

Mohammed Vs. State of Kerala

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Court : Kerala

Decided On : Oct-28-1981

Reported in : 1982CriLJ1120

Judge : V. Khalid, J.

Appellant : Mohammed

Respondent : State of Kerala

Judgement :
ORDER

V. Khalid, J.

1. The revision petitioner was the first accused in C. C. No. 422 of 1978 on the file of the Chief Judicial Magistrate, Ernakulam. There were three other accused also. Charge-sheet was filed against all of them alleging commission of offences punishable Under Sections 454, 380 and 34, IPC The petitioner was arrested on 14-9-1978, and since his arrest he was in judicial custody. The case was posted to 12-10-1978. On that day the accused were taken to Court. The petitioner and his co-accused pleaded guilty to the charge. On this plea, the trial Court ordered the revision petitioner to be detained in Borstal School, Cannanore, for a period of three years by its judgment dated 9-11-1978 stating that the report of the Probation Officer was not in his favour. Under a mistaken impression that no appeal lay against this order, the petitioner filed Cr, R. P. No. 510 of 1979 before

this Court, along with Cri. M. P. No. 1582 of 1979, to condone the delay. It was later realised that a regular appeal would lie since this Court had held so in 1978 Ker LT 779 : 1980 Cri LJ NOC 39. this Court by its order dated 18-12-1979 directed the revision petition to be returned for presentation before the proper Court. The revision was thereafter represented as an appeal before the Sessions Court, Ernakulam, on 19-12-1979 and it was numbered as Criminal Appeal No. 145 of 1979. The learned Sessions Judge dismissed the application to condone the delay and consequently dismissed the appeal as barred by limitation by his judgment dated 22-12-1979. It is against the orders dismissing the the appeal and dismissing the application to condone delay that this revision is filed.

2. When the revision came up for hearing, I felt a doubt whether the revision at the instance of the petitioner was entertainable because of the bar contained in Section 401(4) Cr.P.C. The learned Counsel for the petitioner, Mr. Mooppan, made a valiant attempt to relieve me of my doubt with reference to the following authorities :

3. In State of Kerala v. N. Damodaran 1974 Ker LT 281 : 1974 Cri LJ 1107 a Division Bench of this Court had to consider the maintainability of a revision under the following circumstances. In a prosecution Under Section 7(1) and Section 16(1) of the Prevention of Food Adulteration Act, 1954, against two accused persons, one was let off Under Section 3 of the probation of Offenders Act after admonition and the other Under Section 4 of the Act. No appeal was filed against the said orders by the State. An appeal could be filed Under Section 11(2) of the Probation of Offenders Act. The case came before this Court in revision at the instance of the State. An objection was taken against the maintainability of the revision in so far as the State in not having filed an appeal, which it could do, the revision could not sustain due to the bar Under Section 439(5) Cr.P.C. as it then stood, corresponding to Section 401(4), Cr. P. C this Court held that the objection was well founded and found that the revision was not maintainable. However, this Court observed that for an offence Under Section 16(1) of the Prevention of Food Adulteration Act, which carried with it the maximum term of imprisonment of six years, application of Section 3 of the Probation of Offenders Act was clearly illegal. It also found that the release of the other accused on probation of good conduct

under S- 4 of the Act without giving sufficient reasons could not be justified. this Court then considered the question whether it could exercise its powers Under Section 439, despite the fact that the party who could have filed an appeal, had not filed the appeal. this Court exercised its revisional jurisdiction, holding that it was wide enough to be exercised when facts and circumstances justifying its exercise were brought to its notice. It was further observed that exercise of the revisional jurisdiction was not only exercise of a right but was discharge of a duty. So holding, the orders were' set aside and the case was remitted to the trial Magistrate for disposal in accordance with law.

