
(2007) 03 CAL CK 0009
In the Calcutta High Court
Case No : Criminal Application No. 332 of 2004

Bhim Ch. Hembram	Vs	APPELLANT
State of West Bengal		RESPONDENT

Date of Decision : 13-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 228, 228(2), 229, 240, 240(2)
Penal Code, 1860 (IPC) — Section 409

Citation : (2007) 4 CHN 133

Hon'ble Judges : Rudrendra Nath Banerjee, J; Amit Talukdar, J

Bench : Division Bench

Advocate : R.P. Bhattacharyya, for the Appellant; Tapan Dutta Gupta and Kallol Mondal, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.—This is a jail appeal filed by the convict/appellant which is directed against the judgment and order dated 11.3.2004 passed by the learned Special Judge, Third Court, Purulia in Special Court Case No. 2 of 2003. As the convict/appellant pleaded guilty, the learned Special Court by its impugned judgment and order found him guilty in respect of charge of Section 409 of the Indian Penal Code and sentenced him to suffer a simple imprisonment for a period of eight (8) years and to pay fine of Rs. 1,000/- (One Thousand); In default of payment of fine he was directed to suffer further simple imprisonment for two months.

2. This appeal has been argued by Shri Bhattacharya, the learned State Defence, who has placed before us the following points in support of the appeal.

3. Firstly, Shri Bhattacharya has submitted that the sentence is too severe. Secondly, the learned Special Court without properly appreciating the state of mind of the appellant very abruptly had taken the plea of guilt which resulted in a miscarriage of justice and thirdly, the plea of guilt was not a unqualified plea of guilt. As such, the same should not have been accepted by the learned Special

Court without exercising prior judicial discretion.

4. Relying on the aforesaid situation Shri Bhattacharya, the learned State Defence has submitted that the conviction recorded on the basis of such plea, being illegal, is liable to be set aside.

5. Shri Dutta Gupta with Shri Mondal for the State has raised a preliminary objection. He has submitted that in view of the provisions of Section 375(b) of the Code of Criminal Procedure an appeal is, not maintainable as the convict/appellant has pleaded guilty.

6. Further Shri Dutta Gupta has submitted that the convict/appellant is guilty of serious offence, as he has embezzled the fund allotted for the purpose of welfare of the weaker sections of the society. He has further submitted that after proper understanding the gravity the convict/appellant has pleaded guilty and it is only thereafter the learned Special Court has passed the order, which cannot be interfered with.

7. We have heard the submission made at the Bar and have considered the judgment under appeal. We feel that the same cannot be sustained and has to be set aside for the following reasons.

A. A perusal of the records of Special Court Case No. 2 of 2003 shows that on 20.1.2003 the convict/appellant was produced under custody and he was remanded after his prayer for Bail was refused by the learned Special Court. Ultimately on 4.3.2003 he was admitted on bail. On 17.3.2003, date fixed by the learned Special Court, no steps were taken by the prosecution although the convict/appellant was present. Similar picture can be found from the orders dated 5.5.2003, 18.6.2003, 7.8.2003, 24.9.2003 and 1.2.2003. On 17.1.2004 the Court was vacant; but the convict/appellant was present and the next date was fixed on 4.3.2004. On that date also no steps were taken by the prosecution while the convict/appellant was present and the next date was fixed on 11.3.2004 for consideration charge.

From an appreciation of the same we find that since the time when the appellant was enlarged on bail by the learned Special Court i.e. on 4.3.2003 he appeared on each and every date from 17.3.2003 to 4.3.2004. He was diligent enough to make himself available on every date fixed by the learned Trial Court although we have seen no steps were taken on behalf of the prosecution and the Presiding Officer was transferred. The ordersheets dated 24.9.2003 and 1.12.2003 show that even though the Presiding Officer joined he was not vested with the power. The ordersheet of 17.1.2004 shows again the Presiding Officer was transferred and it is only on 4.3.2004 date was fixed for consideration of charge and even of that date also the prosecution did not take any step.

