

Ramakantha Khadigar Vs. the State

Ramakantha Khadigar Vs. the State

SooperKanoon Citation : sooperkanoon.com/524254

Court : Orissa

Decided On : Aug-30-1956

Reported in : AIR1957Ori10; 1957CriLJ78

Judge : Narasimham, C.J. and ;Das, J.

Acts : [Constitution of India](#) - Article 134 and 134(1); ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 428 and 439(1); ;[Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Supreme Court Appeal No. 58 of 1956

Appellant : Ramakantha Khadigar

Respondent : The State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : S.C. Palit, Adv.

Disposition : Application rejected

Judgement :

Narasimham, C.J.

1. This is an application for grant of a certificate, under Article 134(1)(c) of the Constitution, to appeal to the Supreme Court against the judgment of a Division Bench of this Court in Criminal Appeal No. 166 of 1954, dismissing the appeal by

the petitioner against his conviction and sentence under Sections 330 and 448, Penal Code, passed by the Assistant Sessions Judge of Sambalpur.

The petitioner, Ramakantha Khadigar, was during the relevant period serving as the Assistant Sub-Inspector of Police at Paikmal P. S. The case against him was that during the night of 2-5-1954 he tortured one Dasarathi Duba (P. W. 9) who was suspected to have committed burglary with a view to extort a concession from him. The said suspect, unable to bear the torture, subsequently attempted to commit suicide by cutting his throat. He, however, recovered from his injury to the neck.

The evidence against the petitioner consisted mainly of the statement of the victim Dasarathi Duba (P. W. 9) and of one Arjun Ganda (P. W. 3) who was one of the eye-witnesses to the torture. There was also medical evidence to prove the nature of the cut injury on the neck of Dasarathi Duba and also of some injuries on his leg which supported the prosecution case that bamboos were pressed over his legs and ankles by the Police party to extort confession. The Assistant Sessions Judge believed their evidence and a Division Bench of this Court on appeal also accepted their evidence notwithstanding some unsatisfactory features which have been noticed in the main judgment.

2. On the above facts it would appear that no question of law is involved and that the case is concluded by concurrent findings of fact. But Mr. Palit, on behalf of the petitioner, relied on a Division Bench decision of this Court reported in *S.K. Ghosh v. Maheshwar Dehuri*, ILR (1954) Cut 537 : (AIR 1954 Orissa 248) (A) and urged that a certificate should be granted.

We therefore thought it advisable to examine the various decisions of the Supreme Court regarding the principles to be followed by the High Court in granting a certificate under Article 134(1)(c) against an affirming judgment of the High Court in a criminal proceeding and we are grateful to the learned counsel for both sides for the assistance rendered by them.

3. Under Clauses (a) and (b) of Article 134(1) an appeal lies, as a matter of right, against the judgment of a High Court in a criminal proceedings, in respect of cases

which come within the scope of these two clauses. But a certificate under Clause (c) of Article 134(1) stands on a different footing. As pointed out by the Supreme Court in *Sunder Singh v. State of U. P.* AIR 1956 SC 411 (B):

'the grant of a certificate under Article 134(1)(c) is not a matter of course but the power has to be exercised after considering what difficult questions of law or principle were involved in the case which should require the further consideration of the Supreme Court. The word 'certifies' in Sub-article (1) (c) is a strong word which requires the High Court to look closely into the case to see if any special considerations arise. If a case does not involve any question of law, then however difficult the question of fact may be, that would not justify the grant of a certificate under Article 134(1)(c) because, if the High Court has any doubts about the facts of a criminal case, the benefit of that doubt must go to the accused.....

Therefore, ordinarily in a case which does not involve a substantial question of law or principle in the affirming judgment, the High Court would not be justified in granting a certificate under Sub-article (c) of Article 134(1) of the Constitution.'

4. The earliest pronouncement of the Supreme Court on the subject is to be found in *Pritam Singh v. The State*, AIR 1950 SC 169 (C). Doubtless that case related to the grant of special leave by the Supreme Court under Article 136, but the principles laid down therein would apply with equal force when the High Court has to deal with the question of granting a certificate under Article 134(1)(c).