4. The scope of the revisional powers of the High Court fell to be considered in the decisions reported in *Municipal Corporation of Delhi v- Girdharilal Sapru*, 1981(2) SCC (Cri) 598 : 1981 Cri LJ 632; *R. J. Thakur v. A. P. Jhaveri* 1973 SCC (Cri) 566 : 1973 Cri LJ 201 *Paratap v. State of U- P.* 1973 SCC (Cri) 496 : 1973 Cri LJ 565 and *Eknath Shankarrao Mukkawar v. State of Maharashtra*, 1977 SCC (Cri) 410 : 1977 Cri LJ 964. In 1973 SCC (Cri) 496: 1973 Cri LJ 565, the Supreme Court held that the revisional powers of the High Court could be exercised suo motu in appropriate cases. There, the State had not moved the High Court for enhancement of sentence. When the facts of the case were brought to the notice of the High Court the High Court took the question of enhancement of sentence suo motu in revision Under Section 439 and considered whether the sentence could be enhanced when the revision before it was at the instance of the private party. All that is necessary for the purpose of this case is to highlight the observation that even in revisions by private parties, the Court can exercise its powers suo motu since a person by filing a revision, is drawing the Court's attention to an illegal, improper and incorrect finding, sentence or order by a subordinate Court, even though what he attacks in the revision is not the impropriety which the High Court finally discovers. In 1973 SCC (Cri) 566 : 1973 Cri LJ 201, the Supreme Court held that the revisional jurisdiction could be exercised by the High Court on being moved by either the convicted person himself or by any other person or suo motu on the basis of its own knowledge derived from any source whatsoever. All that is necessary for the High Court to exercise its right is to make it aware of an order made by a subordinate Court which has to be corrected. In 1977 SCC (Cri) 410 : 1977 Cri LJ 964, an argument

appears to have been advanced that the suo motu jurisdiction of the High Court to enhance sentence available Under Section 435/439 of the old Code having been replaced by the specific provision of appeal under Section 377 of the new Code, the High Court's power of revision suo motu has been taken away, The Supreme Court repelled this contention and held that despite the specific provision contained in Section 377 for an appeal the suo motu exercise of power by the High Court in deserving cases is still available. The Supreme Court specifically laid down that the power Under Section 401(4) applied only to a party and it did not stand in the way of the High Court exercising the power of revision suo motu which continued to be the same under the new Code. The decision reported in 1981 SCC (Cri) 598:1981 Cri LJ 632) was brought to my notice by the petitioner's counsel to contend that the dismissal of a revision by the High Court on the technical plea of limitation did not find favour with the Supreme Court. There, the accused under the Prevention of Food Adulteration Act was discharged because of non-compliance with Rule 22 of the Prevention of Food Adulteration Rules. The Municipal Corporation of Delhi filed a revision before the High Court with an application to condone the delay. By the time revision came up for hearing, the decision in Rajaldas's case reported in : 1975 CriLJ254 , which held Rule 22 to be mandatory was overruled by the decision in State of Kerala v. Alassery Mohammed, : 1978 CriLJ925 . Still the High Court dismissed the criminal revision petition on the technical ground that it was barred by limitation. The Supreme Court, when the case went before it, held that the revisional powers of the High Court should not be denied on technical grounds such as limitation. I may observe that the decision was rested largely on the ground that there what was involved was an offence under the Prevention of Food Adulteration Act, which necessitated an observation that offences in such cases should not be allowed to be defeated by resort to technical pleas. The petitioner's counsel invited my attention to this judgment to contend that the dismissal of the appeal by the Sessions Court in this case on the technical plea of bar of limitation in a case when the accused was not given a fair deal, was improper. The principle decided in that case may not strictly apply to the facts of the present case. An application to condone delay in filing an appeal can be dismissed by the Sessions Court. But the petitioners' counsel wants me to extend the principle of the above case to contend that in appropriate cases

where gross injustice has been perpetrated on an accused, courts should be liberal in considering the petitions to condone the delay.

