

ALLAHABAD HIGH COURT

Sm. Vidya Devi

Vs.

State (Allahabad)

Criminal Revn. No. 1237 of 1953, against order of S.J. Gorakhpur,
(H.S. Chaturvedi and S.N. Sahai, JJ.)

16.03.1953. 05.09.1956

JUDGMENT

H.S. Chaturvedi, J.

1. This revision has been filed by one Sm. Vidya Devi, who is the widow of one Jai Narain. A criminal case under Section 408, Penal Code was launched against Jai Narain and he was convicted and sentenced to nine months' rigorous imprisonment and to a fine of Rs. 1,000/- by a Magistrate, first class. Jai Narain filed an appeal before the Sessions Judge of Gorakhpur which came up for hearing on 16-3-1953.

It appears that during the pendency of the appeal the appellant Jai Narain died. The fact that Jai Narain was dead on 16-3-1953, was brought to the notice of the learned Sessions Judge but the Court proceeded with the appeal ex parte and dismissed it. It is against this order that the petitioner has come up in revision.

2. When this revision came up for hearing before a learned Judge of this Court, learned counsel for the applicant raised two contentions. The first was that the learned Sessions Judge should have passed an order of abatement of the whole appeal and that the order dismissing the appeal was bad in law. The second contention was that on the death of Jai Narain a notice should have been sent to the applicant, who is the legal representative of the deceased, to enable her to prosecute the appeal. As the revision raised two questions of law of some importance, the learned Single Judge referred the case to a Bench.

3. The first question that falls for our consideration is whether the appeal filed by Jai Narain abated as a whole on the death of the convict. To answer this question it is necessary to refer to Section 431, Criminal Procedure Code, which is as follows :-

"Every appeal under Section 411-A, sub-section (2), or Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."

In a case where there is only a sentence of imprisonment, no difficulty arises because the

sentence of imprisonment lapse with the death of the accused. In a case where the accused has been sentenced to a fine, the section makes it clear that the appeal, as it relates to a sentence of fine, does not abate. In our opinion Section 431 makes it clear that the intention of the Legislature is that where an appeal is directed against a sentence of imprisonment only, the appeal abates as soon as the accused dies. It is also manifest from the section that where the sentence is one of fine, the appeal does not abate, and the reason for this is obvious. Where a sentence of fine is imposed, the State can realize the fine from the assets left by the deceased in the hands of his legal representatives. We see no reason why the same principle should not be applied to an appeal where an accused person appeals both against the sentence of imprisonment and the sentence of fine. As far as the sentence of imprisonment is concerned, the appeal shall abate, but with regard to the sentence of fine, the same appeal will not abate. The argument that an appeal could not be split up in two portions is not sound. Where an appeal is filed both against the sentence of imprisonment and fine, it is always open to the appellate Court to accept the appeal in part. For example, if a person is sentenced to imprisonment and also to a fine, it is open to the Court of appeal to accept that portion of the appeal which relates to the sentence of fine and reject the other portion which is against the sentence of imprisonment. Where an accused has appealed against the sentenced of imprisonment and fine, and before the appeal comes for hearing he dies, Section 431, Criminal Procedure Code will come into play. Under the provisions of Section 431 that part of, the appeal which relates to the sentence of imprisonment shall abate on the death of the appellant but the other part which relates to the sentence of fine shall not abate on the death of the appellant. In the case of *Lalla Singh v. State*¹, the appellant Lalla Singh had been sentenced to imprisonment as well as to a fine of Rs. 200/-. Lalla Singh filed an appeal but he died during the pendency of appeal. Oak J., held that the appeal had abated in part so far as it related to the sentence of imprisonment but as regards the sentence of fine it did not abate. We are in agreement with the observations made in that case. We are of opinion that the appeal of Jai Narain abated in respect of the sentence of imprisonment; and that it did not abate with regard to the sentence of fine. We, therefore, overrule the contention that the entire appeal abated on the death of Jai Narain.

4. It is next contended that the Sessions Judge committed a serious irregularity in deciding the appeal without giving any opportunity to the applicant to prosecute the appeal. This contention must prevail.

5. We have already noticed that under the provisions of Section 431, Criminal Procedure Code, the appeal did not abate with regard to the sentence of fine. If the appeal did not lapse with the death of Jai Narain in relation to the sentence of fine, the heir of Jai Narain, that is the applicant, would be entitled to prosecute the appeal for the simple reason that she would be liable to pay the fine out of the assets, if any, left by her deceased husband. The difficulty has arisen because the Criminal Procedure Code makes no provision for continuance of the appeal by the legal representative of the deceased convict. No enactment dealing with procedure can provide for all the contingencies that may possibly arise, and it is because of it that the Courts have inherent

powers to make such orders as may be necessary for the ends of justice. It cannot be disputed that the applicant had a right to prosecute the appeal filed by her

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husband against the sentence of fine.

If the applicant had chosen to appear before the Sessions Judge on the day the appeal was decided, the Court could not have refused to give a hearing to the applicant. It is, therefore, manifest that for all practical purposes the applicant (widow of the deceased convict) stood on the same footing as her husband who had filed the appeal. In this view of the matter it was incumbent on the Court of appeal to send a notice to the applicant informing her of the date on which the appeal was to be heard.

In other words, the Court of appeal should have followed the same procedure as is laid down in Section 422, Criminal Procedure Code which provides that the appellate Court 'shall cause notice to be given to the appellant of the time and place at which such appeal will be heard.' Where an appellant dies and the right to continue the appeal survives, it is obligatory on the Court of appeal to send notice to the legal representative of the deceased appellant informing them of the date and place where the appeal is to be heard. We are conscious of the difficulty that might arise in finding out the legal representative of the deceased appellant. This difficulty can be easily solved. After all the provision that an appeal from a sentence of fine will not abate was incorporated in the Act so that the State may be able to realize the fine from the property of the deceased which came to the heirs. The prosecution agency, which is interested in the realization of fine, would be in a position to find out the address of the legal representative and should assist the Court in sending a notice of the appeal to the proper person.

6. It is not disputed that the applicant, who is the widow of the deceased, had no notice of the appeal. The order of the Sessions Judge confirming the sentence of fine is an order which directly affects the applicant who was given no opportunity of being heard on the question of sentence of fine. It is a well understood principle of natural justice that no order should be passed to the prejudice of a person unless he had an opportunity of being heard. We are, therefore, of opinion that the order of the Sessions Judge dated 16-3-1953, cannot be allowed to stand.

7. We, therefore, set aside the order of dismissal passed by the learned Sessions Judge on 16-3-1953. The appeal shall be readmitted to its original number and disposed of in accordance with law. The learned counsel for the applicant states that his client will put in appearance before the Sessions Judge on 5-10-1956, to avoid any notice being sent. The applicant is, therefore, directed to appear before the learned Sessions Judge of Gorakhpur on 5-10-1956, for taking a date in the appeal. It will not be necessary for the Court below to issue any notice to the applicant. Let the record be sent to the Court below without any delay.

Order accordingly.