It is on 11.3.2004 the convict/appellant like all other earlier occasions was also present and for the first time. The learned Additional Public Prosecutor for the State appeared and the ordersheet of the learned Special Court quoted below

shows all of a sudden a charge was framed by the learned Special Court and the impugned order was passed.

This is a position which has to be seen after keeping in mind the track record of the proceedings of the Special Court Case No. 2 of 2003 where since 17.3.2003 after the convict/appellant was on bail he appeared on each date fixed by the learned Special Court without any default. Certainly it has to be appreciated that the convict/appellant had been appearing in Court since 17.3.2003 and date after date was fixed, either the Presiding Officer was transferred or the Court was not vested with the power to try the Special Court case.

But two things remain constant-the convict/appellant religiously appeared on each and every date without any lapse and on each date the prosecution did not take any steps.

Suddenly on a particular date after the prosecution sprang up the charge was framed which has resulted in the impugned order. For a better grasp of the entire thing we would go into the text of the said impugned order dated 11.3.2004.

B. The ordersheet of 11.3.2004 which is the judgment impugned reads as follows:

Learned Advocate for the Accd. is present.

Hd. both sides. Considered.

Today is fixed for consideration of charge. Hd. charge matter from both sides. At the time of hearing charge learned A.P.P. in charge has read over and explained the charge to this accd. person saying that this accd. was appointed job worker for construction of Dhabani Majhidih dug-well under SC/ST Development Fund and the accd. drew Rs. 10,000/- (Rupees Ten thousand only) as advance for implementation of said scheme but the accd. person did not do the job and by thus this accd. person has committed criminal breach of trust in respect of that money. On hearing the substance of accusation of the aforesaid charge as read over and explained by learned A.P.P. the accd. person has pleaded guilty understanding the contents of Cs in presence of his Lawyer in so many words saying.

As the accd. pleaded guilty so the Court has no other alternative but to consider the accd. according to law.

Acting on the basis of such position, which we are yet to come across where the prosecution lawyer explains the charge to the appellant the learned Judge accepted the plea of guilt of the appellant on the basis of such position.

After we have read of the judgment under appeal, passed by the learned Special Court on 11.3.2004 we find that it was incumbent upon the learned Special Court to have read over the charge and explained the same to the accused and asked him whether he pleads guilty of the offence charged or claims to be tried. It is only thereafter he could have proceeded with the plea of guilt. By not doing so he has violated the legislative mandate. But, we find the learned Special Court

proceeded in much haste and did not live up to the legislative intent.

It would be profitable in this context to remember that in the Code there are three (3) distinct type of trials contemplated. They are sessions triable offences warrant triable offences and summons procedure cases including the summary trials. In all these three distinct trials the Code was very emphatic and cautious while framing the provisions regarding the framing of charge and explaining the contents to the accused by the Court. Section 228(2) of the Code of Criminal Procedure reads as follows:

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charges or claims to be tried.

Similarly, in Sub-section (2) of Section 240 of the Code of Criminal Procedure runs as follows:

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charge or claims to be tried.

Section 251 of the Code of Criminal Procedure where it provides for the taking of plea in a summons procedure case the legislature were more specific.

...the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make....

C. That apart, we find from the judgment, under appeal that plea of guilty tendered by the appellant was not unequivocal and unqualified and even to some extent unconditional. The plea of guilt of the appellant in vernacular reads as follows (I am guilty, I do not expend the entire amount). While on the one hand the plea of guilty of the convict/appellant was not spontaneous and unequivocal on the other hand, we find the learned Special Court did not have the entire picture put on record.

