

Adam Sayed Master Vs. the State of Maharashtra

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Court : Mumbai

Decided On : Aug-19-1998

Reported in : 1998(4)ALLMR738; 1999(5)BomCR65; 1999BomCR(Cri)65

Judge : N. Arumugam; and Vishnu Sahai, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 392, 393, 394 and 397;
[Criminal Procedure \(CrPC\), 1973](#) - Sections 482

Appeal No. : Criminal Writ Petition No. 747 of 1998

Appellant : Adam Sayed Master

Respondent : The State of Maharashtra

Advocate for Def. : M/s. Aruna Kamath A.P.P.

Advocate for Pet/Ap. : S.K. Shinde, Adv.

Judgement :

ORDER

Vishnu Sahai, J.

1. Heard learned Counsel for the parties.

Rule. By consent rule made returnable forthwith.

2. This petition has been preferred from jail by the petitioner, who vide judgment and order dated 17-6-1985 passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 229 of 1984 was convicted under sections 397 I.P.C. and 302 I.P.C. and sentenced to undergo 7 years R.I. under the first count and to imprisonment for life under the second count, the sentences to run concurrently. It is prayed that since he has already served a period of about 14 years and he has some family problems, the period of 26 years which he is to serve be set aside and he be directed to be released.

3. Mr. G.J. Kulkarni, the Desk Officer, Home Department, Mantralaya, Mumbai, on behalf of the State of Maharashtra has filed an affidavit dated 13-8-1998, detailing therein in paragraph 8, that including remissions the petitioner has served 21 years two months and three days. In para 10 of the said affidavit it has been mentioned that the case of the petitioner falls under Clause 5(a) of the revised guidelines, date 11-5-1992.

The revised guidelines provide that if a prisoner's case was within guidelines 5(a) i.e. 'Murders committed by dacoits and robbers in the act of committing dacoities and robberies' he would, including the set off, undergo 26 years of imprisonment.

4. Ms. Aruna Kamath, A.P.P. for the State, strenuously urged that since the case of the petitioner falls within clause 5(a) of the guidelines he cannot be released unless he has served 26 years, as provided by the said guideline.

5. We have given our anxious consideration to the submission canvassed by Ms. Aruna Kamath and we are constrained to observe that the case of the petitioner would not fall within the frame-work of the said guideline.

As seen above the aforesaid guideline envisages of murders committed by dacoits and robbers in the act of committing dacoities and robberies. In the instant case we find from a perusal of the judgment of the trial Court that the petitioner was charged on five counts viz. under sections 393, 394, 392, 397 and 302 I.P.C.

6. We also find that the petitioner has been acquitted for the charges under sections 393, 394 and 392 I.P.C. Hence in our view, he could not have been

convicted for the charge under section 397 I.P.C.

7. Section 397 I.P.C. reads thus :

'397. Robbery, or dacoity, with attempt to cause death or grievous hurt - If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.'

A perusal of the said section would show that the condition precedent or its application is that there should either be robbery or dacoity. If during the course of robbery or dacoity :-

a) the offender uses any deadly weapon; or (b) causes grievous hurt to any person; or (c) attempts to cause death or grievous hurt to any person such offender shall not be punished with imprisonment for less than seven years.

8. In the instant case no charge for the offence of dacoity was framed but three charges pertaining to the offence of robbery viz. those under sections 393, 394 and 392 I.P.C. were framed. On all these three charges the learned Additional Sessions Judge acquitted the petitioner. Since the essential prerequisite for the offence under section 397 I.P.C. is that there should either be robbery or dacoity and the petitioner was acquitted on all the charges of robbery and there was no charge of dacoity he could not have been convicted for the offence under section 397 I.P.C.

It is pertinent to point out that the liability for the offence under section 397 I.P.C. is individual and not constructive. The Supreme Court in the case of Phool Kumar v. Delhi Administration, reported in : [1975]3SCR917 , has held that the expression offender referred to in section 397 I.P.C. refers to the actual offender who was armed with deadly weapon.

Hence merely because the conviction of co-accused Ahmad Mohammad Yasin for the offence under section 397 I.P.C. is sustainable does not mean that the petitioner's conviction on the said count is also sustainable.

9. Once it is held that the petitioner could not have been convicted for the offence under section 397 I.P.C. his case would not fall within guideline 5(a).

10. Miss Kamath, learned Counsel for the respondent strenuously urged that since the petitioner has not preferred any appeal against the impugned judgment of the trial Court the same has become final and as his conviction for the offence under section 397 I.P.C. has become final the classification of his case by the respondent under guideline 5(a) was perfectly justifiable.

11. In our view we are not as helpless as Ms. Kamath would like us to believe. It is well settled that in the exercise of the inherent powers vested in us by section 482 Cr.P.C. we can quash the conviction of the petitioner for the offence under section 397 I.P.C. despite the fact he has not preferred any appeal.

Section 482 Cr.P.C. reads thus :

'482. Saving of inherent powers of High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.'

12. A perusal of section 482 Cr.P.C. shows that one of the contingencies in which this Court can exercise its inherent powers is to prevent abuse of process of Court. There can be no denying the fact, in view of reasons mentioned earlier, that the conviction of the petitioner for the offence under section 397 I.P.C. is an abuse of process of Court. Consequently we will exercise our inherent powers and quash his conviction for the said offence.

13. Once the conviction of the petitioner for the offence under section 397 I.P.C. would be quashed it follows as a logical imperative that his case would not fall within the ambit of guideline 5(a). Consequently we feel that the respondent State should consider afresh the question in which guideline the case of the petitioner falls.

14. Before parting with the judgment we would like to point out that justice can never be the victim of technicalities. Merely because a party has not challenged a per se erroneous order does not mean that it has to slavishly accept its consequences. It should always be remembered that it is the duty of the Court to do justice and where a statute gives powers to it to rectify errors in per se erroneous an order, as section 482 Cr.P.C. in the instant case, the Court would not shy in exercising the power. After all courts dispense justice and do not succumb to injustice.

15. In the result this petition is allowed. The order of conviction of the petitioner for the offence under section 397 I.P.C. is quashed. The order of the respondent State classifying the case of the petitioner within the frame work of guideline 5(a) is quashed and the respondent State is directed to pass orders within a period of 4 weeks from the date of receipt of our order indicating the guideline in which the case of the petitioner would fall and to inform the petitioner about it.

Rule is made absolute in the above terms.

16. Petition allowed.