

(1986) 02 MP CK 0037

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 30 of 1986

Hazi Abdul Rehman and Another

APPELLANT

Vs

Ashok Kumar

RESPONDENT

Date of Decision : 12-02-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 248(2), 362, 378, 386
Penal Code, 1860 (IPC) — Section 407

Citation : (1988) ILR (MP) 287 : (1991) 36 MPLJ 747 : (1991) MPLJ 747

Hon'ble Judges : P.C. Pathak, J

Bench : Single Bench

Advocate : N.C. Jain, R.K. Thakur, for the Appellant; P.D. Tiwari, for the Respondent

Final Decision : Allowed

Judgement

P.C. Pathak, J.

This is an application by accused Abdul Rehman and Mohd. Yakub, u/s 482 of the Code of Criminal Procedure for opportunity of hearing on question of sentence and modification of sentence passed on them in Cr. A. No. 1090/1981 dated 22-11-1985.

Ashok Kumar, Secretary of Riddhi Siddhi Power Loom Weavers' Industrial Co-operative Society Ltd. Sari Bazar, Burhanpur (hereinafter called "the Society") filed a complaint against Hazi Abdul Rehman and his son Mohd. Yakub u/s 407 of the Indian Penal Code, on the allegation that they committed criminal breach of trust of 120 bags of yarn valued at Rs. 1,31,849.22 paise, entrusted to them as carrier by M/s. Mama Road Lines, for delivery to the Society. Accepting the plea of the accused that they handed over the consignment of yarn to M/s. Raj Agency, the agent of Society the trial Court acquitted both the accused persons. The society through its Secretary filed appeal u/s 378(4) of the Code of Criminal Procedure against their acquittal after obtaining necessary permission. This appeal was allowed by me by my judgment delivered on 22-11-1985. Both the

accused were convicted u/s 407 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for three years and fine of Rs. 5,000/-, in default rigorous imprisonment for nine months.

After delivery of the judgment, the accused persons made an application u/s 482 of the Code of Criminal Procedure for setting aside the sentence passed on them; for affording of an opportunity of hearing and passing appropriate sentence thereafter according to law. They also submitted that before delivery of the judgment, they were not heard on the question of sentence u/s 248(2) of the Code of Criminal Procedure. The provisions of Sub-section (2) are mandatory and the non-compliance with this provision constitutes an illegality which cannot be cured and vitiates the sentence passed on them. The error can even now be corrected by me after affording an opportunity of hearing, in exercise of powers u/s 482 of the Code of Criminal Procedure. On behalf of the State, it was submitted that Section 362 of the Code of Criminal Procedure bars any alteration or review of the judgment. After delivery of the judgment, the Court is functus officio and cannot entertain any prayer so as to modify the sentence already passed on the accused. It was also submitted that the provisions of Section 248(2), Criminal Procedure Code, do not apply to the appeal Court.

The question for decision is whether the appeal Court converting a judgment of acquittal into conviction must hear the accused on the question of sentence. In other words, whether the provisions of Section 248(2) of the Code also apply to the appeal Court.

The Law Commission in its 48th Report said : -

"45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to the characteristics and background of the offender. The aims of sentencing themselves obscure - become all the more so in the absence of information on which the correctional process is to operate. The public as well as the Courts themselves are in dark about judicial approach in this regard.

We are of the view that the taking of evidence as to the circumstances relevant to the sentencing should be encouraged and both the prosecution and the accused be allowed to co-operate in the process....."

The recommendations of Law Commission were incorporated in Sub-section (2) of Section 235 for trial before Court of Session and in Sub-section (2) of Section 248 for trials of warrant cases, of the Code of 1973.

Section 248(2) runs as under : -

"Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of Section 325 or Section 360 he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law."

Section 235(2) of the Code runs as under : -

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

In Tarlok Singh Vs. State of Punjab, , it was observed that Section 235(2) makes a departure from the previous Code on account of humanist consideration to personalise the sentence to be awarded. The object of the provision is to give a fresh opportunity to the convicted person to bring to the notice of the Court such circumstances as may help the Court in awarding an appropriate sentence having regard to the personal, social and other circumstances of the case.

