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Court : Delhi

Decided On : Feb-25-1995

Reported in : 1995CriLJ3741

Judge : S.D. Pandit, J.

Acts : Indian Penal Code (IPC) - Sections 34, 379 and 411; Code of Criminal Procedure (CrPC) - Sections 360, 375 and 377

Appeal No. : Crl. Rev. No. 251/1980

Appellant : Suresh Alias Suresh Chand

Respondent : State

Advocate for Def. : N.K. Handa, Adv.

Advocate for Pet/Ap. : K.K. Sud and; Ms. Kamna Vohra, Advs

Judgement :

S.D. Pandit, J.

1. The present revision application is preferred by Suresh Chand, original accused No. 2 in FIR No. 33/76 registered by the police of Narela Police Station for the offences punishable under Sections 379/411 read with Section 34 of Indian Penal Code.

2. PW-2 Surinder Kumar and PW-3 Madan Lal were students of M. L. Higher Secondary School, Narela. They had parked their cycles under school cycle stand on 18th February 1976 in the morning when they went to their school. In the evening they found that both the cycles were missing from the cycle stand. They, thereforee, first approached the principal of the school and lodged a complaint about the missing of their cycles and there after they approached the police and lodged complaint regarding the theft of their cycles. On the strength of their complaint, offence was registered vide FIR No. 33/76 on 25-2-1976 and the present revision applicant as well as one Sahib Singh were arrested by the police. The police were in a position to recover both the cycles at the instance of both the accused which were sold by them. On the completion of necessary investigation both the accused i.e. the present revision applicant and Sahib Singh were challenged and case No. 36/2 was registered in the Court of Metropolitan Magistrate, Delhi.

3. A charge was framed against the present revision applicant and co-accused Sahib Singh for the offence punishable under Section 379, I.P.C. Accused had pleaded not guilty to the charge and their defense was of total denial and false implication.

4. In order to prove its case the prosecution examined in all 12 witnesses including the owner of cycles PW-2 Surinder Kumar and PW-3 Madan Lal and the shop keeper from whom they purchased the cycles. The trial Court accepted the evidence of the owners of the cycle as well as the police officers regarding the discovery of the cycle at the instance of the present appellant, though the independent witnesses had turned hostile, and held the revision applicant and his co-accused guilty of the offence punishable under Section 411, I.P.C. by judgment dated 18-2-1980 and sentenced each to suffer R.I. for one year and to pay a fine of Rs. 300/- in default to suffer R.I. for one month by order dated 22-2-1980.

5. Being felt aggrieved by the said decision the original accused had preferred criminal appeal No. 9/80 and 15/80 in the Sessions Court. The learned Additional Sessions Judge by Judgment dated 2-8-1980 came to the conclusion that there was sufficient evidence to uphold the conviction of the appellants. He, thereforee,

maintained the order of conviction. However, he set aside the order of sentence by holding that the learned Metropolitan Magistrate had not considered the provisions of Sections 4 and 5 of Probation of Offenders Act, 1958, hereinafter referred to as the said Act. He thereforee, directed the learned Metropolitan Magistrate to call the report of the Probation Officer and also to consider the provisions of the Act and Section 360, Cr.P.C. and he thus disposed of both the appeals.

6. It seems that thereafter the learned Metropolitan Magistrate called for the report of the Probation Officer and even after getting the report of the Probation Officer the learned Metropolitan Magistrate came to the conclusion that the present revision applicant was not entitled to get benefits of the provisions of Section 360, Cr. P.C. as well as the Act. He, thereforee, by his judgment and order dated 30-8-80 sentenced the present revision applicant as well as the other accused to suffer RI for one year and to pay a fine of Rs. 300/- in default to suffer RI for a month more.

7. The present revision application is presented on 11-9-1980 against the order of the learned Additional Sessions Judge dated 2-8-1980 as well as against the order of Metropolitan Magistrate dated 30-8-1980. The original accused No. 1 Sahib Singh has not preferred any appeal or revision application against the order passed against him.

