

Atma Ram Vs. State

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Court : Delhi

Decided On : Mar-24-1977

Reported in : ILR1977Delhi718

Judge : Prithvi Raj, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 360

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 25 of 1977 and Criminal Revision Appeal No. 87 of 1974

Appellant : Atma Ram

Respondent : State

Advocate for Pet/Ap. : D.R. Sethi and; H.R. Bhardwaj, Advs

Judgement :

Prithvi Raj, J.

(1) By this application the petitioner has prayed that judgment dated August 4, 1976 be reviewed in that the provisions of Section 360(1) of the Code of Criminal Procedure, 1973 (hereinafter called the 'new Code') were not taken into consideration in coming to the conclusion whether it was a fit case where the relief envisaged by the aforesaid section should be granted to the petitioner or not.

(2) Shri D. R. Sethi, the learned counsel appearing for the petitioner strenuously contended that before sentencing the petitioner to imprisonment it was obligatory on the court to consider whether the petitioner was entitled to the grant of benefit of Section 360(1) of the new Code and this having not been done, the sentence awarded to the petitioner stood vitiated.

(3) Shri H. R. Bhardwaj, the learned counsel appearing for the State urged that the aforesaid provisions of law were not attracted in the instant case, in that, the occurrence took place on 21st April, 1970, the trial court convicted the petitioner by its order dated 31st July, 1973, the appeal was dismissed by the learned Additional Sessions Judge, Delhi (Shri M. K. Chawla) on 28th February, 1974, i.e. prior to the enforcement of the new Code. The provisions of the new Code, it was alleged, were not applicable in the instant case. The precise argument was that the Revision Petition having been filed on 6th March, 1974, namely, immediately before the date on which the new Code came into force the petition was to be disposed of in accordance with the provisions of the Code of Criminal Procedure, 1898 (to be called the 'old Code'). There being no provisions in the old Code analogous to the provisions of Section 360 and 361 of the new Code, goes the argument, the application is without merit and deserves to be rejected.

(4) Shri Sethi, the learned counsel for the petitioner, strenuously contended that the petitioner's case was covered by the ratio of the decision of their Lordships of the Supreme Court in the case Rattan Lal vs. The State of Punjab, Air 1963 SC 444 and that the petitioner was entitled to the benefit of the provisions of Section 360 of the new Code. In that case the appellant who was a resident of Palwal in Gurgaon District was convicted on 21-5-1962 under section 351 and 354 Indian Penal Code . and sentenced to 6 months' rigorous imprisonment under each count. In addition a fine of Rs. 200.00 was imposed on him under section 451 Indian Penal Code . in default of payment of fine to undergo rigorous imprisonment for two months. The appellant was 16 years old at the time of his conviction. The Probation of Offenders Act, 1958 was extended to Gurgaon District on 1-9-1962. At the time the appellant was convicted by the Magistrate, the Magistrate had no power or duty 'to make an order under the Act. The appellant challenged his conviction and sentence in appeal before the Sessions Judge. An Additional

Sessions Judge, Gurgaon by his judgment dated 22-9-1962 dismissed the appeal. Though by the time the appeal was disposed of the Probation of Offenders Act had come into force, neither the appellant relied upon the provisions of the Act nor the learned Additional Sessions Judge exercised his powers there under. The appellant filed a revision petition in the High Court but remained unsuccessful, in that the revision petition was dismissed in liming on 27-9-1962. In the revision petition no ground was taken that the Additional Sessions Judge should have acted under section 6 of the Probation of Offenders Act, and release the petitioner on probation of good conduct. After the revision petition was dismissed the appellant filed criminal miscellaneous petition requesting the High Court to exercise its Jurisdiction under section 11 of the Probation of Offenders Act and pass appropriate orders under section 6 of the Act. The said application was also dismissed. The appellant preferred the appeal to the Supreme Court by obtaining special leave.

(5) On behalf of the State it was urged that the Act was not retrospective in operation and, therefore, it would not apply to the appellant as he was convicted before it came into force in Gurgaon District. The precise argument was that the jurisdiction of the High Court under section 11(3) of the Act was confined only to a case that had been brought to its file by appeal or revision and, therefore, it could only exercise such jurisdiction as the trial court had and that since in that case the trial court could not have made any order under section 6 of the Act, as at the time it made the order the Act had not been extended to Gurgaon District. On that assumption it was urged that the Act should not be given retrospective operation, as if so given, it would effect the criminal liability of a person for an act committed by him before the Act came into operation.

(6) Their Lordships on examining the provisions of the Act and in particular of sub-section (1) of Section 11 of the Act held that the Act was a post facto law and has retrospective operation. Noticing the provisions of sub-section (1) of Section 11 of the Act whereunder an order under the Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision, It was observed that the sub-section ex facie did not circumscribe the jurisdiction of an

appellate court to make an order under the Act only in a case where the trial court could have made that order. It was further observed that the phraseology used therein is wide enough to enable the appellate court or the High Court when the case comes before it to make such an order. The court held that when section 11(1) says that an appellate court or a revisional court could make an order under the Act, it means it can make an order also under section 6(1) of the Act. If so, it was held, 'court' in section 6(1) would include in appellate court as well as a revisional court and that if an appellate court or revisional court finds a person guilty under that section it shall not sentence him to imprisonment unless the conditions laid down in that section are satisfied. In the premises it was held that the High Court for the first time could make such an order under section 11 of the Act.

