SUPREME COURT OF INDIA

Rishi Nandan Pandit

Vs.

State of Bihar

(K Thomas and S M Quadri JJ.)

15.10.1999

JUDGMENT

K.T. THOMAS, J.

1. Leave granted.

2. Twelve persons stand convicted by a Sessions Court under Section 395 of the Indian Penal Code and all of them were sentenced to undergo rigorous imprisonment for 10 years. All of them jointly filed an appeal before the High Court of Patna in August 1986. It appears that the High Court had suspended the sentence passed on the appellants pending disposal of the appeal. On 3.8.1998, the appeal stood listed before a Single Judge of the High Court. But the counsel engaged by the appellants did not turn up and hence learned Single Judge proceeded to hear the counsel for the State alone and then dismissed the appeal on merits. Appellants have therefore come up to this Court aggrieved by the aforesaid judgment of the High Court.

3. Shri P.S. Misra, learned Senior Counsel who argued for the appellants did not endeavour to justify the absence of the counsel for the appellants before the High Court when the case was called for arguments, nor are we interested in knowing why the counsel did not turn up. The appellants should have engaged a responsible counsel to argue their appeal in the High Court, as they now put the blame on the Advocate whom they engaged there. No doubt the High Court could have reported the dereliction of the Advocate to the Bar Council concerned for appropriate action in the matter.

4. When the counsel engaged by the appellants in a criminal appeal does not turn up there is no obligation for the court of appeal to wait for him or even to adjourn the case awaiting his presence. The earlier view of a two Judge Bench of this Court in Ram Naresh Yadav and Ors. v. State of Bihar

AIR (1987) SC 1500, that in such a situation the Court could only dismiss the appeal for default, has been held erroneous by a three Judge Bench of this Court in Bani Singh and Ors. v. State of U.P. . A.M. Ahmadi, CJ., speaking for the Bench, has stated the legal position thus :

The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case AIR (1987) SC 1500 that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

5. Nonetheless the learned Chief Justice hastened to add that if the counsel is absent there is nothing in law which precludes the court of appeal from appointing another counsel at State's expense to assist the court. The following observations of the bench are pertinent :

We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so.

6. The question before us is whether there was miscarriage of justice on the fact situation in this case as the learned Single Judge of the High Court proceeded to decide the appeal unaided by the arguments of an advocate at least by appointing as Amicus Curiae to assist the Court. On a deeper analysis we feel that there was miscarriage of justice in this case. To substantiate it, we make a brief reference to the facts of the present case.

7. According to the prosecution story, a dacoity was committed in the house of the informant on the night of 16.11.1980, by a large number of dacoits who were armed with firearms. The commotion ensued attracted a number of persons of the locality who gathered up and resisted the onslaughts made by the dacoits. Thereupon the marauders opened fire. What followed was almost like a pitch battle in which both sides suffered injuries and finally the dacoits fled from the scene leaving out one among them who was captured by the victims. Unfortunately that captive later succumbed to the injuries. The villagers as well as the victims of the dacoity claimed to have identified the ^ dacoits in the light of blazing torches.

8. Altogether 11 witnesses were examined, during trial, to prove the occurrence. The trial court convicted appellants on the strength of the evidence of some of the eye-witnesses. A large volume of evidence has been adduced. No doubt the stake involved in the appeal for the large number of convicted persons is obviously very high, particularly, in view of the sentence of rigorous imprisonment for 10 years imposed on each of them. Hence any supercilious dealing of their case will be at the risk of serious miscarriage of justice.

9. As a matter of legal position the court is not precluded from perusing the records and come to its own conclusion unaided by any legal practitioner to project the points favourable to the accused, when the counsel engaged by them does not turn up to argue. But the three Judge Bench of this

Court indicated in Bani Singh v.State of Uttar Pradesh , that it is a matter of prudence that the court may, in an appropriate case, appoint a counsel at the State's expense to argue for the cause of the accused. Of course it is for the court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could be disposed of unassisted by counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range it is advisable to seek the assistance of a legal talent.

10. The present case seems to be a glaring example of failure of justice due to the absence of such legal assistance. Learned Single Judge of the High Court chose to conform the conviction and the severe sentence passed on the 12 appellants after scrutinizing the evidence on its own, for which the following reasoning has been advanced by the learned Single Judge.

On scrutiny of the evidence, it appears that the prosecution witnesses have proved the manner of occurrence whereas P.Ws. 6, 8 and 14 have identified the dacoits by face. It appears that P.Ws. 6, 8 and 14 had also stated before the Investigating Officer about the commission of the dacoity and they had also disclosed the names of the dacoits. After scrutiny of evidence, it appears to me that the prosecution has proved the charges against the appellants beyond all reasonable doubt.

11. Apparently a serious error has been committed by the learned Single Judge which looms large in the aforesaid passage. He took into account a set of legally forbidden materials in reaching the conclusion. It is trite that whatever a witness had stated to the investigating officer can not be used as evidence. Section 162 of the CrPC, which incorporated the aforesaid prohibition, permits such statements to be used only for the limited purpose of contradicting the witness in certain circumstances.

12. What is more disconcerting to us is, how the learned Single Judge discerned that PW-6, PW-8 and PW-14 had spoken such things to the Investigating Officer because in one of the earlier paragraphs of the impugned judgment learned Single Judge has pointed out that the Investigating Officer has not been examined in this case. We do not wish to dilate more into it except saying that the reasoning is ostensibly vitiated. If a counsel was appointed to argue for the accused (when the counsel engaged by the accused did not turn up) learned Single Judge could have, most probably, averted such a legal folly.

13. The only course open to us in the aforementioned situation is to remit the case to the High Court for disposal of the appeal afresh in accordance with law. If no counsel for the accused turns up we request the High Court, on the peculiar facts of this case, to appoint an advocate at State cost to argue for the accused.

14. We, therefore, set aside the impugned judgment. The appeal filed by the appellants before the High Court will stand restored for fresh disposal according to law and in accordance with the observations made above. If the sentence had remained suspended during the pendency of the appeal in the High Court it is open to the appellants to apply to the High Court for being released on bail till the disposal of the appeal.

15. This appeal is accordingly allowed and the case is remitted to the High Court.