

Jitender Alias Kalle Vs. State

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Court : Delhi

Decided On : Nov-02-2012

Judge : Badar Durrez Ahmed & Manmohan Singh

Appeal No. : CRL. A. 666 & 667 OF 2010

Appellant : Jitender Alias Kalle

Respondent : State

Judgement :

BADAR DURREZ AHMED, J.

1. These two appeals pertain to the same appellant and raise a common issue. In both these appeals, the “judgments”, whereby the appellant has been convicted, though dictated and signed by the judge who heard the arguments in the trials, have been “announced” by a successor judge after the transfer of the predecessor judge. Thereafter, the successor judge has heard arguments on the point of sentence and passed the orders on sentence. A question has been raised by the learned counsel for the appellant as to whether such “announcements” could amount to valid judgments? If not, then they ought to be set aside and so, too, the sentencing orders and the matters be remitted to the trial court for fresh hearing and judgment.

Criminal Appeal No. 666/2010

2. Criminal Appeal No. 666/2010 arises out of sessions case no. 1135/2009 which in turn arose out of FIR No. 67/1999 dated 11.03.1999 registered at Police Station Keshav Puram under sections 302/307 of the Indian Penal Code, 1881. On the completion of evidence and upon hearing arguments, Mr Bharat Parashar, the learned Additional Sessions Judge-II, North-West District, Rohini Courts, Delhi, passed, inter alia, the following order:-

“Case is now adjourned for orders to 30-1-2010 at 2 p.m.”

3. On 30.01.2010, Mr Bharat Parashar directed as under:-

“Certain clarifications sought. Case is now adjourned for orders to 22.2.2010 at 2.00 p.m.”

4. However, on 08.02.2010 the Delhi High Court issued notification no.24/DHC/Gaz./G-1/VI.E2(2)/2010 transferring and posting various judicial officers of the District Courts in Delhi. Mr Bharat Parashar who was the Additional Sessions Judge-II, North-West District, Rohini Courts, Delhi was transferred with effect from 11.02.2010, as Joint Registrar in the Delhi High Court. And, by the same order/notification Dr Kamini Lau was transferred, with effect from 11.02.2010, as Additional Sessions Judge-II, North-West District, Delhi in place of Mr Bharat Parashar. Thus, with effect from 11.02.2010, Mr Bharat Parashar ceased to exercise jurisdiction as an Additional Sessions Judge of the North-West District and, consequently, over the said sessions case no. 1135/2009.

5. On 22.02.2010, when the case was listed before Dr Kamini Lau, the successor judge, she passed the following order:-

“On receipt of information from Sh. Bharat Parashar Ld. Predecessor of this court, case is re-listed/ re-notified for orders on 2.3.2010.”

6. When the matter came up on 02.03.2010, as Dr Kamini Lau was away to the Delhi Judicial Academy as a resource person, the Reader listed the matter for 12.03.2010. But, on her return from the Delhi Judicial Academy, Dr Kamini Lau passed the following order at 4:00 pm that very day, that is, on

02.03.2010:-

“At this stage main file has been received from Sh. Bharat Parashar, Ld. Predecessor of this court along with order. Issue production warrants of the accused for 4.3.2010.”

7. On 04.03.2010, Dr Kamini Lau passed the following order:-

“4.3.2010

File is taken up today and the date given by the Reader of 12.3.2010 is cancelled.

Present: Addl. PP for the State.

Accused is produced from JC pursuant to the production warrants.

Vide order of the Delhi High Court bearing No.24/DHC/Gaz./G-1/VI.E2(2)/2010 dated 8.2.2010, the Ld. predecessor of this court was required to pass the judgment in the present case, the arguments having been heard by him. Vide a detailed judgment dictated and signed by the Ld. Predecessor Sh. Bharat Parashar dated 2.3.2010 duly dispatched to this court in the sealed cover which has now been opened by me today and announced in the open court. The accused Jitender @ Kalla is held guilty for the offences under Section 302/307 IPC and is accordingly convicted.

The judgment could not be announced on 2.3.2010 since the undersigned did not hold the court on 2.3.2010 and 3.3.2010 being Resource Persons in the Delhi Judicial Academy in the training course for newly recruited officers of DJS and the case which was renotified by the Reader for 12.3.2010 was directed to be taken up today on receipt of the judgment from the Ld. predecessor of this court.

