
(2015) 05 BOM CK 0082
In the Bombay High Court
Case No : Criminal Appeal No. 25 of 2015

Amit

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 372, 377, 378, 378 (1) (2), 378 (3)
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 3 BomCR(Cri) 266

Hon'ble Judges : A.B. Chaudhari, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : A.S. Mardikar, Senior Advocate and Sumit Joshi, for the Appellant;
T.A. Mirza, APP, Advocates for the Respondent

Judgement

A.B. Chaudhari, J.—This Criminal Appeal has been filed by Amit Bhagirath Mishra, who is the victim within the meaning of Section 372, Criminal Procedure Code. His mother Nirmalabai had a long-standing dispute with the accused Jagdambaprasad over a share in the property.

2. On 14th December, 2004 at about 11.00 a.m., when Nirmalabai was at home and was sweeping her premises, the accused Jagadambaprasad arrived, asked her not to sweep and to pay him Rs. 1,000/-or to vacate the premises. Then he locked the latrine and bathroom, had a quarrel with Nirmalabai, went back to his house, brought a can of kerosene, poured it on her person and set her on fire. As a result, Nirmalabai died. Investigation was taken up. Charge-sheet was filed and accused Jagadambaprasad son of Parmanand Mishra was put on trial before the Sessions Judge. The Additional Sessions Judge, Akola, ultimately passed the Judgment and Order of acquittal of accused Jagadambaprasad Mishra of the offence of murder under Section 302, Indian Penal Code. Hence this appeal has been filed by the victim.

3. Mr. A.S. Mardikar, learned Senior Adv., for the Appellant, submitted as under:-

[a] In the case of Balasaheb Rangnath Khade Vs. The State of Maharashtra and Others, (2013) ALLMR(Cri) 1153 , the Division Bench of this Court held that proviso added to Section 372, Criminal Procedure Code, does not speak of the Leave of the High Court to file an appeal against acquittal, as contemplated by Section 378 (1) (2), Criminal Procedure Code and, therefore, a separate application for grant of Leave as in the case of an appeal to be filed by the State is not necessary.

[b] There is no limitation provided for filing of appeal by the victim under Section 372, Criminal Procedure Code and, therefore, the Steel Ltd. Vs. M/s. Atma Tube Products law of limitation has no application. As a result, the general principle that in such cases filing of appeal within a reasonable time should be the criteria.

[c] Since Leave of the High Court is not necessary for filing of appeal by a victim, such appeal has to be entertained and posted directly for final hearing without scrutinizing whether such appeal by victim is worth admitting for final hearing or not and that is clear from paragraph 26 of the said Judgment in Balasaheb's case.

4. The two learned Judges constituting Division Bench in the case of Balasaheb while delivering the Judgment on 21st September, 2011 differed and, therefore, a third Judge rendered her opinion and agreed with the view taken by the Judge presiding over the Division Bench [V.M. Kanade, J.], and also held in para 66 of her Judgment that an appeal filed by the victim after its filing cannot be scrutinized for admission, but will have to be straightway posted for final hearing/disposal on merits.

5. Per contra, learned Adv. Mr. A.S. Deshpande for respondent No. 2 accused, opposed the submission and pointed out a Full Bench Judgment of the Punjab and Haryana High Court in the case of M/s. Tata Steel Ltd. Vs. M/s. Atma Tube Products Ltd., and others and Kesar Singh Vs. Dheeraj Kumar and submitted that the Full Bench of the Punjab and Haryana High Court has held that the proviso to Section 372, Criminal Procedure Code, is prospective in application, i.e., from 31st December, 2009, and all matters filed after that date would have to be treated in accordance with the said amended provision as against the matters earlier filed by the old provisions. He also pointed out that the condition seeking Leave to Appeal or Special Leave to Appeal contemplated by Section 378 (3) and (4), Criminal Procedure Code, cannot be imposed for the maintainability of appeal by the victim under the proviso to Section 372 of the Code.

6. We have heard learned counsel for the rival parties at length on the question whether Leave or Special Leave contemplated by Section 378 (3) and (4), Criminal Procedure Code, is required or not. We hasten to add that there should be no difficulty in agreeing with the view that no such Leave is contemplated by Section 372, Criminal Procedure Code, and therefore, no formal application for grant of leave is required. We, therefore, agree with the said aspect of the matter.

