

Rais Ahmed Vs. the State

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Court : Kolkata

Decided On : May-20-1997

Reported in : (1997)2CALLT483(HC)

Judge : Dibyendu Bhusan Dutta, J.

Acts : [Constitution of India](#) - Article 21; ;[Code of Criminal Procedure \(CrPC\)](#) , 1973
- Sections 379, 401 and 482; ;Indian Penal Code (IPC) - Section 409

Appeal No. : Crl. Rev. No. 987 of 1991

Appellant : Rais Ahmed

Respondent : The State

Advocate for Def. : Sudipto Moitra and ;Krishan Ghose, Adv.

Advocate for Pet/Ap. : Susanta Bernerjee and ;Prabhjit Singh, Adv.

Disposition : Application dismissed

Judgement :

Dibyendu Bhusan Dutta, J.

1. The Instant application under Section 379, 401 and 482 of the Criminal Procedure Code is directed against the order dated 13.8.88 passed in case No. C/793 of 1984 (TR 219 of 1984) by the learned Metropolitan Magistrate, 12th

Court, Calcutta, convicting and sentencing the accused petitioner under Section 409 of IPC to suffer rigorous imprisonment for two years and to pay a fine of Rs. 5,000/-, in default, to suffer further rigorous imprisonment for one year as well as the order dated 21.2.91 passed in the Criminal Appeal No. 53 of 1988 by the learned. City Sessions Judge, 7th Bench, Calcutta, affirming the aforesaid order of conviction and sentence.

2. The opposite party No. 2 who was an employee of M/s. U.B.S. Publisher Distributors Ltd. a leading house of distributors of different kinds of printed books, lodged a complaint on or about 3.4.84 before the learned, Chief Metropolitan Magistrate alleging that the petitioner as well as one S.N. Idris did commit offence under Section 409 read with 34 of Indian Penal Code. The complainant's case was that the petitioner was the sole proprietor of Supreme Clearing Agency and the other accused namely S. N. Idris was the proprietor of another concern called M/s. Diamond Clearing Agency. The accused persons approached the complainant company for appointing them as the company's clearing agent in respect of different consignments arriving at in their name by rail from different parts of the country on the representation that both of them were carrying on the same business in two different names from the same address but in fact they had been functioning jointly and they jointly prepared to undertake the clearance of any consignment that the complainant might ask them to clear even if such assignment is given in the name of any of them. Relying on such representation, the complainant company engaged the accused persons as its agents for clearing its consignments. In the usual course of business the company received Railway receipt No. 702061 dated 9.3.83 from New Delhi to Shalimar Railway Siding in respect of a consignment consisting of valuable printed books 33 packages and the complainant entrusted the said accused persons with the task of clearing the aforesaid goods but on or about 15th April 1983, the accused persons delivered 32 packages instead of 33 packages and represented that one package was missing and shortage certificate would be issued by the railway authorities shortly. As the issuance of shortage certificate was being delayed, the complainant approached the railway authorities and came to learn that all the 33 packages were cleared by the accused persons on 15th April, 1983. The accused persons have thus committed the offence of criminal breach of trust in respect of one

package containing 151 books valued at Rs. 74122.13.

3. The learned, Chief Metropolitan Magistrate, Calcutta took cognisance upon that complaint and was pleased to transfer the case to the court of learned Metropolitan Magistrate, 12th Court. After examination of seven witnesses before charge, the learned Metropolitan Magistrate by his order was pleased to discharge the accused No. 2 namely S.N. Idris and framed, charge under Section 409 of I.P.C. against the petitioner. The petitioner was thereafter tried on that charge. The defence case was that the entire consignment was received and delivered by the accused in terms of weights and not in terms of packages. The trying Magistrate by his judgment dated 13.8.88 found the petitioner guilty of the offence punishable under Section 409 IPC and convicted and sentenced him to suffer rigorous imprisonment of 2 years and also a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for a further period of one year.

4. Being aggrieved by the order of the aforesaid conviction and sentence, the petitioner preferred an appeal being Criminal Appeal No. 53 of 1988 before the learned City Sessions Court and the City Sessions Court was pleased to dismiss the said appeal on 21.2.1991 affirming the said conviction and sentence with a direction upon the accused appellant to surrender before the trial court to serve out the remaining part of the sentence.

5. The petitioner, on filing the instant revision application on 17.6.91 challenged the order of conviction and sentence mainly on two grounds. It was alleged that the complainant having entrusted two separate clearing agents for clearance of the consignment in question, the petitioner alone could not be fastened with the liability and the order of conviction and the sentence was bad in law on that score and cannot be legally sustained. Secondly, it was alleged that the provisions of Section 313 Cr. P.C. were not strictly complied with and this omission has vitiated the conviction as well as the sentence.

6. This application was admitted on 17.6.91 by a Division Bench presided over by M.K. Mukherjee, J as His Lordship then was, and was directed to come up for hearing as a contested one, limited only to the ground of sentence. On the date of admission of this application, the petitioner appears to have surrendered before

the trial court in order to serve out the remaining part of sentence as per directions of the lower appellate court. The Division Bench while admitting this revisional application also directed the petitioner to be released on bail till disposal of the application.