The accused submits that his counsel is not available today. He submits that he is not in a position to contact his counsel as his Mulakat has also been stopped in the jail. He has been permitted to contact his family members for passing the information to his counsel but is unable to contact them. Under

these circumstances the accused requests that his case may be listed for arguments on the sentence along with the connected case on 12.3.2010. On request case be listed for arguments on the sentence along with the connected case on 12.3.2010.”

(underlining added)

8. From the order dated 04.03.2010 passed by Dr Kamini Lau, it is apparent that the “judgment” dictated and signed by Mr Bharat Parashar on 02.03.2010 was dispatched by him in a sealed cover which was received by Dr Kamini Lau and was opened by her on 04.03.2010 and “announced” by her in open court. As per the said “judgment”, the appellant was held guilty of the offences punishable under sections 302/307 IPC. We may point out that the said “judgment”, at the end, has been signed by Mr Bharat Parashar in the following manner:-

“DICTATED AND SIGNED on 2nd March, 2010

-sd-

Bharat Parashar

Additional Sessions Judge - II

(NW Distt.), Rohini Courts, Delhi”

9. Apart from the signature at the end, each page of the said “judgment” was signed by Mr Bharat Parashar. The said “judgment” was not signed by Dr Kamini Lau.

10. On 12.03.2010, Dr Kamini Lau heard arguments on the point of sentence. She directed the learned counsel for the parties to file written synopses and listed the matter for the order on sentence on 17.03.2010. On that day, she passed the order on sentence. For the offence under section 307 IPC, the appellant was sentenced to undergo rigorous imprisonment for 10 years with a fine of Rs 2 lacs and in default thereof to undergo further simple imprisonment of one year. For the offence punishable under section 302 IPC,

the appellant was sentenced to undergo life imprisonment with the condition that his case should not be considered for remission till he undergoes actual sentence of 30 years. A fine of Rs 3 lacs was also imposed and in default of which the appellant was to undergo simple imprisonment for 3 years.

Criminal Appeal No. 667/2010

11. Criminal Appeal No. 667/2010 arises out of sessions case no. 1136/2009 which in turn arose out of FIR No. 68/1999 dated 11.03.1999 registered at Police Station Mukherjee Nagar under sections 120B/302 of the Indian Penal Code. A similar pattern of orders ensued as in the previous Sessions Case No. 1135/2009. On the completion of evidence and upon hearing arguments, Mr Bharat Parashar, the learned Additional Sessions Judge-II, North-West District, Rohini Courts, Delhi, passed, inter alia, the following order:-

“Case is now adjourned for orders to 30-1-2010 at 2 p.m.”

12. On 30.01.2010, Mr Bharat Parashar directed as under:-

“Certain clarifications sought. Case is now adjourned for orders to 22.2.2010 at 2.00 p.m.”

13. However, as pointed out above, on 08.02.2010 the Delhi High Court issued notification no.24/DHC/Gaz./G-1/VI.E2(2)/2010 transferring and posting various judicial officers of the District Courts in Delhi. Mr Bharat Parashar who was the Additional Sessions Judge-II, North-West District, Rohini Courts, Delhi was transferred, with effect from 11.02.2010, as Joint Registrar in the Delhi High Court. And, by the same order/notification Dr Kamini Lau was transferred, with effect from 11.02.2010, as Additional Sessions Judge-II, North-West District, Delhi in place of Mr Bharat Parashar. Thus, with effect from 11.02.2010, Mr Bharat Parashar ceased to exercise jurisdiction as an Additional Sessions Judge of the North-West District and, consequently, over the said sessions case no. 1136/2009.

14. On 22.02.2010, when the case was listed before Dr Kamini Lau, the successor judge, she passed the following order:-

“On receipt of information from Sh. Bharat Parashar Ld. Predecessor of this court, case is re-listed/ re-notified for orders on 2.3.2010.”

15. When the matter came up on 02.03.2010, as Dr Kamini Lau was away to the Delhi Judicial Academy as a resource person, the Reader listed the matter for 12.03.2010.

16. On 12.03.2010, Dr Kamini Lau passed the following order:-

“12.3.2010

Present: Addl. PP for the State.

Accused Jitender @ Kalla in JC along with Sh Mohd.Nasir advocate.

Accused Jitender Pal Gulati @ Jeetu is present on bail along with Sh. P.K. Sharma advocate.

Pursuant to the order of Delhi High Court bearing No.24/DHC/Gaz./G-1/VI.E2(2)/2010 dated 8.2.2010, the Ld. predecessor of this court Sh Bharat Parashar passed a detailed judgment which has been dispatched to this court in a sealed cover. The sealed envelope is opened by this court today and the judgment which is dictated and signed dated 6.3.2010 is announced in the open court.