A plea of guilty by an accused in a trial is not akin to the concept of a confession as is dealt with in the Evidence Act. The taking of plea of an accused is obviously the most crucial part of the proceeding of the trial. The learned Special Court has to proceed with extreme caution and utmost circumspection before he accepts the plea of guilt of the accused. He has to consider all the surrounding circumstances and satisfy himself that the plea of guilty was spontaneous and each and every fact necessary to constitute the offence has been explained to him and understood by the accused and the entire plea is voluntary and at the same time it should not be under any hope of leniency in the sentence, then it would be a question of plea bargaining. [See: Thippaswamy Vs. State of Karnataka, and State of Uttar Pradesh v. Chandrika AIR 2000 SC 164].

It is the cardinal principle of law that before an accused can be convicted on the basis of a plea of guilty the Court must satisfy itself that he had admitted each and every fact on the basis of such the charge was founded as well as the plea of

guilt tendered by him in respect of the same. It is only thereafter and upon satisfying itself with regard to probity of the accused's conception then only the Court can proceed to record a finding on the basis of such confession. Here we find that simply the learned Special Court felt "the Court has no other alternative but to convict the accused according to law" and proceed to sentence him to such a harsh term.

There has been no satisfaction of the learned Special Court in this regard and we are rather constrained to find that it proceeded in such a fashion as if from the docket one more case is removed and the burden of the Court becomes lighter with the disposal of the present case.

Absolutely there was an absence of proper application of judicial mind before recording of the plea of guilt and the subsequent order of sentence passed soon thereafter on the basis of the acceptance of such plea which does not reveal that there was a wholesome appreciation of the entire thing by the learned Special Court. That way definitely the impugned order is unsustainable.

There are several areas provided in the Code of Criminal Procedure which empowered the Court to record a conviction on the basis of plea of guilt. These are - Sessions Trial (under Sections 228 and 229), warrant triable case/warrant procedure case (under Sections 240 and 241) and summons procedure case including a summary trial (under Sections 251 and 252).

A plain reading of all the aforesaid provisions show that it is not obligatory on the part of the Court to convict the accused by way of accepting the plea of guilt as sacrosanct. There is wide range of discretion vested to the Court and such power has to be exercised most judiciously. In other words, it only means that notwithstanding the plea of guilt the Court may proceed with the trial and take evidence particularly in serious type of cases. Even though the Court has the jurisdiction to convict the accused solely on the basis of his plea of guilty, it has to satisfy itself that there are proper safeguards against the prejudice to the accused or there has been no miscarriage of justice. The Court has to further satisfy itself that the accused has fully understood the facts constituting such offence which is related to the charge in connection with which he has been arrayed in the trial.

Furthermore, it is incumbent upon the Court to ensure that the accused has admitted all the elements of the offence and not on a fragmented piece of guilt, the conviction can be recorded. Since accepting a plea of guilt concerns serious judicial discretion the Court should apply his mind before recording the plea and acting upon it. The Court cannot proceed mechanically and has to take great caution. The accused must understand the implication of the impending course of action that would befall him in pursuance of his pleading guilty, It is incumbent upon the Court to apprise itself of the entire aspect of the matter and then only having satisfied itself it could have proceeded to record the plea.

D. In the memo of appeal the convict/appellant has taken several grounds

amongst it in ground No. 4 he has urged that he did not understand the vernacular language in which the plea was recorded. In ordinary circumstances we would not have given much importance but in the fact situation of his particular case we feel that this is an abiding situation, which cannot be overlooked.

This situation has to be understood by the Court in the backdrop of the scenario where the convict/appellant since 17.3.2003 for each day appeared before the Court and suddenly on a particular date his plea was recorded which resulted in his conviction. From that angle if we see we would find that the recording of plea by the learned Special Court is quite vitiated. We feel disturbed by the manner in which the learned Special Court recorded the plea. The portion of order where "...the aforesaid charge has read over and explained by the learned A.P.P. the accd. person has pleaded guilty" after putting a mark the following words have been subsequently inserted therein i.e. "understanding the contents of Cs". In fact, such exercise only shows that there has been a cosmetic effort to give the impugned order more credibility which we feel unable to abide by as in our view there has been a failure of justice in the entire exercise.