7. The next question is about the power of the High Court of admission of

appeals. The question has arisen because the Division Bench in the case of Balasaheb [cited supra], so also the learned Third Judge have found that the appeal filed by the victim under Section 372 cannot be scrutinized for admission and will have to straightway go for final hearing no sooner the same is presented to the Registry of High Court as against the appeal filed by the State against the order of acquittal which the High Court can scrutinize for admission as to whether the same should be admitted or dismissed in motion hearing. We are unable to subscribe to the view taken in the above decision that a Criminal Appeal filed against the order of acquittal by victim cannot be scrutinized to find out whether such an appeal should be admitted or dismissed in the admission-hearing or not. We, however, find that in para 66 of the Judgment delivered by the Third Judge, the following observations have been made:-

"66. True it is that the requirement of leave is a sifting provision, it sifts the frivolous and vexatious appeals from the meritorious ones. It, therefore, separates the grain from the chaff. The aspect of leave is akin to an admission of the appeal. The appeal itself could be dismissed upon following the procedure under section 384 of the Criminal Procedure Code if no merit is shown by the victim. However that would be the final dismissal of the appeal on merits and not only analogous to an appeal being not admitted as prima facie not reflecting merit. The material aspect to consider is that a victim having had his/her human rights violated is entitled to a full and unfettered hearing without the permission of the judicial authority that is obligated to hear him/her but as a matter of right that is a writ large in the proviso ".....the victim shall have the right to prefer an appeal., " no matter that the provisions of the Code provided for any other restrictions."

8. In the first place, the question, that was framed by the Division Bench presided over by V.M. Kanade, J., in the case of Balasaheb was as under:-

"Whether the victim can file appeal against an order of acquittal by the Trial Court without filing application for leave to file appeal in this Court?"

There was no other question framed except the above. Since there was difference of opinion between the two learned Judges on the said question, reference was made to the Third Judge and the Third Judge [Mrs. Roshan Dalvi, J.] agreed with the view taken by the presiding Judge of the Division Bench that no such leave was required to be obtained for filing application for grant of leave. We have already indicated that we have agreed with the said proposition that requirement of obtaining leave of the High Court to file an appeal by victim cannot be read into the provision with regard to the substantive right given to the victim to file such appeal in accordance with proviso to Section 372 of the Code. However, the question is about the power of the High Court to examine/scrutinize whether an appeal filed by the victim against an order of acquittal, or, as the case may be, should be admitted or dismissed in admission-hearing or not? The learned Third Judge in para 66 answered the said question. As a matter of fact, the Division Bench had never framed the question as to the power of the

High Court to admit or dismiss appeal in motion/admission hearing against acquittal, or as the case may be and, therefore, there was no occasion to hold directly or indirectly that the High Court was denuded of its power to examine whether such an appeal should be admitted or dismissed in motion hearing or not. The Division Bench had not framed that question as indicated by us above, but the learned Third Judge answered the same in para 66 as above. As a sequel, we think that the view taken by the learned Third Judge in para 66 cannot be said to be the view of the Bench of the strength more than one. We are, therefore, of the opinion that it is not necessary for us to refer the matter to Hon"ble the Chief Justice on this issue. There was no occasion for the learned Third Judge to hold accordingly by answering in para 66, as no question to that effect was framed or answered by the Division Bench.

9. We find that the learned Third Judge has treated the provision for grant of Leave under Section 378 and the power of the High Court to admit or dismiss the appeals in motion hearing as one and the same integral part which itself is, in our opinion, a mistake. Section 378, as it existed from the beginning, provided for the provision to obtain leave for filing appeal against order of acquittal and the Legislature had then specifically inserted a separate provision providing for the power of the High Court to dismiss any appeal summarily. Section 384 reads thus:-

"384. Summary dismissal of appeal.-(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that -

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case.

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law."

10. From the scheme of Section 384, it is clear that in addition to the requirement of obtaining leave under Section 378, the power of the High Court to examine/scrutinize whether appeal filed under Section 382 or Section 383 should be admitted or dismissed exists from the beginning. That being so, the requirement of obtaining leave and power of the High Court to dismiss an appeal summarily is not one and the same. This is fortified from the further provision, namely Section 385 of the Code. We quote Section 385 as under:-

"385. Procedure for hearing appeals not dismissed summarily.-(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given -

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not except with the leave of the Court urge or be heard in support of any other ground."

