

(2002) 02 GUJ CK 0075

In the Gujarat High Court

Case No : Criminal Revision Application No. 56 of 2002

Amratbhai Lilabhai Desai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-02-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 386

Citation : (2002) CriLJ 2765 : (2002) 3 GLR 145

Hon'ble Judges : D.P. Buch, J

Bench : Single Bench

Advocate : J.M. Panchal and K.J. Panchal, for the Appellant; K.G. Seth, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

D.P. Buch, J.—This is a Revision Application filed u/s 397 read with Section 401 of the Criminal Procedure Code (for short "the Code"), challenging the judgment and order dated 7-1-2002 recorded by the learned Additional Sessions Judge, Court No. 10 in Criminal Appeal No. 15 of 1999 under which the learned Judge dismissed the said appeal and confirmed the judgment and conviction order dated 18-1-1999 recorded by the learned Metropolitan Magistrate, Court No. 10, Ahmedabad City, in Criminal Case No. 1806 of 1997 whereby the learned Magistrate convicted the present petitioner for the offences punishable under Sections 279, 304A of the I.P.C. as well as for the offences punishable under Sections 177 and 184 of the Motor Vehicles Act, and sentenced him to suffer S.I. for 3 months and fine of Rs. 500/- for the offence punishable u/s 279 of the I.P.C. The petitioner was directed to suffer further S.I. for 15 days in case the fine was not paid. For the offence punishable u/s 304A of the I.P.C. the petitioner was sentenced to suffer S.I. for six months. He was directed to pay fine of Rs. 1,000/- and in case he did not pay the fine he was required to undergo further S.I. for 1 month. For the offences punishable under Sections 177 and 184 of the Motor Vehicles Act the petitioner was directed to pay fine of Rs. 500/- and in

default of payment of fine he was required to undergo S.I. for 15 days.

2. Looking to the contentions raised on behalf of the petitioner this Revision Application is being heard and disposed of finally with the consent of the learned Advocates for the parties.

3. The learned Advocate for the petitioner has taken a contention that the present petitioner had engaged Advocate Mr. M. I. Laliwala in the aforesaid Criminal Appeal No. 15 of 1999 before the City Sessions Court, Ahmedabad. It is also contended by him that the learned Advocate for the petitioner was not present when the above appeal was taken up by the learned Additional Sessions Judge for hearing and disposal. It is also contended by him that even the petitioner was not present before the said Court when the said appeal was heard. It is also argued by him that the petitioner was not informed by his learned Advocate that the matter was fixed before the Sessions Court for hearing arguments in the aforesaid appeal. Therefore, the Court had not heard either the appellant or his learned Advocate. It is also argued by him that the learned Judge did not appoint any Advocate on behalf of the appellant to place the case of the appellant before the Court of appeal. It is next contended by him that an appeal is a statutory right of a convicted accused person and it is also a right vested in him to plead his case before the Court of appeal and prove his innocence. It is also a right of the accused person to show that the learned trial Magistrate had committed some error in convicting the convict and this right could not be availed of when the Advocate did not appear before the trial Court.

4. At the same time, the learned Advocate for the petitioner was not in a position to say as to why the learned Advocate for the petitioner was absent at the time when the above matter was heard ex parte by the Sessions Court. When an Advocate has been engaged, by a party, then it is the duty of the Advocate to see that he remains present before the Court concerned when the matter is listed for hearing. In case, he is unable to attend the said Court he has to make some alternative arrangement to see that the matter is either heard or adjourned, Absence of an Advocate without any intimation to the Court causes great deal of difficulty to the Court and hardship to the party. The difficulty to the Court is that the Court is never in know as to whether the Advocate is absent on account of some good cause or his absence is without any cause. The Court also does not get assistance of such an Advocate at the trial or at the stage of hearing of the argument. A party whose Advocate is absent is also likely to suffer adversely. His case may not be pleaded properly at the angle from which he would like to plead his case before the Court. Therefore, he is likely to suffer injustice and the case is likely to result in miscarriage of justice.

5. In the present case, we find that Mr. M.I. Laliwala, an Advocate practising in the City Sessions Court, was engaged by the present petitioner to argue out the said appeal before the Court of appeal. Therefore, the petitioner would normally under the impression that his Advocate would remain present as and when the matter may be called out for hearing. He would also be under an impression that

the Advocate would inform him as and when the matter may be heard and disposed of. In the present case, it has been submitted that the learned Advocate for the petitioner, before the Sessions Court, was not present and even after the disposal of the appeal the petitioner was not informed about the dismissal of his appeal. Therefore, the case of the appellant has not been properly placed and argued before the Sessions Court and the errors which may have been committed by the learned trial Magistrate while convicting the present petitioner were not properly pleaded in proper perspective before the Sessions Court when the above appeal was heard and disposed of ex parte. It is, therefore, submitted that in the interest of justice the judgment and conviction order recorded by the Sessions Court may be set aside and the matter may be remanded to the said Court for fresh decision on merits.