The accused Jitender Pal Gulati @ Jeetu has been acquitted of the offence under section 302/120-B IPC and the accused Jitender @ Kalla has also been acquitted for the offence (sic) under section 20-B (sic) IPC. The accused Jitender @ Kalla has however been held guilty for the offence under section 302 IPC and accordingly convicted.

Ld. counsel for the accused Jitender Kalla submits that he is ready with the arguments on the point of sentence. Heard arguments on the point of sentence. Counsel for accused shall file written synopsis of arguments on the aspect of sentence along with various authorities relied upon by him by 15.3.2010. The Addl. PP shall also file his written synopsis of arguments on the point of sentence by 16.3.2010. Case be listed for order on sentence for

17.3.2010. At this stage the copy of the judgment has been supplied to the accused.

(underlining added)

17. From the order dated 12.03.2010 passed by Dr Kamini Lau, it is apparent that the “judgment” dictated and signed by Mr Bharat Parashar on 06.03.2010 was dispatched by him in a sealed cover which was received by Dr Kamini Lau and was opened by her on 12.03.2010 and “announced” by her in open court. As per the said “judgment”, the appellant was held guilty of the offence punishable under section 302 IPC. We may point out that, as in Sessions Case No. 1135/2009, in this case also the said “judgment”, at the end, has been signed by Mr Bharat Parashar in the following manner:-

“DICTATED AND SIGNED on 6thMarch, 2010

-sd-

Bharat Parashar

Additional Sessions Judge - II

(NW Distt.), Rohini Courts, Delhi”

18. Apart from the signature at the end, each page of the said “judgment” was signed by Mr Bharat Parashar. This “judgment”, also, was not signed by Dr Kamini Lau.

19. On 17.03.2010, Dr Kamini Lau partly heard arguments on the point of sentence. She directed that the matter be re-listed on 18.03.2010 for additional arguments. On that day, she concluded the hearing and directed that the matter be listed for orders on sentence on 20.03.2010.

20. On 20.03.2010, she passed the order on sentence. The appellant was sentenced to undergo life imprisonment for the rest of his life with the condition that such sentence would “start running consequent to and only after the conclusion of the sentence imposed upon the appellant in case FIR

No. 67/99 PS Keshav Puram”.

21. A fine of Rs 3 lacs was also imposed and in default of which the appellant was to undergo simple imprisonment for 3 years.”

22. It is evident that both the cases have virtually travelled the same route. Arguments were heard in both by Mr Parashar when he was the Additional Sessions Judge-II of the North West District at the Rohini Courts, Delhi. But, before he could pronounce judgments in the said two cases he was transferred to the Delhi High Court as Joint Registrar with effect from 11.02.2010. Despite this, Mr Parashar dictated and signed the judgments in the two cases on 02.03.2010 and 06.03.2010 and sent them under sealed covers to the successor judge (Dr Kamini Lau) who, without examining the evidence or hearing further arguments and without adopting the said “judgments” as her own merely ‘announced’ them in open court on 04.03.2010 and 12.03.2010, respectively.

23. The learned counsel appearing on behalf of the appellants submitted that the so called ‘judgments’ dated 02.03.2010 and 06.03.2010 which were ‘announced’ by the successor judge on 04.03.2010 and 12.03.2010 were invalid judgments in law inasmuch as they were not pronounced in a judicial way. The learned counsel placed reliance on the following decisions in support of the aforesaid plea:-

1. Mahomed Rafique v. King Emperor: AIR 1926 Cal 537 (DB)

2. In re Guruswami Thevar : AIR (38) 1951 Mad 902 (DB)

3. Surendra Singh v. State of U.P : AIR 1954 SC 194

4. Sanwar Mal v. State of Rajasthan: 1987 Raj LW 351

24. The learned counsel also referred to the 41st Report of the Law Commission in respect of the Code of Criminal Procedure, 1898. In particular he referred to Chapter XXVI of the said Law Commission Report which deals with the subject of “Judgment.” He also referred to some of the High Court

Rules and in particular to Part-E, Volume 3, Chapter 24 Part B Rules 30-31.