11. There is a decision rendered by the Division Bench of Allahabad High Court in the case of State Vs. Ballister Singh and Others, AIR 1954 All 47 : (1953) 23 AWR 560 upholding the power of the High Court to dismiss appeal against acquittal summarily or in the admission-hearing, as stated in para 3 of the said Judgment. The Division Bench of Andhra Pradesh High Court in the case of In Re: The Public Prosecutor, AIR 1960 AP 64 referred to the said decision of Allahabad High Court and further held thus in paras 3 and 4 thereof:-

"3... Such being the case, it cannot be said when an appeal against the acquittal is filed by the State, the counsel for the appellant has not been heard. The

dismissal, therefore, of an appeal against acquittal after hearing the Public Prosecutor, as is in vogue, is in strict conformity with S. 421, Cr.P.C. Further, the stand taken by the learned Public Prosecutor, in our view, would mean that the procedure under Sub-section (2) of S. 421 could be applied to cases of an appeal against acquittal, even though the Court has not to follow or observe the terms of sub-section (1). To accept this contention of the learned Public Prosecutor would, in our view, be to abrogate the operation of sub-section (1) of S. 421, Cr.P.C., while calling in aid sub-section (2) in order to give notice to the accused. Moreover, if sub-section (2) can apply to the cases of appeals against acquittal, nothing has been shown why sub-section (1) should be kept in abeyance in so far as appeals against acquittals are concerned. It follows that the power to summarily dismiss an appeal against acquittal after perusal of the petition by this Court and after hearing the Public Prosecutor is neither expressly nor impliedly taken away by the non-mention of S. 417 in S. 421, Cr. P.C."

"4... The line of reasoning that appeals against acquittal filed under sub-section (1) of S. 417 is considered more privileged than those filed with leave or special leave or with certificate, is unacceptable, even though the right to appeal against acquittal as is urged by the learned Public Prosecutor, is not hedged in by those restrictions. It, therefore, stands to reason to have to posit that a perusal of the appeal petition under S. 421 Cr. P.C. accords also with the policy underlying the right to appeal against acquittal which had been denied before the year 1872. Thus the non-specification of restrictions such as contained in S. 411-A or sub-section (3) of S. 417 by itself does not guarantee immunity to appeals by the State against acquittal from scrutiny at the stage of admission."

We are, thus, fortified in our view, and in the light of the doctrine stare decisis, namely for exercise of power to scrutinize the appeal at the admission-hearing, we think the power of the High Court to dismiss the appeal against acquittal summarily is intact and cannot be taken away. Our attention was invited to paragraphs 25 and 26 of the Division Bench Judgment in the case of Balasaheb. We have carefully seen the same. In para 25, the argument that the pendency of such appeals would increase if "Leave" is not retained, was not accepted and as a consequence, in para 26, the some earlier orders of the learned Single Judges were approved. We, however, find that the question as to the power of the High Court to admit or dismiss an appeal against acquittal in a motion/admission hearing was neither framed, argued nor answered. In fact, the said question did not arise for determination before the Division Bench, as only one question was framed in the beginning. To repeat, the provision regarding "Leave" is clearly distinct and separate from the power of the High Court to scrutinize an appeal in motion/admission hearing and further to either dismiss the same summarily or admit for final hearing. We accordingly hold so.

12. The next question is about limitation for filing an appeal against order of acquittal by a victim. The Division Bench in the case of Balasaheb has held that there is no limitation provided for filing of such an appeal against acquittal by a

victim; but it firmly held that such appeal should be filed within a reasonable period of time. Now, as a matter of fact, the question whether the limitation for filing an appeal by a victim from order of acquittal did not fall for consideration before the Division Bench, nor any question to that effect was framed in the case of Balasaheb. According to us, therefore, the Division Bench Judgment in the case of Balasaheb is not an authority for the proposition that no limitation is provided for filing of an appeal against an order of acquittal and that such appeal should be filed within a reasonable period. The aspect of limitation for filing of an appeal against acquittal is governed by Article 114 of the Limitation Act. It is interesting to note that the said question fell for consideration before the Full Bench of the Punjab and Haryana High Court in the case of M/s. Tata Steel Ltd., Vs. M/s. Atma Tube Products Ltd. and others [decided on 18th March, 2013]. It would be convenient to quote some of paragraphs from the said Judgment in this Judgment. They are paras 129, 130, 137, 138 and Question [G] and answer thereto, which are quoted below:-

"129. One of the well-recognized principles of criminal jurisprudence is that "crime never dies". The maxim "nullum tempus qut locus occurrit regi"[lapse of time is no bar to Crown in proceedings against offenders] is an age-old rule embedded in criminal justice delivery system. The public policy behind this rule is that a criminal offence is considered as a wrong committed against the State and the Society though it is committed against an individual. The aforesaid rule of prudence has been duly acknowledged by the Parliament as it has prescribed no period of limitation for filing an appeal under proviso to Section 372 of the Code against an order of acquittal.