8. It is urged before me by the learned advocate for the appellant Shri K. K. Sud that the order of Additional Sessions Judge passed on 2-8-1980 of confirming the order of conviction and setting aside the order of sentence and remanding the matter to the trial Court is illegal and invalid. He further contended that as the said order passed by the Additional Sessions Judge is illegal and invalid, the subsequent order passed by the Metropolitan Ministration 30-8-1980 is also illegal and invalid. He, thereforee, urged that the present revision application must be allowed.

9. As against Shri N. K. Handa, learned standing Counsel for the State contended that the present revision application is not maintainable, as according to him, the revision applicant ought to have preferred an appeal against the order dated 30-8-1980 passed by the learned Metropolitan Magistrate after the matter was

remanded by the learned Additional Sessions Judge.

10. The important legal question which is involved in this revision application is regarding the validity and legality of the order passed by the Additional Sessions Judge in Crl. Appeal No. 15/80 which was preferred by the present revision applicant on 22-2-1980. Crl. Appeal No. 15/80 was heard along with Crl. Appeal No. 9/80 preferred by original accused No. 1 in that criminal case bearing S. No. 36/2 in FIR No. 33/76 of Police Station Narela. The learned Additional Sessions Judge after hearing the Advocate for both side and considering the evidence on record came to the conclusion that the trial Court was quite justified in holding the appellants Sahib Singh and Suresh Chand guilty of the offence punishable under Section 411, I.P.C. and he ended with para No. 5 by making the following observations :

'The finding of the trial Court finding the accused guilty is confirmed.'

In para No. 6, which is the concluding para of his judgment, the learned Additional Sessions Judge has made the following observations :

'As regards the question of sentence, the trial Court has failed to give the reason as to why it has not granted the benefit of Section 360, Cr.P.C. Report of the Probation Officer has not been called. I find force in this contention of the learned counsel for the appellant. So I set aside the order and sentence of the trial Court and accept the appeal to this extent only and remand the case back to the trial Court for compliance of provisions of Sec. 360, Cr.P.C. and Probation of Offenders Act, 1958. Appellants are directed to appear before the trial Court on 8-8-80. Lower Court record be sent back. This file be consigned to the record room.'

11. thereforee, I have to see as to whether the provisions of Code of Criminal Procedure permit the Additional Sessions Judge to partly confirm the order of the Metropolitan Magistrate and partly set aside the order of learned Metropolitan Magistrate. If the provisions of Code of Criminal Procedure are considered then it will be quite clear that if an accused is convicted he is to prefer an appeal against the order of conviction and sentence. Only in those cases covered by Sections 375 and 377, Cr.P.C. an appeal against the order of sentence could be preferred.

Section 375, Cr.P.C. provides that where an accused person who has pleaded guilty and has been convicted on such plea can prefer an appeal only to the extent or legality of the sentence. Section 377, Cr.P.C. empowers the State Government to prefer an appeal to the High Court against the sentence on the ground of inadequacy of the sentence.

12. The case of the revision applicant does not fall within the purview of either Section 375 or Section 377, Cr.P.C.

13. In the case of Pratul Chaudhary v. State, 1978 CLR 98, a learned Single Judge of this High Court had dealt with a similar case and it has been held that a Sessions Judge i.e. the appellate Court has not power of remission except for the purpose of retrial and a remand for the purpose of hearing the accused on the question of sentence is not within the jurisdiction of a Sessions Court. Once the appeal is admitted, the Sessions Court has to decide the appeal as a whole and has to confirm or set aside the order of conviction as well as sentence simultaneously. It is not open for the Sessions Judge to confirm only the order of conviction and set aside the order of sentence and to remand the matter to the trial Court. It must be remembered that in a criminal case the only and real issue is as to whether the accused is guilty of the offence with which is choosed. Once he is found guilty the sentence must follow. Order of sentence is not distinct and separate issue. Criminal case is not like a civil case. In civil case number of issue are arising. Hence in civil appeal it is open to Appellate Court to confirm finding on some issue and remand the suit to trial Court to reconsider or consider other issues involving in that civil case. But in civil Appeal there could not be remand to consider the issue on question of costs of civil case. Similarly in criminal appeals there could not be remand of case to trial Court for consideration question of sentence.