7. In view of the specific order of the Division Bench admitting the revisional application only on the question of sentence, the merits of the conviction would fall outside the scope of this revision and cannot come up for my consideration at this stage. In fact, Mr. Susanta Banerjee, the learned Counsel for the petitioner, did not also address the court on merits of the conviction. He did not also advance any argument challenging the legality or propriety of the impugned sentence. Mr. Banerjee's only contention was that the petitioner has a right to speedy trial flowing from Article 21 of the Constitution and in view of the long lapse of time during which the petitioner had suffered enough mental worries and anxieties, it would not be in the interest of justice to send the petitioner back to Jail at this stage and that it would only be just and proper to reduce the substantive sentence of imprisonment to the term already undergone by the petitioner.

8. Mr. Banerjee has cited several decisions in support of this plea of reduction of the term of imprisonment of the substantive sentence. The decisions are reported in (1) : 1979 CriLJ1045 , Husainara Khaton v. The State of Bihar, (ii) 1986 C Cr. LR (Cal) 116, T.R. Malik v. The State (iii) 1996 C Cr LR (Cal) 131, Subhas Chandra Bose v. The State of West Bengal (iv) 1996 C Cr LR (SC) 217, 'Common Cause' A Registered Society through its Directory. Union of India, (v) 1997 C Cr LR (SC) 1: 'Common Cause' , A Registered Society through its Director v. Union of India, (vi) : 1992 CriLJ2717 , Abdul Rehman Antulay v. R. S. Nayak, (vii) : [1974]1SCR204 ; Jagdish Chandra v. State of Delhi and (viii) 1995 Supp (4) Supreme Court Cases 500; Raj Singh v. The State of U.P.

9. Mr. Sudipto Moitra, the learned Counsel appearing for the State, submitted that the decisions cited on behalf of the petitioner would not be of much help to the petitioner. He submitted that the first six decisions relate to pre-conviction stage and are not applicable to the facts and circumstances of the present case, while the last two decisions cannot be pressed into service in reducing the sentence in

view of the fact that in the facts and circumstances of those two particular cases which materially differ from the facts of the present case, the Supreme Court was inclined to reduce the sentence to the term already undergone. Mr. Moitra submitted that the petitioner has not specifically raised any plea of infringement of his right under Article 21 of the Constitution in the instant revisional application nor is there anything on record to show that such right was ever infringed in the instant case and as such the petitioner's claim for reduction of the sentence is not tenable. Moreover, Mr. Moitra submitted that the petitioner has not at all disclosed the exact term of substantive imprisonment that might have already been undergone by him in execution of the impugned sentence and the petitioner has not also taken any step to make it available before this court to what extent he had undergone the said sentence up till now and as such, in the absence of any material on this point, the plea of reduction of the sentence to the term already undergone cannot be entertained. Finally, Mr. Moitra submitted that no interference with the impugned sentence would be justified in the instant revisional case.

10. Let me now examine the decisions cited on behalf of the petitioner so as to find out how far they are helpful in determining the question of reduction of sentence and whether the sentence should be reduced, and if so, to what extent.

11. In : 1979 CriLJ1045 (supra), the Supreme Court held that detention of under-trial prisoners in jail for periods longer than what they would have been sentenced, if convicted, is illegal as being in violation of Article 21.

12. In 1986 C Cr. LR. (Cal) 116 (supra), a Single Bench of our High Court quashed a proceeding of 1971 under Sections 5(1) (c) and 5(1)(d) of the Prevention of Corruption Act, 1947 read with Section 120B IPC and Section 109 IPC and also under Section 471 IPC because of inordinate delay of as many as 15 years on the part of the prosecution to have even the charge framed.

13. In 1996 C Cr LR (Cal) 131 (supra), a Single Bench of our High Court quashed a criminal proceeding pending before the Special Court under Sections 409, 477A and 120B of the IPC because of serious prejudice having been caused to the accused due to the inordinate delay of 18 years in framing the charge.

14. In 1996 C Cr LR (SC) 217 (supra), the Supreme Court fixed certain time limits for pendency of criminal cases in regard to certain offences and the offence of criminal breach of trust under Section 409 IPC was not then excluded from the said list of offences.

15. in 1997 C Cr LR (SC) 1 (supra), the Supreme Court clarified its earlier judgment regarding the fixation of time limit for pendency of criminal cases and categorically excluded the offence of criminal breach of trust from the scope of that judgment. The Supreme Court further clarified that the time limit shall not apply to a case wherein such pendency is wholly or partly attributable to the dilatory tactics by the concerned or on account of any other action of the accused which results in prolonging the trial and that in order to get the benefit of the aforesaid time limit, it should be shown that a criminal proceeding has remained pending for the requisite period despite full co-operation by the concerned accused to get the proceeding disposed of and that the delay in the disposal of that particular case is not at all attributable to the concerned accused, nor such delay is caused on account of such accused getting stay of the criminal proceeding from higher courts.

16. In Antulay's case reported in : 1992 CriLJ2717 (supra) the Supreme Court laid down the following amongst other guidelines :

'(i) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trialand there is no reason to take a restricted view.

