

(2005) 01 KAR CK 0055

In the Karnataka High Court

Case No : Criminal.A. No. 829 of 2001 c/w No. 975 of 2001

Ammanamma and Others

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 31-01-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377, 377 (3), 384 (4), 393
Penal Code, 1860 (IPC) — Section 149, 302, 498A

Citation : (2005) CriLJ 2341 : (2005) ILR (Kar) 1029 : (2005) 2 KarLJ 279 :
(2005) 2 KCCR 1282 : (2005) 2 RCR(Criminal) 508

Hon'ble Judges : S.R. Bannurmath, J;S.B. Majage, J;Mohan Shantanagoudar, J

Bench : Full Bench

Advocate : C.H. Hanumantharaya and G. Suresh, for the Appellant; B.C. Muddappa, Addl. SPP, for the Respondent

Judgement

S.B. Majage, J.—The question referred to the Bench is:

"Whether in cases where appeal against conviction is filed and appeal against enhancement is also filed, the Bench considering the same is required to dispose of the same simultaneously and together; and if such procedure is not followed, what is its effect and remedy available to the aggrieved party?"

2. The facts, giving rise to the said question and the reason for reference are;

The Court of 25th Addl. Sessions Judge, Bangalore City, by its order dated 25.6.2001, has convicted 5 accused in S.C. No. 40/1991 and sentenced them to undergo R.I. for 3 years for the offence u/s 498-A r/w 149 of IPC and sentenced the accused Nos. 2 to undergo imprisonment for life whereas, sentenced accused Nos. 1 and 3 to 5 to undergo R.I. for a period of 5 years for the offence u/s 302 read with Section 149 of IPC. Challenging their conviction, accused Nos. 1 and 3 to 5 have filed Cr.A. No. 829/ 2001 whereas, accused No. 2 has filed CrI.A. No. 975/2001 before this Court. These appeals are pending for consideration.

Under Section 377 of Cr.P.C., the State had also filed CrI.A. No. 1181/2001

against the inadequacy of the sentence as against accused Nos. 1 and 3 to 5 since they were sentenced to undergo R.I for 5 years only as against the minimum punishment of imprisonment for life for the offence punishable u/s 302 of IPC. When said State appeal was taken for consideration, filing of and pendency of two criminal appeals filed by the accused challenging their conviction was brought to the notice of the Division Bench. Still, without considering the case of the accused regarding their acquittal, the Division Bench allowed the State appeal (Crl.A. No. 1181/2001) after hearing the State and the accused and ordered as under:

"4. The State Appeal is allowed and the sentence passed by the Trial Court is set aside and the accused is sentenced to imprisonment for life.

5. This will not preclude the appeal being heard on merits."

Thus, the sentence imposed on accused Nos. 1 and 3 to 5 has been enhanced.

In view of Section 377(3) of Cr.P.C., an accused would be deemed to have waived his right to claim acquittal or reduction in sentence, if not argued or heard and, if heard, the order passed in the State appeal would operate against the accused challenging their sentence.

So, when the two appeals filed by the accused came up for consideration before the Division Bench consisted of two of us (SRBMJ & SBMJ), for the reasons given, it was felt proper that the matter be referred to a Larger Bench on the question referred to already. Thus, the matter is before us.

3. We have heard both sides. The learned Counsel for the accused submitted that under inherent powers vested in this Court u/s 482 of Cr.P.C, this Court can recall the order passed by the Division Bench in Crl.A. No. 1181/2001 and thereafter hear and decide that (State) appeal along with the two appeals filed by the accused. In this connection, he placed reliance on a Full Bench decision of Rajasthan High Court in the case of Habu Vs. State of Rajasthan, . So also, according to him, inspite of disposal of the appeal filed by the State (Crl.A. No. 1181/2001), this Court has still power to hear and dispose of the appeals filed by the accused persons and relied on a decision of Madhya Pradesh High Court in the case of Mst. Budhwara Bai Vs. The State of Madhya Pradesh, in support of his argument.

On the other hand, the learned Addl SPP, though not able to support the procedure adopted by the Division Bench of this Court in the State appeal (Crl.A. No. 1181/2001), submitted that inspite of the order of the Division Bench in disposing the State appeal, this Court can still decide the present appeals in view of provisions contained in Sections 384(4) and 393 of Cr.P.C. and invited our attention to the said provisions with some other provisions relating to appeals against conviction. Perused the records carefully.

4. Since the State appeal has been disposed of already and the learned Addl. SPP firstly relied on Section 384(4) of Cr.P.C., let us see what it says:

"384. Summary dismissal of appeal-

(1) to (3)...