We are emboldened to reach our aforesaid conclusion on the basis of the fact that the entire ordersheet shows it was not in the handwriting of the learned Special Court as it was dictated. At the time of correction the insertion "understanding the contents of C/S" was put in which can very easily be apparent, by the learned Special Court, at the time of correcting and putting his signature.

E. Since this is an appeal which is directed against an order of conviction, based on the plea of guilty we cannot be oblivious of the statutory provisions of Section 375 of the Code of Criminal Procedure:

375. No appeal in certain cases when accused pleads guilty.-

Notwithstanding anything contained in Section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal,-

(a) if the conviction is by a High Court; or

(b) if the conviction is by a Court of Sessions, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence.

Except as to the extent or legality of the sentence this appeal would not be maintainable on merit. Let us, understand the position on the basis of the aforesaid legislative indictment.

The convict/appellant has sent the petition of appeal from jail. He has averred that the sentence was "against all proportion" amongst other grounds which we have dealt with earlier. Ordinarily a plea of guilty is recorded as a waiver of the

right of the statutory appeal as provided u/s 374 of the Code of Criminal Procedure except to go into the legality of the sentence or severity of the same. But we cannot be oblivious of the fact that at the same time this bar imposed u/s 375 of the Code of Criminal Procedure upon an appellant to prefer an appeal, who has pleaded guilty, would, in our view, come into operation only if the plea of guilty has been recorded in a trial which has been held according to law.

As we have found that the trial itself is invalid and was not in accordance with law the absolute prohibiting of Section 375 of the Code of Criminal Procedure cannot act as a waiver of the convict/appellant's right to the legality of his conviction based on such defective plea. We have been fortified with the fact that firstly the plea was a conditional plea and secondly, it was not recorded in the manner as known to law. As such, it cannot be said the trial was held in accordance with law.

Where the trial itself was illegal any plea which is an offspring thereof obviously is no plea in the eye of law. We have the authority of our Court in *Profulla Kumar Roy Choudhury and Anr. v. King Emperor* AIR 1944(31) Cal 120, where *Allen Geraid Russell Henderson*, JICS held:

I am not satisfied that this was a proper plea of guilty which would preclude the petitioners from asking for any relief except the reduction of the sentences and the setting aside of the order of confiscation.

F. A whole appreciation of the entire scenario of the records of the lower Court including the judgment and order passed by the learned Special Court on the basis of the plea of guilty as in our view is not in accordance with law and more so as we have found that the acceptance of the plea of guilt was a result of an erroneous approach of the learned Special Court which shows that the conviction recorded by the learned Special Court on the basis of the plea of guilty tendered by the appellant was not the outcome of a valid trial and as the entire process was not in accordance with law we feel the appeal is quite maintainable.

8. Accordingly, we set aside the impugned judgment and order recorded by the learned Trial Court on the basis of the plea of guilty.

9. Accordingly, we set aside the impugned judgment and order recorded by the learned Trial Court on the basis of the plea of guilty tendered by the convict/appellant and direct that the entire matter should be sent on remand before the learned Trial Court afresh from the stage of framing charge.

10. Accordingly, we are allowing the appeal by setting aside the judgment and order of conviction and sentence passed by the learned Special Court, Purulia in Special Case No. 2/2003 on 11.3.2004.

11. The learned Trial Court will proceed from the stage of framing of the charge in accordance with law without being guided by the disposal of this appeal.

12. Learned Special Court after receiving the lower Court records, is requested to

proceed with utmost dispatch, keeping in mind the passage of time.

13. Since during the trial the convict/appellant was on bail he will be permitted to remain so after obtaining proper sureties.

14. Furthermore, the learned Special Court would also do well to see that the convict/appellant, who has filed this appeal from jail, is duly represented at the Bar. Needless to say in the event he is unable to avail any legal assistance the learned Special Court would appoint a State Defence to properly defend him and then only proceed further.

15. The convict/appellant is directed to be set free forthwith.

Rudrendra Nath Banerjee, J.

16. I agree.