(ii) '.....it is usually the accused who is interested in delaying the proceedings..... delay is a known defence tactic..... Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactic nor can the time taken in pursuing such proceedings be counted towards delay.....The mere fact that an application is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not

frivolous. While determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances

(iii) 'It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well but a realistic and practical approach should be adopted in such matters instead of a pedantic one.'

(iv) 'Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage.'

(v) 'An accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial.'

(vi) 'Ultimately, the court has to balance and weigh the several relevant factors and determine in each case whether the right to speedy trial has been denied in a given case where the court comes to the concluding that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open..... it is open to the court to make such other appropriate order.....of reducing the sentence where the trial has concluded as may be deemed just and equitable in the circumstances of the case.'

(viii) 'It is neither advisable nor practicable to fix any time limit for trial of offences.'

17. In : [1974]1SCR204 (supra), there was collision between a truck and an auto-rickshaw and the Supreme Court, while dealing with the appeal by special leave, reduced the sentence of imprisonment for six months under Section 304A of IPC to a period of three weeks of imprisonment already undergone. In reducing the sentence, the Supreme Court took into account not only the fact that the criminal proceeding in that case had gone on for a little more than 8 years but also the fact that the circumstances in which the collision between the truck and the appellant's scooter occurred seemed prima facie to suggest that they (their drivers) were both to blame. Although the Supreme Court declined to interfere with the concurrent conclusion of the three courts below on the question of rash and negligent driving of the rickshaw, it observed that in view of the impact of collision between a truck

and an auto-richshaw, a much lighter vehicle, it could be contended with a certain amount of reason that the death of the child due to the dash of the rickshaw subsequent to the collision was an indirect result and not a direct result of the rash and negligent driving on the part of the appellant.

18. In 1995 Supp (4) SC 500 (supra), the conviction was one under Section 409 IPC and the sentence was one of rigorous imprisonment for six months and a fine of Rs. 2000/-, in default, further simple imprisonment for two months. The occurrence took place in the year 1971 and the amount misappropriated was Rs. 3604.85. The appellant served the substantive imprisonment for more than two months and the Supreme Court, after a laps of 21 years in 1992, reduced the substantive sentence to the period already undergone and affirmed the sentence which was passed in default of payment of fine.

19. There is really nothing on record to reveal that the accused petitioner's right to speedy trial as enshrined in Article 21 of the Constitution was ever infringed at any point of time during the period that intervened between the date of lodging of the complaint and the date of initial conviction and sentence by the trial court or during the period which followed that conviction and sentence till they were affirmed by the lower appellate court on 21.2.91. The present application appears to have been filed on 27.5.91 and was moved before the then Division Bench on 17.6.91. While admitting the application, the then Division Bench directed this application to come up for hearing as a contested one four weeks from that day (i.e. 17.6.91). The Division Bench further directed the petitioner to serve the copy of the application upon the opposite parties intimating the date of hearing within the said period of four weeks and also directed his release on bail to the satisfaction of the learned Chief Metropolitan Magistrate till the disposal of the application. The petitioner filed the certified copy of an order of the trial court on the date of admission of the application by the Division Bench showing that he surrendered before the trial court as per direction of the lower appellate court only on 17.6.91. There is nothing on record to suggest that the petitioner did carry out the direction of the Division Bench in regard to the service of copies of the application upon the opposite parties within the period fixed and the affidavit of service filed on 29.4.97 goes to show that the petitioner took step for service of notice upon the opposite

parties only on 19.4.97. In the circumstances, the petitioner cannot complain of any delay or for that matter, infringement of his right to speedy trial in the disposal of the present revisional application. It is true that the complaint was lodged in the year 1984 and we are now in 1997. But then, the mere lapse of time cannot ipso facto entitle the petitioner to reduction of sentence. Having regard to nature and character of the offence involved, it cannot be said that the sentence was arbitrary, unreasonable, unduly harsh, excessive or not commensurate with the offence involved. The amount criminally misappropriated in this case was to the tune of Rs. 74,000 and odd. There is hardly any mitigating circumstances in favour of reduction of the sentence. Upon a careful consideration of the guidelines laid down in the *Antulay's case* (supra) visavis the right to speedy trial, in the light of the facts and other attendant circumstances of this case including the nature and character of the offence and the materials on record, I am unable to hold that there has been any infringement of the petitioner's right to speedy trial at any point of time. The present age of the petitioner is also not known to this court. The exact period that might have been undergone by the petitioner so far in execution of the sentence is neither disclosed nor known to this court.

20. Thus, giving the matter my anxious consideration to the question of reduction of the sentence, with which I am presently concerned, in the light to all attendant facts and circumstances as also the factors relevant for being taken into account for the purpose, I am of the view that It is not all a fit and proper case where the demand for reduction of the sentence to the term already undergone should be acceded to. In such view of the matter, no interference with the sentence is called for at this stage either in exercise of the revisional jurisdiction of this court or in the interest of justice. In the result, the revisional application fails and is hereby dismissed. The petitioner convict do surrender before the trial court in order to serve out the remaining part of the sentence.