14. The learned Additional Sessions Judge has not taken into consideration the provisions of Section 11, of the said Act. The said Section 11 runs as under :

11. Courts competent to make order under the Act, appeal and revision and powers of Courts in appeal and revision - (1) Notwithstanding anything contained in the Code or any other law, an order under this 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.

(2) Notwithstanding anything contained in the Code, where an order under Section 3 or Section 4, is made by any Court trying the offender (other than a High Court) an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the Court by which he is found guilty declines to deal with him under Section 3, or Section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the Court to which appeals ordinarily lie from the sentences of the former Court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under Section 3, or Section 4, in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law : Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was found guilty.'

If the above provisions of sub-section (1) of Section 11, are considered then it would be quite clear that an order under the provisions of the Act could be made by the appellate Court as well as revisional Court. thereforee, if the learned Additional Sessions Judge had felt that the report of the Probation Officer ought to have been called and considered by the trial Court, then he ought to have called the said report himself and then dispose of the appeal by passing the necessary order in respect of the sentence along with the order of confirming the conviction.

15. Thus it would be quite clear that the order passed by the learned Additional Sessions Judge by maintaining the order of conviction and setting aside the order

of sentence and remanding the matter to the trial Court only to consider the question of sentence is illegal. The said order is not supported by any provisions of law. It is open for an appellate Court to remand the matter to the trial Court for re-trial as a whole but it is not open for an appellate Court to only remand the matter to the trial Court for the purpose of considering the question of sentence because the Code of Criminal Procedure does not provide any right of appeal except the cases covered by Sections 375 and 377 to a person. By such an improper and illegal order of remanding the matter to the trial Court only to consider the question of sentence would be depriving the fundamental right of an accused person to prefer an appeal against the order of sentence. Thus, I hold that the order of Additional Sessions Judge passed by him on 2-8-1980 is illegal and invalid and the consequential order passed by the learned Metropolitan Magistrate on the strength of the said order of Additional Sessions Judge passed on 2-8-80 is also illegal and invalid.

16. Admittedly, the appellant was 19 years old at the time of the trial as well as the commission of offence and, thereforee, in view of provisions of Section 6 of the said Act it was incumbent upon the learned Metropolitan Magistrate to call the report of the Probation Officer and then to consider the question as to whether the revision applicant was to be given the benefit of the provisions of the Act or not. The said section also clearly lays down that when the person was under 21 years of age and was found guilty of having committed an offence punishable with imprisonment other than imprisonment for life, the Court must record its reasoning for not giving him the benefits under Sections 3 and 4, of the Act. But the said provisions are not followed by Metropolitan Magistrate.

17. If the order of the learned Metropolitan Magistrate passed by him on 30-8-80 is seen then it would be quite clear that the order passed by him is not at all proper and correct. If the provisions of Section 360, Cr.P.C. as well as the provisions of the said Act are taken into consideration then it would be quite clear that a person who is found guilty of the offence punishable for imprisonment happen to be below the age of 21, must be given opportunity to make improvement in his life by giving him the benefits of the provisions of the Act. Such a young offender is not to be sent to jail in order to convert him into a hardened criminal by putting him in the

company of other hardened criminals in the jail. If the report of the Probation Officer justifies giving him the benefit of the said Act then a heavy burden lies on the Magistrate to show as to how the report of the Probation Officer is not justified and what are the special circumstances or reasons for not giving the benefit of the Act to such an offender. If the reasoning given by the learned Metropolitan Magistrate in his order dated 30-8-80 is considered, then it would be quite clear that there are no justifiable grounds or reasons for not giving the benefits of provisions of the Act to the present revision applicant. In the case of Daulat Ram versus State of Haryana : 1972 CriLJ1517 the Apex Court has laid down the following principles :

'The object of Section 6, is to see that young offenders are not sent to jail for the commission of less serious offences, because of grave risk to their attitude to life to which they are likely to be exposed as a result of their close association with the hardened and habitual criminals who may happen to be the inmates of the jail. Their stay in jail might well attract them towards a life of crime instead of reforming them. This would clearly do them more harm than good, and would perhaps also be prejudicial to the larger interests of the society as a whole. It is for this reason that the mandatory injunction against imposition of sentence of imprisonment has been embodied in Section 6.'