(4) Where an appeal presented u/s 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented u/s 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".

As per said provision, Court can hear and dispose of an appeal filed by accused u/s 382, even if jail appeal filed by accused u/s 383 is dismissed summarily. But, CrI.A. No. 1181/2001 was not an appeal filed u/s 383 of Cr.P.C. It was an appeal filed by the State. Further, it was disposed of u/s 377 of Cr.P.C. and not dismissed summarily u/s 384(1) of Cr.P.C., So, Section 384(4) has no application. So also, the decision of Madhya Pradesh High Court in the case of Musamat Budwara Bai (supra) dealing with the situation, where jail appeal filed by the accused was dismissed summarily, does not come to the aid of the accused.

5. Now let us turn to Section 393 of Cr.P.C., on which the learned Additional S.P.P. relies. It reads as follows:

"393. Finality of judgments and orders on appeal-Judgments and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in Section 377, Section 378, sub-section (4) of Section 384 or Chapter XXX:

Provided that notwithstanding the final disposal of an appeal against conviction in any case, the Appellate Court may hear and dispose of, on the merits,-

(a) an appeal against acquittal u/s 378, arising out of the same case, or

(b) an appeal for the enhancement of sentence u/s 377, arising out of the same case."

According to said provision, though the judgments and orders passed in appeals are final, Court can still hear an appeal against acquittal u/s 378, or an appeal filed seeking enhancement of sentence u/s 377, if such appeal(s) arise out of the same case. But, in the case on hand, the appeal filed by the State u/s 377 of Cr.P.C. has been decided and the appeals filed by the accused u/s 374 of Cr.P.C. seeking their acquittal are pending consideration. As such said provision also does not come to the help of the State.

6. Now reference can also be had to Section 386 of Cr.P.C. dealing with the powers of appellate court, because any power to be exercised in the appeals under consideration will be necessarily under that section only. Since we are concerned with the powers of this Court (appellate court) in the appeals arising out of conviction of the accused, Section 386(b), which is relevant to such appeals, is extracted below:

"386. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal u/s 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a).....

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

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

.....

A bare reading of said provision shows that even this provision does not provide what an appellate Court could do in appeals against conviction when, after hearing accused in an appeal filed by the State, the sentence imposed on the accused is enhanced u/s 377 of Cr.P.C. So, it is also of no help to the prosecution.

7. It is not a case requiring any amendment or consequential or incidental order. So, clause, (e) of Section 386, under which an appellate Court may make any amendment or any consequential or incidental order that may be just or proper also does not come to the aid of the learned Addl.SPP. Thus, neither Section 384 nor Section 393 nor Section 386 of Cr.P.C. applies to the case on hand.

8. Now let us see Section 377(3) of Cr.P.C. since, admittedly, CrI.A. No. 1181/2001 filed by the State and disposed of already was u/s 377 of Cr.P.C. Section 377(3) of Cr.P.C. is as under:

"377(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence".

In view of the said provision, in an appeal filed by the State, accused is required to be heard and given an opportunity to plead for his acquittal also. So, it goes without say that at the time of hearing an appeal filed by the State, accused has to be heard in his appeal filed challenging his conviction and it is only after guilt of the accused is found established, State appeal for enhancement has to be heard and considered and not vice-versa. However, as noticed by us earlier, Division Bench of this Court has neither heard accused in the appeals filed by them challenging their conviction nor heard the accused regarding their acquittal

or reduction of sentence when it heard the accused and disposed of Crl.A. No. 1181/2001 filed by the State u/s 377, though it was aware and in knowledge of the pendency of appeals filed by the accused. Not only that, after hearing the accused and State in the State appeal, the Division Bench has allowed the State appeal and enhanced the sentence to imprisonment for life. In view of that order, the conviction and finding of guilt of A-1 and A-3 to 5 of the offence u/s 302 of IPC stood confirmed. So, on hearing the appeals filed by the accused, if the Division Bench also comes to the conclusion for confirming the conviction, there arises no problem. On the other hand, if it comes to any other conclusion, is it open to the Court to reverse that finding of guilt and acquit the accused or reduce the sentence in their appeals by holding that the offence for which they were charged and found guilty is not proved? is the point for consideration.