(7) The ratio of the above case which proceeded on its own facts, is not applicable to the instant case.

(8) The question whether a law is retrospective and if so, to what extent depends upon the inter-pretation of a particular statute having regard to the well settled rules of construction. So interpreted the provisions of section 360 of the new Code cannot be said to operate retrospectively and made applicable to cases tried under the old Code. The language of section 360 does not permit such an interpretation being placed on it, in view of the provisions of sub-section 2(a) of Section 484 of the Code.

(9) It was next contended that the sentence passed against the petitioner by the trial court, confirmed in appeal and revision, under the old Code being in force immediately before the commencement of the new Code shall be deemed to have been passed under 'the corresponding provisions of the new Code as envisaged by sub-section 2(b) of section 484. That being so, sentence could not be passed without considering the question whether it was expedient to release the petitioner on probation of good conduct as stipulated by section 360 of the new Code. In case it was considered that it was not expedient to do so, special reasons should be recorded in the judgment for not having done so, as prescribed in section 361 of the new Code. Reliance for this submission was placed on case Mr. Boucher

Pierre Andre vs . Superintendent, Central Jail Tihar, New Delhi and another, : 1975 CriLJ182 . In that case the petitioner was convicted by an Additional Sessions Judge, Delhi on 16-7-1973 for an offence under section 380 of the Indian Penal Code and was sentenced to four years rigorous imprisonment and a fine of Rs. 10,000 in default to further undergo rigorous imprisonment for one year. He remained unsuccessful in his appeal before the High Court. However, his substantive sentence was reduced to 2 years' rigorous imprisonment but fine was enhanced to Rs. 15,000 in default to undergo one year's rigorous imprisonment. He was continuing under detention from 10-11-1971 during the investigation, enquiry and 'trial. He contended that period between 10-11-1971 to 16-7-1973 was liable to be set off against the term of imprisonment. His writ petition seeking the said relief was rejected by the High Court.

(10) In appeal the Supreme Court held that section 428 on a plain natural construction of its language posits turn its applicability a factual situation which is described by the clause 'where an accused person has, on conviction, been sentenced to imprisonment or a term,' and that there is nothing in this clause which suggests either expressly or by necessary implication that the conviction and sentence must be after the coming into force of the new Code. Accordingly it was held that the clause merely indicates a factual situation which must exist in order to attract the applicability of the section and this factual situation would be satisfied equally whether an accused person had been convicted and sentenced before or after the coming into force of the new Code. It was further held that even where an accused person had been convicted prior to the coming into force of the new Code but his sentence was still running, it would not be inappropriate to say that 'the accused person has, on conviction, been sentenced to imprisonment for a term' and that section 428 would apply. It was in that context that it was observed that the sentence of imprisonment and fine passed against the petitioner under the provisions of the old Code must be deemed to have been passed under the provisions of the new Code as where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. In the premises it was observed that it must be imagined that the sentence imposed upon the petitioner was as one imposed under the new Code and then give effect to all the consequences and incidalsises a situation where the term of sentence is going on

and it was for this reason that it was held that the provisions of section 428 could not apply to sentences which would inevitably flow from or accompany a sentence imposed under the new Code. It would be seen that the question under consideration was as to what was the correct import of section 428, which was invoked by a miscellaneous application at any time while the sentence runs for passing appropriate order for reducing the term of imprisonment.

(11) Case *Suraj Bhan vs. Om Parkash and another*, 1976 U.R.J. SC 210 relied upon by the learned counsel for the petitioner re-enforced the view taken in case *Boucher Pierre Andre (supra)*, and does not support the contention sought to be urged on behalf of the petitioner. The reliance placed by the petitioner on case *Santa Singh vs. State of Punjab*, Air 1976 S C 2386, wherein it was held that when no opportunity had been given to an accused person to produce the material and make submission in regard to the sentence to be imposed on him is equally of no help to sustain the contention urged on his behalf.

(12) In *State of Karnataka vs. K. H. Annegowda and another*, : 1977 CriLJ220 , it was held that where a trial was pending immediately before the commencement of the new Code it shall be proceeded with in accordance with the provisions of the old Code as if the new Code were not in force. The petitioner having been tried in accordance with the procedure envisaged by the old Code the question of considering the case of the petitioner on the question of sentence in the light of the provisions of section 360 of the new Code does not arise. In this view of the matter the authorities relied upon by the learned counsel for the petitioner to contend that the provisions envisaged by section 360 of the new Code are mandatory and not directory need not be considered.

(13) For the reasons stated above the application fails and is hereby dismissed.