25. The learned counsel for the appellant also referred to sections 326 and 353 of the Code of Criminal Procedure, 1973 (hereinafter refer to as the 1973 Code). Referring to section 326 of the 1973 Code, the learned counsel submitted what while it was permissible for a successor judge or magistrate to act on the evidence recorded by his predecessor, it was not permissible for the successor judge or magistrate to pronounce a judgment written by his predecessor after the later ceased to exercise jurisdiction in respect of a criminal case. The learned counsel further submitted that in keeping with the provisions of section 353 of the 1973 Code, unless a judgment was pronounced in open court in the manner indicated in that section, it would not be a judgment in the eye of law. According to the learned counsel, the provisions of section 353 did not permit a successor judge to pronounce a judgment written by a predecessor after the predecessor had ceased to exercise jurisdiction in respect of the trial in question. It was also contended by the learned counsel for the appellant that the provisions of the Code of Civil Procedure, 1908 and those of the Code of Criminal Procedure, 1973 were at variance on this aspect of the matter. While Order XX Rule 2 specifically empowers a judge to pronounce a judgment written but not pronounced by his predecessor, there is no such provision under the 1973 Code. As such, the successor judge cannot pronounce a judgment written, but not pronounced, by his predecessor in the case of a criminal trial.

26. The learned counsel for the State submitted that there was nothing wrong in the 'announcement' by Dr Kamini Lau (the successor judge) of judgments written and signed by Mr Bharat Parashar (the predecessor judge). She placed reliance on the note appended to the High Court order dated 08.02.2010 which, according to her, specifically enabled judicial officers to pronounce judgments/orders in all such matters where cases had been reserved for judgments/orders prior to the relinquishment of charge in terms of the posting/transfer under the said order dated 08.02.2010, within a period of 2-3 weeks notwithstanding the posting/transfer. She submitted that the period of 2/3 weeks was not to be construed strictly and ought to be read as 2/3 weeks or so. According to her if the note is read in this manner, then

even the “judgment” dated 06.03.2010, which was announced on 12.03.2010, would be within time and, therefore, cannot be faulted. She also submitted that in any event the provisions of section 326 and 323 of the 1973 Code have to be read along with provisions of section 465 thereof which specifically entail, inter alia, that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a Court of appeal on account of any error, omission or irregularity, inter alia, in the order or judgment, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby. She submitted that even if the announcements by the successor judge on 04.03.2010 and 12.03.2010 and the subsequent orders on point of sentence are considered to be irregular, since no failure of justice has been occasioned thereby, the same cannot be reversed or set aside by this court in appeals.

27. The learned counsel appearing for the State sought to place reliance on the following decisions:-

1. In Re: Sankara Pillai alias Sankaranarayana Pillay: (1908) 18 MLJ 197
2. Gian Singh Munsha Singh v. Amar Singh Jaimal Singh: AIR 1939 Lah. 21.
3. Surendra Singh v. State of U.P: AIR 1954 SC 194
4. Parasram Shivilal Tara Sewania v. Laxminarayan and Ors: AIR 1961 MP 8
5. In Re: Reference by District and Sessions Judge: 1986 Cri. LJ 1966.

28. Before we examine the rival contentions, it would be appropriate if we set out the relevant provisions. Sections 326, 353 and 465 of the 1973 Code are pertinent and they read as under:-

“326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.-

(1) Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who

has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under Section 322 or in which proceedings have been submitted to a superior Magistrate under Section 325.”

“353. Judgment.-(1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,-

(a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment; or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

(2) Where the judgment is delivered under clause (a) of subsection (1), the presiding officer shall cause it to be taken down in short-hand, sign the transcript and every page thereof as soon as it is made ready, and right on it the date of the delivery of the judgment in open Court.

(3) Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub-section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.”

“465. Finding or sentence when reversible by reason of error, omission or irregularity.- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

29. In contrast, we may also set out the provisions of Order XX Rule 2 of the Code of Civil Procedure, 1908 which reads as under:-

“2. Power to pronounce judgment written by judge's predecessor.- A Judge shall pronounce a judgment written, but not pronounced, by his predecessor.”

30. Reading the above provisions in a plain manner it is evident that there is a difference between the civil procedure and criminal procedure. While in a civil case, it is mandatory for a successor judge to pronounce a judgment written but not pronounced, by his predecessor, this is not so in a criminal case. There is no such provision in the 1973 Code. Furthermore, section 326 of the 1973 Code makes it clear that it is in the nature of an enabling provision. It enables a judge or magistrate to act on the evidence recorded wholly or in part by his predecessor. However, this is, at the discretion of the

succeeding judge or magistrate. He may decide to go in for a de novo trial or he may proceed from the stage where the predecessor left off. If the evidence had been recorded in whole, the successor judge or magistrate can proceed from that point onwards and list the case for hearing of arguments and thereafter proceed to pronounce judgment in the manner prescribed under the 1973 Code. On the other hand, if the evidence had been recorded only in part, by the predecessor judge, the successor may continue from that point on and record the balance evidence himself and then proceed to hear arguments and pronounce judgment as provided in the 1973 Code. The provisions of section 326 of the 1973 Code while enabling the successor judge or magistrate to proceed in the manner indicated above, does not specifically empower the succeeding judge or magistrate to pronounce a judgment written by the predecessor judge or magistrate.

