

Sely Vs. State of Kerala

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Court : Kerala

Decided On : Nov-16-2001

Reported in : 2002CriLJ1207

Judge : T.M. Hassan Pillai, J.

Acts : Kerala Abkari Act, 1077 - Sections 55, 58, 377, 378 and 386; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 106(3), 411-A(2), 417, 423(1) and 423(3)

Appeal No. : Crl. R.P. No. 845 of 2001

Appellant : Sely

Respondent : State of Kerala

Advocate for Def. : P.M. Habeeb, Public Prosecutor

Advocate for Pet/Ap. : T.D. Robin,; V.V. Pratheeksh Kurup and; V. John Sebastia

Disposition : Appeal allowed

Judgement :

ORDER

T.M. Hassan Pillai, J.

1. The revision petitioner is the convicted accused in C.C. No. 1294/1996 on the file of the Judicial 1st class Magistrate Court-II, Erankulam and she was convicted for the commission of the offence punishable under Section 58 of the Abkari Act. Revision petitioner was tried for the alleged commission of the offences punishable under Sections 55(a) and 55(i) of the Abkari Act and the learned Magistrate, on scrutiny and evaluation of the evidence led by the prosecution in support of its case, came to the conclusion that the prosecution dismally failed to prove the offences punishable under Section 55(a) and 55(i) of the Abkari Act and acquitted her of the charge levelled against on these two counts. He convicted her for the offence under Section 58 of the Abkari Act. Consequent on conviction the revision petitioner was sentenced to pay a fine of Rs. 2000 with a default clause to undergo simple imprisonment for 20 days.

2. Assailing the conviction of her for the offence punishable under Section 58 of the Abkari Act, the revision petitioner preferred CrI. A. 601/2000 and the learned Sessions Judge, Ernakulam, on reappraisal of the evidence, altered the finding of guilt recorded by the trial Magistrate under Section 58 of the Abkari Act to one under Section 55(a) of the Abkari Act. While altering the finding the Sessions Judge maintained the sentence offline imposed upon the revision petitioner by the trial court and directed the trial court to execute the sentence.

3. Counsel for the revision petitioner is well founded in his submission that the conviction of the revision petitioner under Section 55(a) of the Abkari Act by the learned Sessions Judge is not sustainable on the ground that no appeal has been preferred by the State against the order of acquittal of the revision petitioner for the offence under Section 55(a) and 55(i) of the Abkari Act by the trial court and the acquittal of revision petitioner has attained finality. Counsel also rightly submitted that appeal has been preferred against the order of conviction of the appellant therein (revision petitioner) for the offences under Section 58 of the Abkari Act and the powers conferred on an appellate court under Section 386(b)(iii) is clearly confined to cases of appeal preferred against order of conviction and sentence and the powers conferred by this clause could not be exercised for the purpose of reversing an order of acquittal passed in favour of revision petitioner. The decision rendered by the Supreme Court in *State of A. P. v. Thadi Narayana* (AIR 1962 SC

240) is cited before me by the learned counsel to canvass for the position that the learned Sessions Judge acted against the clear mandate of Section 386(b)(ii) and without jurisdiction altered the order of acquittal passed by the trial Magistrate under Section 55(a) of the Abkari Act to one of conviction under Section 55(a) of the Act holding that such a power is conferred on him by Section 386(b)(ii).

4. For appreciating the contention vigorously urged before me it is appropriate to extract here Section 386(b)(ii) and (iii):

386. Powers of the Appellate Court:- 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) xxx xxx xxx (b) in an appeal from a conviction-

(i) xxx xxx xxx (ii) alter the finding, maintaining the sentence; or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

Section 386(b)(ii) and (iii) corresponds to Section 423(1)(b) and (3) of Code of Criminal Procedure, 1898. Section 423(1)(b) reads thus:

'423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. 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 411-A, Sub-section(2) or Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) xxx xxx xxx (b) in an appeal from conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial or (2) alter the finding, maintaining the sentence, or with or without altering the

finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of Section 106, Sub-section (3), not so as to enhance the same;'

Section 386(b)(ii) in terms deals with an appeal from a conviction and Section 386(b)(ii) is clearly confined to cases of appeals preferred against orders of conviction and sentence. The powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged while dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. The meaning of the expression 'alter the finding' is alter the finding of conviction and not the finding of acquittal. The order of acquittal passed by the trial court does not fall for consideration in the appeal preferred by the revision petitioner against her conviction under Section 58 of the Abkari Act and the order of conviction alone falls for consideration. The whole case is not before the appellate court when it entertains an appeal against conviction.

5. The Supreme Court had occasion to consider Section 423(1)(b) in the decision cited *supra* and laying down the law the Apex Court held thus:

'If an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. Therefore, the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well founded and as such it cannot be pressed into service in constructing the expression 'alter the finding' has only one meaning, and that is 'alter the finding of conviction and not the finding of acquittal'.

The Supreme Court in the above cited case further held that power conferred under Section 423(1)(b)(1) cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged in dealing with an appeal preferred by him against an order of conviction in respect of another offence charged and found proved.

6. In *State of West Bengal v. Laisel Haque* (AIR 1989 SC 129) the Supreme Court held that in the absence of an appeal preferred by the State against the acquittal the Appellate Court cannot under Section 386(b) in appeal by a party against his conviction alter the acquittal nor can there be a splitting up of the trial. Section 386(b)(ii) only provides for altering the finding and maintaining the sentence and that can only apply to cases where the finding of guilt under one section is altered to a finding of guilt under another. A clear distinction is made by Section 386(b) between a reversal of a finding and its alteration and provides that when there is a reversal, the order to be passed is one of acquittal, discharge or retrial, whereas when there is an alteration the order to be passed is one of maintaining, reducing or altering the sentence.

7. Order of acquittal of the revision petitioner passed by the trial court for the offence under Section 55(a) of the Abkari Act (acquittal attained finality) was overturned by the learned Sessions in an appeal preferred by her against the order of conviction for an offence under Section 58 of the Abkari Act and the Sessions Judge without jurisdiction altered the finding of acquittal recorded by the trial court to conviction under Section 55(a) against clear mandate of Section 386(b)(ii). The proper course open to me is to set aside the order of conviction recorded by the learned Sessions Judge for the offence punishable under Section 55(a) and remit the appeal for reconsideration of the question whether the order of conviction passed by the trial court under Section 58 of the Abkari Act is sustainable or not.

8. In the result, the revision is allowed setting aside the impugned order passed by the learned Sessions Judge convicting the revision petitioner for the offence under Section 55(a) of the Abkari Act and the matter is remitted to the Sessions Court for considering afresh the appeal preferred by the revision petitioner against his conviction under Section 58 of the Abkari Act in accordance with law. Revision petitioner is directed to appear before the appellate court on 1.1.2002.