5. Not being satisfied with these formidable array of authorities in his favour to overcome the bar Under Section 401(4), the petitioner's counsel pursued his submissions and referred me to a decision of this Court reported in 1970 Ker LT 95. There, a Division Bench of this Court dismissed the appeal by the State against the acquittal of the accused, in limine-The case was taken in calendar revision by this Court. A contention was raised that the appeal by the State having been dismissed in limine, the calendar revision was not in order. this Court repelled that contention and held that despite the dismissal of the appeal in limine, the calendar revision was in order and if there were materials for the Court to exercise its suo motu jurisdiction in revision, it could still be exercised. Though ultimately the revision was dismissed, the principle enunciated in that case is pressed into service to contend that the dismissal of the petitioner's appeal before the Sessions Judge as a consequence of the dismissal of the application to condone the delay should be equated to the dismissal of the appeal in limine by the above Division Bench case, wherefore the present revision should be' held to be maintainable. There is some force in this submission. The result of the discussion is that if a clear illegality or injustice comes to the notice of the High Court by whatsoever means it might be, the suo motu jurisdiction of the High Court is available to correct such mistakes.

6. I may refer in passing to the decision reported in Harwari Lal v. State : AIR1959 All751 , which the petitioner's counsel in fairness brought to my notice, which is against him. An appeal was preferred before the Additional District Magistrate, which was out of time. The Magistrate converted it into a revision. He dismissed the revision. Against that order the party approached the High Court by a revision. The High Court dismissed the revision holding that the party had the statutory right of filing an appeal and that appeal not having been filed, the revision was barred Under Section 439(5), Cr.P.C. The view expressed by the High Court appears to be that an appeal filed out of time is not an appeal at all. I am not sure, with respect, whether the case of an appeal not having been filed at all or an appeal filed out of time without an application to condone the delay could in all cases be

equated with the case of an appeal filed with an application for condonation of delay which is ultimately dismissed consequent upon the dismissal of the delay petition. A detailed consideration of this legal question is not strictly necessary in view of my finding on the strength of the Supreme Court decisions, that suo motu exercise of power of revision is available to this Court when an illegality comes to its notice. I hold, therefore, that this is an appropriate case for exercise of the revisional power, though technically, no appeal was filed.

7. Now regarding the facts of this case. The petitioner was put on trial for offences punishable Under Sections 454 and 380, I.P.C. to which the warrant procedure applied. Sections 238, 239, 240 & 241, Cr.P.C. deal with the procedure when the accused appears or is brought before a Magistrate at the commencement of trial. The Magistrate shall first see that Section 207 is complied with. After being so satisfied, the Magistrate shall consider the police report and documents sent along with it Under Section 173, make such examination as he thinks necessary and after giving the prosecution and the accused an opportunity of being heard, if he considers the charge against the accused to be groundless, shall discharge the accused and record his reasons for so doing. Else, he shall frame a charge against the accused as laid down in Section 240. If the accused thereafter pleads guilty, the Magistrate shall record the plea and may in his discretion convict him thereon. In this case, the petitioner was arrested on 14-9-1978 and till he was brought to Court to face trial on 12-10-1978 he was in custody. On 12-10-1978 the entire procedure laid down in Sections 238 - 241 was gone through and later order was passed sending the accused to Borstal School for three years. Normally, the procedures Under Sections 238 - 241 do not take place on the same day. The petitioner complains that strict adherence to Sections 238 - 241 is absent in this case. The charge is written in English. Though it is stated that the charge was explained to the petitioner, the petitioner's counsel submits that it is the routine practice without any substance.

8. When an accused is brought from custody before a Magistrate, the Magistrate has a duty to inform the accused and to explain to him in his mother-tongue the charge against him and alert him at the stage of Section 241 the consequences of his plea of guilty. In this case there was an undue haste. The petitioner's complaint

is not wholly unfounded.

