case, the summoning of the record was not thought to be necessary by the parties.

16. Assuming for the sake of argument, that there were certain irregularities in the procedure the judgment of the High Court could not be set aside unless it was shown by the appellant that there has been failure of justice, as will be evident from Section 465 of the Criminal Procedure Code which reads :

465. Finding or sentence when reversible by reason of error, omission or irregularity.
- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have to take into account the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

17. We have perused the judgment of the High Court which was placed before us in full. It shows that each and every aspect of the matter has been thoroughly discussed and the High Court has also referred to the error committed by the Sessions Judge in the approach of the case and also in making unwarranted assumptions.

18. On merits we fully agree with the appraisal of the evidence made by the High Court. It is not necessary to repeat the same over again. There is no eye-witness. The fate of the case hinges upon the circumstantial evidence. The High Court has dealt with the two dying declarations, one recorded by the Doctor and the other by the Assistant Sub-Inspector. The High Court also took into consideration the oral dying declaration on which the prosecution strongly relied. But even that declaration does not implicate the accused. The reason given by the High Court for acquittal in our

opinion is cogent and plausible.

19. For the foregoing discussion, the criminal appeal and the special leave petition must fail and they are accordingly dismissed.

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