31. Section 353 of the 1973 Code makes it clear as to how a judgment is to be pronounced. Unless and until, a judgment is pronounced in that manner, it cannot be regarded as a judgment in law. The provisions of section 353 (1) make it abundantly clear that the judgment in every trial in any court of criminal jurisdiction has to be pronounced in open court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice has been given to the parties. The pronouncement of the judgment shall be by one of the following three modes:-

(a) By delivering the whole of the judgment; or

(b) By reading out the whole of the judgment; or

(c) By reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

Sub-section (2) of section 353 deals with the pronouncement of the judgment where the same is delivered in whole. Sub-section (2) of section 353 gives a clear indication that the delivery of whole judgment that is spoken of in clause (a) of sub-section (1) relates to “verbal delivery”

inasmuch as the said sub-section (2) makes it clear that where the judgment is delivered under clause (a) of sub-section (1), the presiding officer shall cause it to be taken down in short-hand and to the sign the transcript on every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open court. It is obvious that the delivery of the judgment which is referred to in clause (a) of sub-section (1) of section 353 cannot relate to the “announcement of a written judgment”. Because if it were so then the requirement that the presiding officer shall so cause it to be taken down in short-hand would be redundant.

32. Sub-section (3) deals with cases of pronouncement under clauses (b) and (c) of sub-section (1) both of which deal with reading out of the judgment. It is obvious that the reading out of the judgment can only be of something which is written. In this case also if a judgment is written, the pronouncement would be complete only upon reading out either the whole of the judgment or by reading out of the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader. It is also pertinent to note that if the judgment is written in the hand of the presiding officer, then it shall be merely dated and signed in open court but if the judgment is not written under his own hand, then there is the additional requirement of the presiding officer signing every page of the judgment.

33. Therefore, from the above it can be easily deduced that where a judgment is pronounced by delivery, that is, through the verbal mode in open court, by the presiding officer, it has to be taken down in shorthand, and thereafter the transcript and every page of it has to be signed as soon as it is made ready. The presiding officer is required to right on it the date of the delivery of the judgment in open court. In the context of the facts of the present case, the announcements by Dr Kamini Lau on 04.03.2010 and 12.03.2010 cannot by any stretch of imagination be covered under clause (a) of sub-section (1) of section 353 of the 1973 Code. The said announcements cannot also be covered under clauses (b) or (c) of sub-section (1) of section 353. This is so because the ‘judgments’ written by Mr Bharat Parashar were

neither dated nor signed by Dr Kamini Lau in open court in the manner indicated in sub-section (3) of section 353. Therefore, the so-called 'judgments' of Mr Bharat Parashar cannot be regarded as having been pronounced in open court and consequently the same cannot be regarded as judgments at all.

34. Coming now to section 465 of the 1973 Code which was relied upon by the learned counsel appearing on behalf of the State. We find that it deals with error, omission or irregularity. That provision, to our mind, would not apply at all in the facts and circumstances of the present appeal. Because what is alleged on behalf of the appellant is that it is not a mere error, omission or irregularity which may be cured but an illegality which cannot be cured. When a judgment is not pronounced at all in accordance with law, it cannot be regarded as a mere irregularity, error or omission. Consequently, the orders on point of sentence which are based on the said so-called 'judgments' would also be invalid.

35. Let us now examine the decisions cited by the learned counsel for the parties. We begin with the decisions cited on behalf of the appellant. The first of such decisions is that of a Division Bench of the Calcutta High Court in the case of Mahomed Rafique (supra). That decision pertains to section 350 of the Code of Criminal Procedure, 1898. Before we analyse that decision it would be appropriate if we set out the said provision which is more or less equivalent to Section 326 of the 1973 Code. Section 350 of the 1898 Code as it originally stood reads as under:-

“350. Conviction or commitment on evidence partly recorded by one magistrate and partly by another. - (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the inquiry or trial.

Provided as follows:-

(a) In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

(b)The High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.”