130. Article 114 of the Schedule to the Limitation Act, 1963, however, prescribes period of limitation for State's appeal against order of acquittal and it reads as under:-

"137. The Legislative intentment behind Articles 114 and 115 (b) of the Limitation Act in prescribing the period of limitation for appeals to the High Court or to the Court of Session against different type of orders, is the best guiding factor to determine reasonableness of the period of limitation for an appeal preferable at the instant of a "victim" also. It would, therefore, be reasonable to view that for appeal against acquittal filed by a "victim" to the High Court the period of limitation would be 90 days and where such appeal lies to the Sessions Court such period shall be 60 days. For appeal against any other order, the reasonable period would be 60 days to the High Court and 30 days for appeals to the Sessions Court from the orders passed by the Magistrate, as the case may be. To be more specific, the period of limitation for the purpose of filing appeal(s) by a victim shall be as under:-

(a) In case of acquittal -

(b) Any other sentence or order -

"138. The limitation period of ninety, sixty and thirty days, as the case may be,

prescribed above for the maintainability of an appeal by a victim, in our considered view, ought to be counted from the date such "victim" acquires knowledge of the order appealable under proviso to Section 372. We say so for the reason that in most of the State cases, the "victim" has no participatory role at the trial stage and the possibility of his/her remaining in the dark about the adverse order cannot be lightly brushed aside. The above rule of limitation, therefore, cannot be mechanically enforced even if the victim had no informed knowledge regarding culmination of the trial proceedings as it might cause serious prejudice to his/her rights, close to the extent of snatching away the right to appeal earned by the victims after a long drawn battle."

"Question (G) (ix) Subject to the exception carved out in para 138 of this order, the period of limitation for an appeal by a "victim" under proviso to Section 372 of the Code shall be as under:-

(a) In case of acquittal -

(b) Any other sentence or order -

Upon perusal of the reasons above, recorded by the Full Bench of Punjab and Haryana High Court, we respectfully agree with the above reasons, except for the reasons in paras 137 and 138 read with answer to Question [G} as above.

13. As is clear from the above discussion, there is no provision of limitation for filing of an appeal by the victim under proviso to Section 372 of the Code and Article 114 is silent. In other words, simultaneously, there is no amendment made to Article 114 of the Limitation Act for providing limitation to such appeals under Section 372, Criminal Procedure Code. But then the Full Bench of the Punjab and Haryana High Court has prescribed the limitation as provided in Article 114 of the Limitation Act in para 138, and has also further held that the date of acquisition of knowledge by the victim of the order of acquittal which could be a disputed question to be appealed against should be the commencement of limitation.

In our humble opinion, and with respect to the Full Bench of the Punjab and Haryana High Court providing for the limitation for filing of an appeal against acquittal does not fall within the realm of the judicial function. It is for the Legislature to provide for limitation under Article 114 when the occasion has arisen as a result of insertion of proviso to Section 372 with effect from December 31, 2009. Till then, the settled principle that such appeals must be filed within a reasonable time should hold the field. In that view of the matter, the only way out for us is to make a recommendation to the Law Commission through the Ministry of Law and Justice to consider amendment to Article 114 of the Limitation Act for providing for limitation in relation to the appeals to be filed under the proviso to Section 372, Criminal Procedure Code. Further, the appellate Court has always a power to consider the reason about the date of knowledge of the order appealable by the victim as sufficient cause for condoning the delay in filing the appeal. With respect, it would not be appropriate to hold that the

limitation should be counted from the date of knowledge acquired by the victim without the same being projected as a reason to condone the delay.

We accordingly record our findings as above. We further direct the Registry now to place the instant appeal for admission-hearing on 10th June, 2015.

A copy of this Judgment be sent to the Law Commission through Ministry of Law and Justice.