9. As per the mandate contained in Section 377(3) of Cr.P.C., when an appeal is filed by the State seeking enhancement of the sentence imposed by the trial Court and an appeal is also filed by the accused seeking acquittal or reduction in sentence, both the appeals require to be heard together to avoid conflicting decisions and dispose of them simultaneously. So, in our view, it would be appropriate and proper to hear the Appeal of the accused first and only if the Appellate Court comes to the conclusion to confirm judgment of conviction, then the appeal of the State for enhancement has to be dealt with. However, the Division Bench has not followed the said procedure, though it was aware of the pendency of the appeals filed by the accused and as such, we are of the clear view that the procedure adopted by the Division Bench in Crl.A. No. 1181/2001 filed by the State is clearly erroneous.

10. Now it is pertinent to note that, while allowing Crl.A. No. 1181/2001 filed by the State and enhancing the sentence to imprisonment for life, the Division Bench has observed that its order (in the State appeal) will not preclude the appeal (filed by accused) being heard on merits. This indicates that the Division Bench did not hear the accused pleading their acquittal in the appeals filed by them and as such, they cannot be deprived of their valuable right of hearing regarding their acquittal. In the circumstances and fact situation of the present case, it could be clarified that the appeals filed by the accused for their acquittal could be heard and decided.

11. At this juncture, it would be useful to note that in the case of Habu (supra), the Full Bench of Rajasthan High Court has observed thus:

" 42.... A perusal of the history of the cases shows that in all democratic societies right of hearing has been given utmost importance, rather laws have been enacted from time to time for providing legal aid to the persons who are unable to afford the lawyers. Holds Werth's history on English Law vol.9 page 226 deals with history of struggle which took place in England before a litigant's representation in the Court took a final shape in bringing out Poor Persons' Defence Ordinance which came up for scrutiny before their Lordship of the Privy Council in Gelosh Hurads (AIR 1944 PC 93) (Cited above). Very valuable

observation has been made therein and if there is a refusal to hear the counsel for the accused an appeal cannot stand. Their Lordship had gone to the extent of holding that even when an adjournment had been sought and refused the accused has to be re-heard because right of hearing cannot be taken away. Their Lordships of the Supreme Court have also advanced this very principle where it was held in couple of cases that if a lawyer does not appear it behoves the Court to appoint an amicus curiae. The same view has been taken in other cases also which have been referred to by the learned Counsel above and we are firmly of the opinion that right of hearing cannot be taken away and the sound judicial view would be that reasonable opportunity of being heard must be provided to the accused. Thus, once an appeal or revision is admitted for hearing, it should not normally be decided *ex parte* and if it has been decided *ex parte* and valid reasons have been shown that there had been failure of justice, inherent powers of this Court should be exercised..."

It also observed as under:

"43... A great emphasis has been laid on Article 21 of the Constitution of India which has been given new dimensions. Therefore, while considering the scope of right of hearing we are of the opinion that due consideration has to be given to Section 304 Cr.P.C, Articles 21 and 39A of the Constitution. Section 482 Cr.P.C. will have to be considered in the light of the aforesaid provisions. We have already mentioned above that in all civilized and democratic societies right of hearing has been considered to be one of the most fundamental of the fundamental rights flowing from principles of natural justice and principles enshrined in well known maxim-audio alteram partem..."

So also, further observed thus:

"44. Keeping the well known principles of interpretation of statute in our mind we deem it proper to observe that while considering the scope of Section 482 Cr.P.C. we must remember that inherent powers which are always inherent in a Court are if (not) specifically provided by the legislature, all pervasive and comprehensive enough to arm the Court for advancing the cause of justice and to prevent the abuse of the process of the Court. It is a well known dictum that justice has not only to be done but it should also appear to have been done and, therefore, whenever a litigant comes before the Court it is essential that he must go having full faith in his mind that the Court has done justice with the cases. It is true that all cannot go satisfied with the decision of the Court but at least all must have the satisfaction that they have been heard by the Court....."

The said observations make it clear that an accused cannot be deprived of his important and fundamental right of hearing and support our view that the accused cannot be deprived of their right of hearing in their appeals filed challenging their conviction, though they were represented and given an opportunity of being heard in the appeal filed by the State ie., in CrI. A. No. 1181/2001 while enhancing their sentence to undergo imprisonment for life for

the offence u/s 302 of I.P.C.

12. So, our answer to the first part of the question referred to the Bench is: "Where an appeal against conviction is filed by accused and also an appeal against enhancement is filed by the State, the Bench considering the appeals is required to dispose of both the appeals simultaneously and together and not separately i.e., not in any other manner."

Since it is made clear by us that in spite of the disposal of the State appeal (Crl.A. No. 1181/2001), the appeals filed by the accused seeking their acquittal could be heard, we feel it unnecessary to consider and decide the second part of the question as it does not survive for consideration.

With the opinion, the matter be referred back to the Division Bench hearing the appeals filed by the accused.