18. Even before that the Apex Court had considered the provisions of the Act in the case of Ramji Missazr v. State of Bihar, : AIR 1963 SC1088 and has clearly laid down that it is incumbent on the Court to give reasons for passing a sentence of imprisonment on such offender. It has been observed by the apex Court in that case that the object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of the mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment of their crime. That object would make it clear that the question of the age of the person is relevant not for the purpose of determing his guilt but only for the purpose of punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. In the said case it has been also observed by the Apex Court that the Court exercising the appellate jurisdiction can exercise the powers under Section 6, by

reading the beneficial provisions of the said Act. I have, thereforee, to observe that the learned Metropolitan Magistrate was not justified at all initially in not calling the report from the Probation Officer in view of the fact that the revision applicant was less than 21 years at the time of the commission of offence as well as trial and then to reject the recommendation of the Probation Officer without giving valid reasons for refusing to accept the same.

19. Thus the position which now remains is that the original order passed by the Additional Sessions Judge on 2-8-80 of partly confirming the order of Metropolitan Magistrate and partly setting aside the order of the Metropolitan Magistrate and remanding the matter to Metropolitan Magistrate is illegal and invalid. As the record and proceedings are before this Court and the fact that the commission of offence had taken place 18 years ago and even the order of conviction of sentence is passed 14 years ago I hold that it is not necessary to send back the record and proceedings to the learned Additional Sessions Judge to pass the necessary order in place of the order passed by him on 2-8-80. The order passed by the Additional Sessions Judge in that Crl. Appeal No. 15/80 on 2-8-1980 could be corrected by this Court by exercising revisional jurisdiction.

20. From the material on record there is no doubt that the learned Metropolitan Magistrate as well as the learned Additional Sessions Judge were quite justified in coming to the conclusion that the present revision applicant was found in possession of the said stolen cycle and, thereforee, they were quite justified in holding him guilty of the offence punishable under Sec. 411, I.P.C. It could not be said that the finding of the learned trial Court as well as Additional Sessions Judge is without any evidence on record or that the said finding is perverse. The material on record further shows that the revision applicant was less than 21 years of age at the time of the commission of offence as well as the trial. The report of the Probation Officer also clearly shows that the revision applicant deserves the benefit of the said Act. But as stated earlier, more than 14 years have passed since the decision of the learned Additional Sessions Judge, thereforee, in these circumstances, it would not be proper and just to bound down the said revision applicant after about 18 years of commission of offence by him particularly in view of the fact that there is nothing on record to show that he has misbehaved at any

time after the commission of the said offence. thereforee, in these circumstances, I hold that the revision applicant deserves to be released on due admonition under Sec. 3, of the said Act read with Sec. 360, Cr.P.C. But at this stage Shri Sood learned Advocate for the applicant submits before me that the revision applicant has been employed at far off place and it would be financially difficult for him to come before this Court. Hence this Court should award the sentence of the period of imprisonment already undergone.

21. Thus, I hold that the present revision application is allowed. The order passed by the learned Additional Sessions Judge in Cr. A. No. 15/80 is set aside and in its place the following order is passed :

22. The order of conviction passed against Revision applicant by the learned Metropolitan Magistrate in case No. 36/2 in FIR No. 36/76 of Nrela Police Station for the offence punishable under Sec. 411, I.P.C. is confirmed. However, the order of sentence passed by the learned Metropolitan Magistrate against the revision applicant Suresh Chand is set aside and he is sentenced to imprisonment of period already undergone by him of period of detention before trial and period of sentence.

23. In view of setting aside the order of the learned Additional Sessions Judge passed on 2-8-1980 the consequential order passed by the learned Metropolitan Magistrate against the present revision applicant on 30-8-80 is also set aside.

24. Revision dismissed.

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