

The State Vs. Gani Mohammad

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Court : Rajasthan

Decided On : Mar-10-1988

Reported in : 1989CriLJ742; 1988(1)WLN721; 1988(2)WLN179

Judge : Navin Chandra Sharma, J.

Appellant : The State

Respondent : Gani Mohammad

Advocate for Def. : Mr. L. R. Choudhary

Judgement :

Navin Chandra Sharma, J.

1. This is an appeal by the State of Rajasthan under Section 377 of the Cr.P.C, and is directed against the judgment of the Additional Chief Judicial Magistrate, Balotra dt. Aug. 22, 1986 directing that the respondent Gani Mohammad be released on probation on his furnishing a personal bond in the sum of Rs. 1000/- to maintain peace and be of good behaviour for a period of one year under Section 4(1) of the Probation of Offender's Act, 1958 instead of sentencing him despite holding him guilty for the offence under Sections 26-A, 41 and 42 of the Rajasthan Forest Act.

2. Facts in brief are that the Regional Forest Officer, Balotra filed a criminal complaint for offence under Sections 26A, 41 and 42 of the Rajasthan Forest Act against the respondent with the averments that while checking on July 2, 1985 at 4.00 a.m., he found one Nissan Truck bearing registration No. RJC 1463 loaded with 25 quintals wet and dry wood which was found to have been taken and loaded from the reserved forest area without permit or transit pass. On Aug. 22, 1986, the respondent filed an application, pleading guilty to the charges framed against him for the said offences. The Additional Chief Judicial Magistrate, Balotra, therefore, held the respondent guilty for the above charges, but instead of sentencing him, released him on probation under Section 4(1) of the Probation of Offender's Act, 1958 as aforesaid.

3. It was urged by Mr. S. K. Mathur, learned Public Prosecutor that the offence was punishable with six months imprisonment and fine, but the Additional Chief Judicial Magistrate neither passed a sentence of the imprisonment against nor even imposed a fine upon the respondent. It was prayed that the respondent may adequately be punished by this Court.

4. Mr. L. R. Chowdhary, the learned Counsel appearing for the respondent, however, raised a preliminary objection against the maintainability of this appeal under Section 377 Cr. P.C. in this Court. It was contended by Mr. Chaudhary that in the instant matter an appeal at the instance of State of Rajasthan lay to the Court of Sessions Judge, Balotra under Section 11(2) of the Probation of Offender's Act, 1958 and not to this Court under Section 377, Cr. P.C. The short question for determination, therefore, is whether an appeal would lie at the instance of the State Government against the order of the Additional Chief Judicial Magistrate Balotra mentioned above under Section 377, Cr. P.C. despite the provisions contained in Section 11(2) of the Probation of Offender's Act, 1958 (for short, hereinafter, 'the Act'). Section 11 of the Act reads 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 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.

5. In State v. Jagdish , a learned single Judge of this Court, observed as under:

In the first place I think the order passed ,by the Magistrate giving the accused the benefit under Section 4(1) or the Probation of Offender's Act is appealable under Section 11(2) of the said Act...From the language of this sub-section it is clear that the right to prefer an appeal from an order under Section 4 of the Act has been conferred both upon the prosecution as well as upon the accused. It appears that this point escaped the notice of the Public Prosecutor as well as the learned

Sessions Judge. In my opinion, the order passed by the learned Magistrate was appealable and if the State felt aggrieved of it, it should have filed the appeal.

6. Again in Shivcharan Lal v. The State another learned single Judge of this Court observed:

The next argument of Mr. Chaterjee is that the State was not competent to appeal under Section 11 because under the Cr. P.C. the State can never appeal before a Sessions Judge against a conviction. This argument has no force.

Operation of the Code of Criminal Procedure has been excluded by a non-obstante clause with which Sub-section (2) of Section 11 begins... The Code of Criminal Procedure is merely available for determining the Court of appeal under its provisions. Other provisions of Code of Criminal Procedure are clearly excluded (by the provisions contained in Section 11(2) of the Probation of Offenders Act, 1958) (within brackets mine).

7. A Division Bench of the Karnataka High Court took the same view in the State of Karnataka v. Chandrappa 1981 Cri LJ 1349. Dealing with the matter Nesargi, J. observed as under:

Therefore, the State has a right of appeal as against an order passed under Section 3 or Section 4 of the Act and contend that such an order ought not to have been passed regard being had to the facts and circumstances of the case or the procedure followed by the concerned Magistrate and that the Magistrate ought to have proceeded to sentence the concerned convicted accused. That is exactly what is envisaged in Sub-section (4) of Section 11 of the Act. The proviso to the said sub-section clarifies to a further extent the powers of the appellate court or revisional court by laying down that the sentence that it can impose in such an appeal under Section 11(2) of the Act after allowing the appeal would be limited to the sentence that would have been imposed by the Magistrate who had tried the concerned accused person or persons and convicted him or them.

8. The same view was taken by the Division Bench of Allahabad High Court in State of U. P. v. Salezar 1984 Cri LJ 315 in slightly different context.

9. The learned Public Prosecutor relied upon the Division Bench decision of Gujarat High Court in *State of Gujarat v. Purani Jagatpawandas Guru Bhakti Jiwandas* (1981) 22 Guj LR 895 and contended on its basis that after the introduction of Section 377(1) in the new Cr. P.C., 1973 ordinarily an appeal by the State against the order of sentence imposed by the Chief Judicial Magistrate would lie to the High Court and no other Court. With great respect, I am not inclined to agree with this part of the view of the Gujarat High Court, firstly, because so far as this Court is concerned, in *State v. Jagdish* 1970 Cri LJ 731 (Raj) and *Shivcharan Lal v. The State* 1973 Cri LJ 1630 (Raj) (both supra), a categorical view has been taken that the State can appeal to the Court of Sessions and secondly, because it is Section 374, Cr. P.C. under which appeal ordinarily lies from the sentence and under Sub-section (3) of Section 374, Cr.P.C, appeal against conviction on a trial held by a Magistrate of the First Class lies to the court of Session. An appeal under Section 377(1), Cr. P.C. is not the ordinary forum of appeal from the sentences but a special forum available to the State Government to appeal against the sentence on a specific,, ground i.e. on the ground of its inadequacy. The legislature did not intend the special forum provided in Section 377(1), Cr. P.C. when they used the expression 'to which appeals ordinarily lie from the sentences of the former Court'. On the contrary, the legislative intent is very clear that the forum contemplated by Section 11(2) of the Act was that which is provided in Section 371, Cr. P.C. which provides the ordinary forum for appeals from the sentences awarded by the Court trying the offender. The fact that power of revision by the High Court was ensured by Sub-section (4) of Section 11 of the Act also lends support to the view.

10. I agree with the view taken by this Court in *State v. Jagdish* and *Shivcharan Lal v. The State* (supra) and by the Division Benches of Karnataka and Allahabad High Courts in *State of Karnataka v. Chandrappa* 1981 Cri LJ 1347 and *State of U. P. v. Salezar* 1984 Cri LJ 315 respectively. The preliminary objection raised by Mr. L. R. Choudhary, appearing for the respondent, is upheld that appeal lay to the Court of Sessions Judge, Balotra under Section 11(2) of the Probation of Offender's Act, 1958 and not to this Court against the judgment of the Additional Chief Judicial Magistrate, Balotra dt. Aug. 23, 1986 in the instant case.

11. It is, therefore, directed that this appeal be returned to the appellant for presentation to proper Court in case the appellant chooses to do so. With these observations, the appeal is rejected as not maintainable in this Court.

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