There, their Lordships of the Supreme Court laid down the following principles: Unless it is shown that (i) exceptional and special circumstances exist, or (ii) substantial and grave injustice has been done or (iii) the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, leave will not be granted against the judgment of a High Court in a criminal proceeding. The same principle was reiterated in a subsequent decision of the Supreme Court reported in *Mohinder Singh v. The State* AIR 1953 SC 415 (D) in the following terms:

'The Supreme Court will not entertain a criminal appeal except in special and exceptional cases where it is manifest that, by a disregard of the forms of legal

process or by a violation of the principles of natural justice or otherwise, substantial and grave injustice has been done'.

In that particular case they entertained the appeal because the appellant was convicted notwithstanding the fact that the evidence was wanting on a most material part of the prosecution case.

5. In a very recent decision of the Supreme Court, in Criminal Appeal No. 44 of 1956 (E) which went up from this Court, their Lordships pointed out that the grant of leave under Article 134(1)(c) by a Bench of this Court (Panigrahi C. J., and P. V.B. Rao J.) was not in accordance with the principles laid down by the Supreme Court in the aforesaid decisions. I may quote the following observations:

'It has been repeatedly pointed out by this Court that where, as in the present case, appeal could not have lain as of right under Clauses (a) and (b) of Article 134(1) of the Constitution, a certificate under Clause (c) may be granted to meet extraordinary cases, that is to say, the High Court should apply its mind and indicate exactly what the difficulty in the case was and what exactly were the questions of outstanding difficulty or importance which, the High Court felt, should be settled by this Court.

In this connection the observations of this Court in the cases of Narsingh v. The State of U P. AIR 1954 SC 457 (F) and Baladin v. State of U. P. AIR 1956 SO 181 (G) are relevant. Now, from the certificate granted in this case it does not appear that the High Court has pointed out any questions of unusual difficulty or importance. The question which troubled it was whether the circumstantial evidence adduced in the case brought the charge home to the accused. Hence, it was a case on its own facts. As pointed out by this Court, doubts or difficulties about facts have to be resolved by the High Court itself.

If the High Court had any doubt about the facts or had difficulty about coming to the conclusion that the circumstances disclosed in the evidence, against the accused did not bring the charge home to him, its duty was to acquit. It must, therefore, be held that the certificate granted in this case does not satisfy the requirements of Article 134(1)(c) of the Constitution.'

In that case a sentence of death under Section 302, Penal Code, passed by a Sessions Judge was confirmed by a Division Bench (myself and Mohapatra J.) of this Court, and the conviction and sentence were based entirely on circumstantial evidence which that Bench thought was conclusive in establishing his guilt.

Another Bench which heard the leave application under Article 134(1)(c) thought that the circumstantial evidence was inconclusive and hence it granted leave. Their Lordships of the Supreme Court have clearly pointed out that leave should not be granted in such circumstances. They have further observed that they would examine the records to see whether there was failure of justice by reason of misapplication or omission to consider any established rule of law or of natural justice.

6. The following principles seem to be therefore well established:

1. A certificate under Article 134(1)(c) should not be granted against an affirming judgment unless special or exceptional circumstances are shown to exist in consequence of which substantial and grave injustice has been done, or the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.

2. Where, by a disregard of the forms of legal process or by a violation of the principles of natural justice or otherwise, substantial and grave injustice has been done, special circumstances will undoubtedly exist for the grant of a certificate.

3. Similarly, where questions of outstanding difficulty or importance arise which the High Court considers should be resolved by the Supreme Court, the certificate may be granted.

4. Merely because the Court which hears the leave application takes a different view of the facts from the Court which heard the original appeal a certificate should not be granted. It must be further shown that there was failure of justice by reason of misapplication or omission to consider any established rule of law or natural justice.

5. Even mere questions of law or principle should not suffice. The questions of law or principle should be of outstanding importance or difficulty so as to require to be decided by the Supreme Court.

7. I may now examine some of the decisions of the Orissa High Court on this question which were cited by Mr. S.C. Palit on behalf of the petitioner.

8. The earliest case is *Arjun Misra v. The Indian Union* AIR 1950 Orissa 235 (H) where a Division Bench of this Court, while reiterating the principles mentioned above regarding grant of leave in criminal matters, held that where the conviction of an accused was based on his retracted confession which had been found to be false by the Courts of fact in respect of other co-accused persons and which had not been put to him during his examination under Section 342, Criminal P. C., there was a disregard of the forms of legal process so vital to a criminal trial and that a certificate should be granted. The principles laid down in this decision do not in any way run counter to the principles enunciated by the Supreme Court in the various decisions cited above.