6. In support of the said argument, the learned Advocate for the petitioner has shown a decision of Hon^{ble} Supreme Court in the case of Dr. Jainendra Kumar Vijay Kumar Badjate Vs. State of Maharashtra, , there also the Advocate for the appellant-accused was absent and the matter was heard and disposed of in absence of the appellant-accused and his Advocate. There the Advocate was appointed by the Court and he was absent. The Hon^{ble} Supreme Court has observed that Their Lordship did not wish to enter into the question as to why the Counsel was not present. However, it was further observed that it was a matter which could be considered by the proper authorities, if they thought it fit. At the same time, it was further observed that in the circumstances, however, the judgment of the High Court was set aside and direction was issued that the said Criminal Appeal be heard fresh by the High Court.

7. Another decision referred to and relied upon by the learned Advocate for the petitioner can be gathered from the case of Ram Naresh Yadav v. State of Bihar, reported in AIR 1987 SC 1500. Here also, neither the appellants nor their Counsel were heard in support of the appeal challenging the order of conviction and sentence of the convict was confirmed. The Hon^{ble} Supreme Court, in the course of a short order in the said matter, had observed that it was an admitted position that neither the appellants nor their Counsel were heard. It was further observed that if the Counsel did not appear when the Criminal appeals were called out, it would hamper the work of the Court and create a serious problem for the Court. It is further observed that if this happens often, the work of the Court would become well-nigh impossible. That in criminal matters convict must be heard before their matters were decided on merit. It was also observed that the Court could dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council. But, the matter can be disposed of, on merits, only after hearing the appellant or his Counsel who may be appointed by the Court at the State cost to argue on behalf of the appellants. It was also observed that since the order of conviction and sentence was confirmed without hearing either the appellant or Counsel for the appellant, the order must be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with the law after hearing the appellants or their

Counsel and on their failure to engage Counsel, after hearing Counsel appointed by the Court to argue on their behalf.

8. This shows that the Hon''ble Supreme Court has observed that the Court of appeal could dismiss the criminal appeal for the default of the party and/ or his Advocate, but the Court of appeal could not dispose of appeal on merit without hearing the accused or their Advocate.

9. In the case on hand, the appeal has been dismissed on merit and judgment and order recorded by the learned trial Judge have been confirmed without hearing the petitioner or his Advocate and without appointing Advocate to argue out the case of the petitioner. In above view of this fact situation and considering the aforesaid two decisions, it is clear that the Sessions Court should have dealt with the said appeal and in accordance with the decision of Ram Naresh Yadav (AIR 1987 SC 1500) which has not been done. This has resulted in some sort of injustice to the present petitioner as his case was not put forward in proper perspective. Therefore, the stigma of the conviction has continued to be with him.

10. In above view of the matter and in the background of facts and circumstances of the case as also considering the principle enunciated in AIR 1987 SC 1500 (supra), the said judgments and orders of the Sessions Court are required to be quashed and set aside and the matter is required to be remanded to the Sessions Court for decision on merits, according to law and in accordance with the observation made by the Hon''ble Supreme Court in AIR 1987 SC 1500 (supra). At the same time, because of absence of the Advocate before the Court of appeal, the petitioner was required to rush to this Court, and in turn, this Court is required to remand the matter back to the Sessions Court. This also shows that even the time of the Sessions Court has been wasted and the Sessions Court will be required to hear and dispose of the matter afresh again. There is nothing on record to show that the Advocate was sick or he was busy with his personal/social work. It is required to be noted that the absence of Advocate on account of his engagement in another matter in another Court will not be a ground for adjourning any case pending in a particular Court. However, in the present case, we do not find anything on record to show that Mr. Laliwala, learned Advocate, was busy with his social work or he was sick. Therefore, in the interest of justice and with a view to protect the interest of the present petitioner, I am of the opinion that the matter should be taken up by the Bar Council for appropriate decision in the matter. At the same time, before referring the matter to the Bar Council a notice should be issued by this Court to the said Advocate to show cause as to why the matter should not be referred to the Bar Council for disciplinary action against him. With the above observation, this Criminal Revision Application is allowed and the judgment and conviction order recorded in Criminal Appeal No. 15 of 1999 by the learned Additional Sessions Judge are set aside and the matter is remanded back to the City Sessions Court for hearing and disposal of the said appeal according to law and in the light of the observations made hereinabove.

11. Notice shall be issued to Advocate Mr. M.I. Laliwala to show cause as to why the matter should not be referred to the Bar Council of Gujarat.