In Mahomed Rafique (supra) the predecessor magistrate recorded in the order sheet that he was going on leave and that he had written his judgment which was appended to the record and that he had only to sign it but since the accused had absconded, he was proceeding on leave and left the judgment to his successor to deal with “as he thinks fit”. The accused subsequently surrendered before the successor magistrate and filed a petition stating that he did not want a de novo trial. Thereafter, the successor magistrate recorded in the order sheet that the predecessor magistrate who had tried the case had left the written judgment before he made over the charge to him which was undated and unsigned. The successor further recorded that he was signing and dating the judgment and pronouncing it. The accused in that case was convicted and sentenced to undergo one year rigorous imprisonment. The Division Bench of the Calcutta High Court observed that section 350 of the 1898 Code no doubt authorized the magistrate to try a case on evidence recorded by his predecessor, but there was no authority for the proposition that a magistrate succeeding his predecessor could deliver a judgment, which had been written out by his predecessor, without considering the evidence on the record and without hearing the arguments if any on behalf of the accused. The Division Bench further observed that such a procedure could not stand to reason because the magistrate who makes himself responsible for a judgment must always be the magistrate who before delivery of the judgment had considered the evidence on record fairly and impartially, and had also listened to

the arguments, if any, on behalf of the accused. In the context of the facts of that case, the Division Bench noted that it was abundantly clear from the order sheet that the succeeding magistrate did not consider the evidence on the record nor did he hear any arguments on behalf of the accused before he signed and dated the judgment and pronounced it. A somewhat similar situation has arisen in the present appeals also where the successor judge has not applied her mind at all to the said 'judgments' of the predecessor judge. On her own admission as recorded in the order sheet, the successor Judge has merely 'announced' the 'judgments' of Mr Bharat Parashar. The successor judge has not claimed the 'judgments' as her own. She has not even signed and dated the said 'judgments'.

36. The next decision is that of a Division Bench of the Madras High court in In Re: Guruswami Thevar (supra). In that case the evidence was heard by Mr H.A. Ayyar who also appeared to have actually written the judgment in the case. The judgment which he wrote was pronounced by the successor in his office, Mr Sankaran Nambiar. The Division Bench of the Madras High Court observed as under:-

“We must hold that unless the Cr.P.C., expressly provides for the pronouncement by a Judge other than he who recorded the evidence, a succeeding Judge would have no power to do so.”

37. Of course that decision in In Re: Guruswami Thevar (supra) was only on the ground that section 350 of the 1898 Code did not apply to a Sessions trial. Such an argument would no longer be available in the present situation inasmuch as the equivalent provision of section 326 of the 1973 Code, after the amendment of 1978, applies to judges as well as magistrates.

38. In Surendra Singh (supra) the Supreme Court observed as under:-

“4. Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved. In a criminal case it often means the difference between freedom and jail, and when there is a conviction with a sentence of imprisonment, it alters the status of a prisoner from an undertrial to that of a convict; also the term of his sentence starts from the moment

judgment is delivered. It is therefore necessary to know with certainty exactly when these consequences start to take effect. For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallise into an act which is thereafter final so far as the court delivering the judgment is concerned.”

XXXX XXXX XXXX XXXX XXXX

“**10.** In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal “pronouncement” or “delivery” in open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest - the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter - can be cured; but not the hard core, namely, the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.

11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else upto then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative

conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the “judgment”.

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of locus poenitentioe, and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who “delivers” the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light dawn upon him before the delivery of judgment.”

(underlining added)

39. From the above decision of the Supreme Court it is apparent that the pronouncement of a judgment is a judicial act which must be performed in a judicial way. The Supreme Court observed that there may be small irregularities in the manner of pronouncement or the mode of delivery which may be curable but not the hard core namely, the formal intimation of the decision and its contents formally declared in a judicial way in open court. The Supreme Court also stressed that the pronouncement of a judgment must be an expression of the mind of the court at the time of delivery. It further observed that the final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the judgment. Importantly the Supreme Court also observed that up to the point of pronouncement, judges have the right to change their minds and therefore it follows that the judge who delivered the judgment or causes it to be delivered by a fellow judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. An important point that may be derived from this is that the predecessor judge must have jurisdiction and be present as a member of the court when a fellow judge pronounces the decision. In the present case, we find that Mr Bharat Parashar had ceased to be an Additional Sessions Judge in respect of the North West District with effect from 11.02.2010 and from that date he was functioning as a Joint Registrar in the High Court. Therefore, he could not have exercised jurisdiction in the matter after 11.02.2010.