9. The next case cited by Mr. Palit was a Division Bench decision of this Court (Panigrahi C. J. and Mohapatra J.) reported in ILR (1954) Cut 537: (AIR 1954 Orissa 248) (A). The material facts of that case are as follows: One Maheshwar Dehuri was prosecuted under Section 224, Penal Code, in the Court of the First Class Magistrate, Baripada, who acquitted him and passed strictures on some Police Officers including Shri S.K. Ghosh, the Superintendent of Police, observing that they had instituted a false case against the said Maheshwar Dehuri and that they had ante-dated the F. I. R. in that case.

Government filed an appeal against the order of acquittal and the three Police Officers including Shri S.K. Ghosh, against whom strictures were passed by the Magistrate, also filed revision petitions before this Court for expunging the adverse remarks made against them, under Section 561-A, Criminal P. C. The Government Appeal and the revision petition were all heard together by a Bench of this Court (myself and Mohanty J.) and were dealt with in one judgment reported in *State v. Maheshwar Dehuri* ILR (1953) Cut 751 (I) (hereinafter referred to as the main judgment).

One of the important points urged by the Government Advocate during the hearing of that Government Appeal and also by counsel for the Police Officers was that though Sri S.K. Ghosh offered to give evidence before the trying Magistrate the latter declined to examine him and yet passed adverse remarks thereby condemning him without giving him an opportunity to explain his conduct.

Then, at the special request of the Government Advocate the High Court, as a Court of appeal, agreed to take additional evidence under Section 428, Criminal P. C., by permitting Shri S.K. Ghosh, to explain his conduct. His evidence was taken at the appellate stage and, after fully considering that evidence along with the evidence already recorded in the lower Court, the High Court came to the conclusion that the case against Maheshwar ' Dehuri was false and that a false F. I.R. was subsequently prepared at the instance of Shri S.K. Ghosh and was' ante-dated.

In coming to this conclusion that Court relied on the positive testimony of several Police Officers examined on behalf of the defence in that case. The Court attached great importance to the evidence of one Shri Nanda Gopal Banerji (D. W. 11) who was an Inspector of the C. I. D., unconnected with the general Police and who stated categorically that he wrote out the F. I. R. at the dictation of Shri Ghosh on a date subsequent to that shown in the F. I. R. itself.

In paras 15 and 16 of the main judgment at pp. 767 and 768 of ILR (1953) Cut 751 (I) the importance of the evidence of D. W. 11 was fully discussed. Having thus come to the conclusion that the case against Maheshwar Dehuri was false, that Court proceeded to examine what could possibly have been the motive for such a senior officer as a Superintendent of Police to concoct a false case. Several alternative theories suggested themselves.

But after examining these the Court held that whatever might have been the motive there was ample evidence on record to show that the contents of the F. I. R. were untrue and that it was ante-dated. Then the Court proceeded to consider the question as to whether the adverse remarks made by the Magistrate should be expunged.

It is true that so far as the remarks against Shri Ghosh were concerned the Magistrate's conduct was vulnerable because Shri Ghosh was not given an opportunity to explain his conduct, but that opportunity was given at the appellate stage and when the Court of appeal, after reviewing the entire evidence, was satisfied that the finding of the Magistrate was correct, it thought that in exercise of its discretionary powers it should not expunge those remarks.

10. Mr. S.K. Ghosh filed an application for grant of a certificate, for leave to appeal to the Supreme Court, under Article 134(1)(c) of the Constitution against the judgment of the High Court declining to expunge the adverse remarks passed against him by the Magistrate. Bearing in mind the principles laid down by the Supreme Court regarding grant of leave, it seems fairly clear that there was no ground for granting a certificate under Article 134(1)(c). The case presented no unusual difficulty, nor did it involve any important question of law.

The main question was a question of fact, namely whether the F. I. R, against Maheshwar Dehuri Contained an untrue statement of facts and whether it was ante-dated. The answer to this question depended upon the belief or otherwise of two sets of witnesses, one examined on the side of the prosecution and the other on his side of the defence. Mere belief or otherwise of one set of witnesses can hardly be said to raise any important question of law which required to be decided by the Supreme Court. Nor can it be said that any principle of natural justice was violated.

