
(1991) 10 BOM CK 0032

In the Bombay High Court

Case No : Criminal Writ Petition No. 975 of 1991

Dharamaji Gangaram Gholem and others

APPELLANT

Vs

Vithoba Soma Khade and another

RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 378, 395, 397, 399, 401

Penal Code, 1860 (IPC) — Section 34, 417, 420

Citation : (1991) 93 BOMLR 659 : (1992) CriLJ 870 : (1992) 1 MhLj 118

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : S.M. Paranjpe, for the Appellant; G.R. Rege and Mrs. Shakuntala A. Mudbidri and H.A. Solkar, Public Prosecutor, for the Respondent

Judgement

1. This petition under Article 227 of the Constitution of India and S. 482 of the Code of Criminal Procedure, 1973 takes exception to the order passed below Ex. 1 by the Additional Sessions Judge, Ratnagiri in Criminal Revision Application No. 36 of 1986.

2. Respondent No. 1 - hereinafter referred to as the "complainant" - filed a private complaint in the Court of J.M.F.C. at Devrukh which was registered as Criminal Case No. 19 of 1984. The said complaint ascribed to the petitioner-accused commission of offences punishable under Ss. 417 and 420 read with S. 34 of the Indian Penal Code. The learned Magistrate acquitted the accused on 30-6-1986. The complainant assailed the acquittal by a revision to the Sessions Court at Ratnagiri. A doubt was expressed as to the maintainability of the revision and the A.P.P. was directed to put in an appearance so that the maintainability of the revision could be decided after a proper hearing. The A.P.P. contended that the revision did not lie and in support of this contention he relied upon S. 378(4) read with S. 401(4) of the Code of Criminal Procedure. The learned Additional Sessions Judge relying upon the judgment of Sharad Manohar J. in Kokilabai Mahajan Vs. Gangadhar Mahajan and Another, overrule the

objection raised by the A.P.P. The revision was held to be maintainable and the petitioners were directed to be served with notices to show cause on merits.

3. Mr. Paranjpe representing the petitioners-accused contends that the Additional Sessions Judge was in error in holding that a revision lay. In support of this submission learned Counsel relies upon the State of Bombay Vs. N.G. Tayawade and Another, . Mr. Rege for the complainant supports the view of the Additional Sessions Judge and says that the same is correct having regard to the decision in Kokilabai's case (supra). The decision in Kokilabai's case arose upon a charge-sheet filed by the police at the instance of Kokilabai who is described by Sharad Manohar J. as the "original complainant". It was the acquittal of respondent No. 1 Gangadhar which led Kokilabai to file a revision. A contention taken in the hearing before Sharad Manohar, J. was that no revision assailing an acquittal lay to the Sessions Court. Negating this contention the learned Judge observed :-

"If the power given to the High Court under said Section 395, therefore, extends to revising the order of acquittal passed by the trial court and if the revisional power to the Session Court u/s 397 is co-extensive with that of the High Court, it follows that the Sessions Court has as much power to entertain a revision application against the order of acquittal passed by the Judicial Magistrate in the District as is had by the High Court. My attention was not invited to any other provisions of the Code by virtue of which the Sessions Court's power is said to have been curtailed or restrict The plea that the Sessions Court does not have power to entertain a revision application against the order of acquittal does not, to my mind, owe its legal justification to any statutory provision."

Mr. Paranjpe submits and in my view rightly so that the judgment of Sharad Manohar J. though right in the facts of the case before him, the learned Judge has expressed the ratio in somewhat specious terms. A person at whose instance the police had filed the charge-sheet is fettered from preferring an appeal where the prosecution ends in an acquittal and this is because Section 378(1) of the Code enables the right of appeal to be exercised only by the Public Prosecutor upon a direction of the State Government. Therefore such an aggrieved person or complainant has no right to prefer an appeal assailing the acquittal. But the same limitation is not imposed upon an acquittal in a case instituted upon a complaint. The complainant in such a case can take recourse to sub-section (4) of Section 378 which enables an acquittal upon a private complaint to be assailed in appeal to the High Court though the pre-condition for permitting such an appeal is an appeal is an application soliciting special leave to appeal. Learned Counsel refers to sub-section (4) of Section 401 which lays down :-

"Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

Mr. Rege for the complainant submits that the limitation to be found in sub-section (4) of Section 401 is a fetter upon the powers of the High Court sitting in

revision, the same fetter should not be foisted upon a Sessions Court entertaining revision. This argument flies in the face of sub-section (2) of Section 399 which says -

"Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of Section 401, shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge."

Mr. Rege submits that an appeal assailing an acquittal does not lie to a Sessions Judge, and therefore, sub-section (4) of Section 401 has no application to a Sessions Court hearing a revision under revision u/s 399. It is not possible to agree with this submission. Sub-section (2) of Section 399 does speak of provisions of different sub-sections of Section 401 being applicable "so far as may be",. But sub-section (4) of Section 401 speaks of the remedy of appeal provided by the Code and not any particular provision thereof. Sub-section (4) of Section 378 permits a complainant in a private case to assail a verdict of acquittal by an appeal to the High Court which appeal can be preferred only after grant of special leave to appeal. Therefore this fetter would come in the way of a revision entertainable by the Sessions Judge also. The facts of the case before Sharad Manohar J. were different and there the Sessions Judge did have jurisdiction to entertain an appeal against a verdict of acquittal. The reason for that was the disability of the said revision petitioner to prefer an appeal whether under sub-section (1) or sub-section (4) of Section 78. To the facts of this case the judgment of Badkas J. in State of Bombay Vs. N.G. Tayawade and Another, applies. Significantly, this judgment was not brought to the notice of the learned Judge hearing Kokilabai's case. Had his attention been drawn to Badkas J.'s decision perhaps the learned Judge may not have chosen to express himself in the broad terms he has done.

4. It was contended that the petition suffers from the vice of false allegations made against Advocate Dingankar. Mr. Paranjpe very fairly states that he is not pressing those allegations. Mr. Rege wants me to make observations enabling the complainant to file an application seeking special leave special have to appeal the verdict of acquittal. It will not be proper for me to say anything on the subject for unless an application is made, there can be no observations in regard to the merits governing firstly condonation of delay and secondly the correctness or otherwise of the acquittal warranting the grant of special leave to appeal.

5. In the result, the petition is allowed and the rule made absolute by quashing the finding of the learned Additional Sessions Judge holding that the revision was maintainable in law.

6. Petition allowed.