9. In State v. Gopinatha Pillai, (1978 Ker LT 779 :1930 Cri LJ NOC 39, Poti J., as he then was, had occasion to consider the plea of guilty in a summons case. There the accused was brought from custody. The learned Judge found that the materials on record did not disclose that the plea of guilty was a genuine one made freely and voluntarily. In that case, the accused had been arrested by the Excise Officers and he was in their custody at the time he was produced in Court. The necessary papers had not been given to him. He was only asked whether he was admitting the offence of keeping wash with him. The learned Judge observes in paragraph 8 as follows:

It is pertinent to note that at the time he pleaded guilty he did not have the assistance of a counsel. In fact he had no assistance of any person to enlighten him of the consequences of pleading guilty. There is no case that the Magistrate made known to him such consequences. That in such circumstances the assistance of a counsel is relevant is indicated by the decision of this Court in State v. Raghavan : AIR1959 Ker248 .,

A cursory statement of the nature of the charge which the accused was called upon to answer and in response to which the accused pleaded guilty is what we find from the records of the case.

The learned Judge set aside the conviction and ordered fresh trial.

10. Stronger is the case before me. That was a summons case. Here, it is a warrant case. Here also, the petitioner did not have the assistance of a counsel or any other person to enlighten him. In fact, he was ignorant of what took place. He did not know that an appeal would lie against the order sending him to Borstal School. It was after the expiry of one year when his brother came to know of his plight that an appeal was filed with a petition to condone delay. I refer to these facts only to reassure myself that the haste with which the Court proceedings took place on 12-10-1978 ending with the plea of guilty was not in conformity with the provisions contained in Sections 238 - 241, Cr.P.C. I hold that this is a fit case for exercise of jurisdiction Under Section 397 read with Section 401, Cr.P.C.

11. In the result, I quash the orders of the learned Sessions Judge dismissing the application for condonation of delay and the consequent dismissal of the appeal.

12. Two courses are open to me; either to send back the case for fresh trial or to dispose of the case here itself. The petitioner's counsel submits that the petitioner is indigent, he has his old mother and that he should be discharged. Section 386(b)(i), Cr.P.C. reads as follows:

386. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal Under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may,

(a) x x x x(b) in an appeal from a conviction....

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial or....

A close reading of this section shows that an appellate Court or a Court of revision can in appropriate cases reverse the finding and sentence and acquit or discharge the accused. On a consideration of the materials placed before me, I have already held that the procedure adopted by the trial Magistrate was against the provisions of the Code and that the entire proceedings are therefore vitiated. In this case the incident took place on 10-9-1978. The petitioner had been under cloud for a long time and was in Borstal School for more than an year. Under these circumstances, I hold that this is a fit case not to order re-trial but discharge the petitioner in exercise of the powers of this Court Under Section 386(b)(i), Cr. P. G

13. The decision reported in *In re Arunachala Gounden* AIR 1948 Mad 492 :1948-49 Cri LJ 748) supports the procedure that I adopted above. In that case the offence involved was Under Section 353, I.P-C. As seen from the judgment of the trial Court, the filing of the charge-sheet, apprehension of the 'accused, commencement of trial, the close of the trial, and the passing of the order of

sentence were all on the same day, that is, on 1-4-1947. In that case, the petitioners pleaded guilty to the offence and were convicted on their own plea. The High Court held that the entire proceedings were vitiated. Since the accused did not have a fair or proper trial, the plea of guilty in the circumstances of the case could not be accepted at its face value. Since the petitioners in that case had already undergone a period of 36 days in prison and that nearly an year had elapsed from the date of the alleged offence, the question considered by the learned Judge who disposed of the case was whether a fresh trial was not necessary. The learned Judge held that a fresh trial was not necessary. Accordingly, a fresh trial was not ordered. Instead, an order of discharge of the accused was passed.

14. This is the procedure I have adopted in this case, which, according to me, would alone advance the ends of justice.

15. In the result, I allow this petition, set aside the conviction and sentence and discharge the accused.