It is true that so far as the Magistrate's judgment was concerned there was some defect inasmuch as Shri Ghosh was condemned even though his offer to give evidence to explain his conduct was rejected. But this defect was cured in the appellate stage at the special request of the appellant's counsel and Shri Ghosh was given ample opportunity to explain his conduct in connection with the investigation of that case. The appellate Court's finding on facts was based not only on the evidence recorded by the trying Magistrate, but also on the additional evidence given by Shri Ghosh in the appellate stage.

11. The leave application was disposed of by a Bench of this Court consisting of Panigrahi C. J. and Mohapatra J., and the leading judgment was written by

Panigrahi C. J. He seems to have thought that the judgment of the High Court, on appeal, was distinct from the judgment of that Court in revision and that the evidence recorded by the appellate Court and the findings of the appellate Court on the facts of the case should not be taken into consideration at all in disposing of an application under Section 561-A, Criminal P. C., which, according to him, should be limited to the evidence available before the trying Magistrate.

Having thus made a distinction between the two portions of the same judgment of the High Court, the learned Judge observed that the Magistrate's adverse comments against Shri Ghosh were made without giving him an opportunity to explain his conduct, and thus the principles of natural justice were violated. He also observed that the High Court in declining to expunge the remarks relied on evidence 'improperly admitted' -- apparently referring to the additional evidence given by Shri Ghosh at the appellate stage. He further commented on some observations in the main Judgment regarding the discussion as to what could possibly have been the motive for such a senior officer as a Superintendent of Police to concoct a false case.

From that discussion he drew the conclusion that on 'idle surmises about the motive' the Court had damaged the reputation of a responsible Officer 'by drawing inferences from facts which have no legs to stand upon.' He therefore formulated the following three questions of law:

'(i) Whether a Court acts within its jurisdiction in making remarks which adversely affect the status, prestige, and official position of a person who is not given an opportunity to explain.

(ii) Whether the remarks made by the Magistrate in the concluding paragraph of his judgment were necessary for the decision of the case before him, and whether in any event they can be justified if the evidence, on which they were based is found to be irrelevant.

(iii) Whether the jurisdiction of the High Court, under Section 561-A, Criminal P. C. is not limited to a consideration of the evidence already recorded by the lower Court, or whether it is open to the High Court to take additional evidence into

consideration and, on the strength of such evidence, refuse to exercise its jurisdiction under Section 561-A.' The learned Judge thought that these questions were of considerable public importance and therefore directed that leave should be granted. Mohapatra J., while agreeing that the aforesaid three questions of law formulated by Panigrahi C. J., would justify grant of leave under Article 134(1)(c), did not express either concurrence or dissent from the other observations contained in the judgment of Panigrahi C. J., while criticising the main judgment.

12. With great respect, I must point out that the observations of Panigrahi C. J., on the main judgment and the three questions of law formulated by him are all based on a failure to read the main judgment carefully. There was only one judgment of the High Court which covered both the Government Appeal and the application of Shri Ghosh under Section 561-A, Criminal P. C.

Any attempt to divide the judgment into two parts and to say that though, as an appellate Court, the High Court may take additional evidence it cannot, while sitting as a Court of Revision and disposing of an application under Section 561-A, Criminal P. C., take into consideration that additional evidence, will be highly artificial and not warranted by law.

Under Section 439 (1), Criminal P. C. a Court of Revision has all the powers of an appellate Court including the power to take additional evidence under Section 428, Criminal P. C. Whatever might have been the irregularity committed by the trying Magistrate in passing adverse remarks against a Government servant without giving him an opportunity to explain his conduct, that irregularity had been fully cured in the appellate stage; and if the appellate Court who was in seisin of the entire case came to an independent finding, agreeing with the trying Magistrate on the facts, how can the same appellate Court, sitting as a Court of Revision, exercise its discretionary powers of expunging the adverse remarks? This was made clear in para 30 of the main judgment.

It was against the main judgment of this Court that leave was asked for and not against the judgment of the trying Magistrate. Hence question (i) as formulated by Panigrahi C. J., did not really arise in the case.

13. Similarly question (ii) also is based on a misconception. There was no irrelevant evidence either before the trial Court or before the appellate Court, The entire evidence related to the main question as to whether the F.I.R. contained an untrue statement of facts and about the date on which it was actually drawn up, both of which were very relevant and material for the purpose of the case.