40. The learned counsel for the appellant had also referred to a decision of a learned single Judge of the High Court of Rajasthan in Sanwar Mal (supra). Of course that decision is not binding on us but for persuasive value, the learned counsel submitted that the same may be looked into. In that case, it was observed that while there is an express provision under Order XX Rule 2 of the Code of Civil Procedure whereby the judge is empowered to pronounce judgment written, but not pronounced, by the predecessor, there is no corresponding provision in the Code of Criminal Procedure. This is a view which we have already taken above.

41. We may also refer to paragraph 26.11 of Chapter XXVI of the 41st Law Commission Report to which we have already alluded above. The said paragraph 26.11 which was in the context of amendment to section 366 of the 1898 Code reads as under:-

“ Pronouncement of Judgment by successor

26.11 We note that there is no provision in the Code as to pronouncement of a judgment written by a predecessor. We considered the question whether any provision on the subject should be inserted. In our view, it is not proper that in criminal cases, a judge should pronounce a judgment written by his predecessor. He can, no doubt, make use of the material contained in the (draft) judgment prepared by his predecessor. But in that case he is himself responsible for the contents of the judgment.”

This is a view which we endorse and which we also find to be discernable from a long line of decisions, some of which we have referred to above.

42. We now come to the decisions referred to by the learned counsel for the State. The first of those decisions is that of the Madras High Court in the case of In Re: Sankara Pillai (supra). In that case the magistrate who had recorded the evidence and had written his judgment had left before it was delivered. Another magistrate who was appointed in his place read out the predecessor’s judgment and sentence and signed and dated it in open court. It was contended that this was illegal inasmuch as the judgment and sentence were not delivered in open court by the magistrate who heard the case and wrote the judgment and a re-trial was sought. The Madras High Court, however, repelled such a contention by holding that it was not necessary that the presiding officer of the court who wrote the judgment should be the same person as the presiding officer who was required to date and sign and pronounce it in open court. It was also observed that even if this was an irregularity it did not prejudice the accused. With regard to these observations we may, first of all, point out that the case was clearly distinguishable from the appeals at hand. The judgment written by the predecessor magistrate had been signed and dated in open court by the successor magistrate. In other words the successor magistrate had adopted the

predecessor's written judgment as his own. This is not the case in the appeals before. The successor judge had not adopted the predecessor's written judgments as her own. In fact, she did not even sign and date the same. The decision of the Madras High Court in the case of **In Re: Sankara Pillai** (supra) is also distinguishable inasmuch as the decision was rendered in the backdrop of the understanding that even if there was an irregularity it did not prejudice the accused. The question of prejudice does not at all arise in the present appeals inasmuch as the whole argument is that it is not an irregularity but an illegality.

43. Gian Singh Munsha Singh (supra) which is a decision of a learned single Judge is of course not binding on us but the learned counsel for the State had adopted the reasoning in that judgment as her own. We, however, do not agree with the same. The learned Single Judge in **Gian Singh Munsha Singh** (supra) had sought to distinguish between the words 'pronounced' as used in sub-section (1) of section 353 of the 1973 Code and the word 'delivered' as used in sub-section (3) of section 366 of the 1898 Code. The said provision is similar to section 353 of the 1973 Code with which we have already dealt elaborately. We have already indicated that delivery of a judgment under clause (a) of sub-section (1) of section 353 of the 1973 Code is one of the modes of pronouncement. Thus, while all deliveries would be pronouncements, the reverse is not necessarily true. And, in any event, the decision in **Gian Singh Munsha Singh** (supra) was one which pertained to a situation where a judgment could not be delivered on account of absence of the accused, that is, not the case in the present appeal. Therefore, the said decision would be of no help to the learned counsel for the State.

44. Insofar as the Supreme Court decision in the case of Surendra Singh (supra) is concerned we have already discussed the same at length above. We do not see as to how that decision comes to the aid of the case set up on behalf of the State. On the contrary it is a decision which supports the propositions of the learned counsel for the appellant.

45. We then come to the decision of a Division Bench of the High Court of the Madhya Pradesh, Indore Bench, in the case of Parasram Shivilal Tara Sewania (supra). In that case the question of legality of a judgment which was

written by the trying magistrate but was pronounced by the successor in office, was in issue. That decision sought to make a distinction between a judicial act and a mechanical or ministerial act. The observations of the Division Bench in this regard are as under:-

“3. The law has provided that the judgment should be written by the Magistrate who has heard the case. It might happen that a magistrate is transferred or for some other reasons is unable to complete the hearing; in that event, the successor takes over the case. He might either, complete the hearing beginning at the stage at which his predecessor has left it, or acting suo motu or on the prayer of the accused, hear it de novo. This is well known and involves no uncertainty or confusion. Since magistrates are constantly on the move, it does happen that one who has completed the hearing of a case, has to leave before he pronounces judgment.