14. Question (iii) is somewhat ambiguous inasmuch as it seems to convey, the idea that the additional evidence was taken 'by the High Court in an application under Section 561-A, Criminal P. C.

As already pointed out, that evidence was taken by the High Court under Section 428, Criminal P. C.

15. I have further to point out, with great respect, that such remarks as 'Shri S.K. Ghosh has been made a victim of judicial lynching' and 'the petitioner has been subjected unfortunately to a process of judicial injustice by both the Courts, by the admission of improper evidence and the failure of the Courts to justly appraise it' are not made by Judges of a High Court while commenting on the judgment of another Bench of equal jurisdiction and they further indicate that in considering the leave application Panigrahi C. J., thought that he could sit, as it were, as an appellate Court, over the main judgment and criticise its findings on facts.

Similarly, his observation that in the main judgment the reputation of a responsible officer was damaged by 'surmises' and by drawing 'inferences from facts which have no legs to stand upon are not only based on his failure to appreciate the limitations of a Court hearing a leave application, but also show that he overlooked the fact that though, as regards the motive, there were discussions about various alternative theories, in the main judgment, as regards the facts of the case the findings were based on positive testimony of eye-witnesses. This unfortunate omission to distinguish between the two aspects appears to have very much coloured the judgment of Panigrahi C. J.

If his object was to re-examine the evidence bearing on the conduct of Shri S.K. Ghosh, he would surely have discussed the evidence of several defence witnesses, including D. W. 11 whose evidence was given great importance in the

main judgment.

16. In view of the repeated, observations of the Supreme Court referred to in the previous paragraphs it must be held that the observations in the Division Bench decision of this Court, in ILR (1954) Cut 537: (AIR 1954 Orissa 248) (A), do not lay down any principle. On the other hand those observations were (speaking with great respect) uncalled for and made without jurisdiction.

In a leave application the High Court is concerned solely with the question as to whether, on the judgment of the High Court, any important question of law or principle arises. It cannot reassess the evidence, come to its own conclusion different from' that of the first Court, and then grant leave to appeal on the ground that the findings were not justified by the evidence on record.

17. I am fully conscious that a Division Bench of this Court cannot overrule an earlier decision of another Division Bench of the same Court. But where the decision of the previous Bench was not based on complete unanimity between the two Judges who constituted that Bench and the concurrence of one of the Judges was expressly limited to the questions of law formulated in the main judgment of his learned brother, it is obvious that the observations made by the other Judge in respect of other matters have not the binding force of a Division Bench decision.

It will accordingly be open to a later Division Bench to examine whether those observations were made without jurisdiction and whether they lay down any principles for the guidance-of Courts, in considering an application for leave under Article 134(1)(c). Moreover, even a Division Bench decision of the Court may have to be ignored if it is subsequently found that it was based on a failure to take into consideration the principles laid down by the Supreme Court.

I should further add that the necessity for commenting on ILR (1954) Cut 537: (AIR 1954 Orissa 248) (A), would not have arisen but for the fact that it was reported in the Official Law Report thereby creating an impression that the learned Judges who constituted that Bench--or at any rate one of them--thought that that judgment laid down principles of importance for the guidance of the Courts.

Moreover, that decision was relied on by Mr. Palit in support of his contention that leave should be granted in the present case, and we could not therefore, help examining the same, It is certainly note a pleasant task to criticise the judgment of my predecessor, and I would have gladly avoided the same if possible.

18. Coming to the present case, I do not think leave can be granted. The question is simply a question of fact depending on the belief or otherwise of the victim of the torture, namely, Dasarathi Dube (P. W. 9) and the eye-witness Arjun Ganda. Mr. Palit however urged that the unusual delay in lodging the P. I. R., the disbelief of a portion of the story of Dasarathi Dube as an exaggeration, and other adverse comments made against the prosecution case by the trial Court and the Court of appeal, would justify the grant of a certificate.

In my opinion, these are questions of fact to be considered by a regular Court of appeal, and once they have been considered and due weight given to them a certificate under Article 134(1)(c) cannot be granted for re-agitating the same before the Supreme Court.

19. I would therefore reject this application.

20. DAS J.:-- I entirely agree with my Lord.I have nothing more to say except that I am somewhat surprised at the language used in a case of this Court reported in 'ILR (1954) Cut 537: (AIR1954 Orissa 248) (A)', which appears to me not to be strictly judicial at more places than one.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com