If he does not write the judgment at all, there is nothing to be done about it and the case has to be heard again, and then disposed of. His successor cannot in a criminal case, write a judgment on the materials wholly and solely recorded by his predecessor. But often it happens that the outgoing magistrate has got just time to write the judgment but is not able to stay on to pronounce it. It may be, one or two holidays intervene or he has to leave so late in the day that by then the Court time is over. These are unusual happenings and certainly magistrates should do their best to avoid them. But when they do occur, there is nothing left except for the magistrate, if he is unable to stay on, at least to write the judgment and leave it with his successor, who in his turn, would pronounce it in Court. In such a case, the judicial part of the work, namely, the weighing of the pros and cons of the case and arriving at a decision as to the guilt or otherwise of the accused, has been done by the very magistrate who has heard the case. But the mechanical part of the work, namely, of taking the paper and reading out in the Court room before the accused has been done by the successor.

I do not see how the merits of the judicial decision can at all be affected by the mechanical work of reading out. The notion that there is something

possibly illegal in a successor doing certain things in connection with a case heard and decided by a magistrate, comes out of the failure to distinguish between judicial acts which certainly cannot be delegated and must be done by the very magistrate who hears the case, and ministerial or mechanical acts which could be done by him or his successor, though, naturally, it would be more convenient if he did it himself.”

These observations to our mind clearly run counter to the observations of the Supreme Court in **Surendra Singh** (supra) where the pronouncement of a judgment has been held to be a judicial act. Therefore, the said decision would also be of no use to the learned counsel for the State.

46. Lastly, the learned counsel for the State has placed reliance on a Single Judge decision of the High Court of Kerala in In Re: Reference by District and Sessions Judge (supra). The view taken therein and adopted by the learned counsel for the State was that there was no legal provision which says that a judgment or an order in a criminal case prepared and signed by a judicial officer could be pronounced in court only by him. In our view, such a conclusion also runs counter to the observations of the Supreme Court in **Surendra Singh** (supra). In any event we do not agree with the conclusion. Section 326 of the 1973 Code only enables a successor judge or magistrate to act on the evidence recorded by the predecessor judge or magistrate and then proceed to pronounce the judgment. It does not empower the successor magistrate to merely ‘announce’ a ‘judgment’ written by the predecessor judge or magistrate.

47. We are now left to deal with ‘note 2’ of the High Court order dated 08.02.2010. While it is true that the note sought to enable the judicial officers to pronounce judgments/orders within a period of 2/3 weeks, notwithstanding, the posting/transfer, that was merely an administrative order and cannot over ride the statutory provisions of the 1973 Code. The High Court could not permit something by way of an administrative order which was not permissible under the 1973 Code. The mere fact that there is a note such as note 2 in the order dated 08.02.2010 would not enable us to detract from the statutory provisions which do not permit the

pronouncement of a judgment by a successor judge which have been written and signed by the predecessor and that, too, after the predecessor ceased to have jurisdiction over the said case. It is important to remember that Mr Bharat Parasar ceased to exercise jurisdiction as an Additional Sessions Judge of North West District with effect from 11.02.2010. Consequently, he could do nothing in respect of the cases of that district after 11.02.2010. It is not even as if he had written his judgments prior to 11.02.2010 at which point of time he did have jurisdiction. He wrote the judgments and signed them on 02.03.2010 and 06.03.2010 much after he ceased to have jurisdiction in respect of the said matters. The judgments were not even pronounced in the manner indicated in section 353 of the 1973 Code. They were merely “announced”, whatever that expression may mean. As such, they were not judgments in law.

48. Consequently, the so-called judgments dated 02.03.2010 and 06.03.2010 which were ‘announced’ on 04.03.2010 and 12.03.2010 by the successor judge are invalid and are set aside.

49. Resultantly, the orders on point of sentence in both the cases are also without jurisdiction and are hereby set aside. The matters are remitted to the concerned Additional Sessions Judge having jurisdiction for concluding the trial and hearing arguments and thereafter pronouncing judgments thereon.

50. We make it clear that we have not examined either the evidence or the arguments based thereon. This decision has been rendered solely on the preliminary issue of the validity of the said so-called judgments and orders on point of sentence in the circumstances indicated above.

51. The appeals are allowed to the aforesaid extent.

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