The scope of Section 235(2) was examined in Santa Singh v. The State of Punjab, AIR 1976 SC 2386, and it was observed as under : -

"The Court must in the first instance deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But, if he is convicted, then the Court has to hear the accused on the question of sentence and then pass a sentence on him according to law. When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the Court can proceed to pass the sentence."

The Supreme Court held that the provisions of Section 235(2) are mandatory and the breach thereof cannot be ignored as inconsequential, nor can it be described as mere irregularity curable u/s 465.

The scope and importance of Section 248(2) was examined in Mohammad Giasuddin Vs. State of Andhra Pradesh, , wherein it was observed as under : -

"There is need on the part of judges to see that sentencing ceases to be downgraded to Cinderella status. The new Criminal Procedure Code gives an opportunity to both parties to bring to the notice of the Court facts and circumstances, which will help personalise the sentence from a reformatory angle. It is fundamental to put such a provision to dynamic judicial use."

The aforesaid cases and catena of other cases, with which I do not propose to burden this judgment, leave no manner of doubt that hearing on the nature and quantum of punishment is a condition precedent for passing sentence on the accused found guilty of the offence charged. The provisions are mandatory and their breach vitiates the sentence.

It was next argued that the provisions of Section 248(2) are attracted only at the stage of trial and not when the matter is before the appeal Court. It is, therefore, essential to examine the powers of the appeal Court. Sub-section (a) of Section 386 of the Code runs as under : -

"(a) in an appeal from an order of acquittal, reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial, as

the case may be, or find him guilty and pass sentence on him according to law"

The words "pass sentence according to law" were interpreted in *Shankar Kerba Jadhav and Others Vs. The State of Maharashtra*, wherein the Court observed :-

"An appeal is a creature of a Statute and the powers and jurisdiction of the appellate Court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial Court. The words "sentence according to law" mean any sentence that could be given for the offence, but in imposing sentence, the appeal court should not impose sentence more severer than the accused should have got if he were convicted by the Magistrate. In other words the appeal Court should not exceed the maximum limit of sentence which the trial Magistrate is empowered to impose."

In *Dagdu and Others Vs. State of Maharashtra*, the Supreme Court held :

"The imperative language of Sub-section (2) of Section 235, Criminal Procedure Code leaves no room for doubt that after recording the finding of guilt and the order of conviction, the Court is under an obligation to hear the accused on the question of sentence unless it releases him on probation of good conduct or after admonition u/s 360. The mandate of Section 235(2) must be obeyed in its letter and spirit. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher Court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence."

The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher Court. For a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the Court which recorded the conviction. Remand is an exception, not the rule, and ought to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."

My attention was also drawn to certain observation in *Shankar Kerba Jadhav's* case (supra). That was a case in which the accused was convicted by the trial Court but was acquitted in appeal by the Sessions Judge. The State filed appeal against his acquittal. The High Court allowed the appeal and after setting aside the acquittal convicted him. The High Court awarded sentence higher than passed by the trial Court. In appeal before the Supreme Court, it was argued that it was not open to the High Court exercising the appellate jurisdiction u/s 423(1)(a) of the Code of Criminal Procedure to enhance the sentence passed by the trial Magistrate and that even if the High Court was competent to do so, the appellants should have been asked to show cause why the sentence imposed on them by the Magistrate should not be enhanced and in the absence of such opportunity no enhancement of sentence was competent. Repelling this

argument, the Supreme Court observed : -

"Where in an appeal from an order of acquittal preceded by an order of sentence, the accused is given notice of appeal and actually takes part in the hearing before the High Court, it would be superfluous to give him notice to show cause why a sentence within the competence of the trial Magistrate should not be passed. The accused knows or ought to know that the High Court was bound to form its own conclusions on the material before it and award a sentence which the merits of the case demanded within the limit of the trial Court's jurisdiction."

"The absence of a show cause notice does not violate any known principle of natural justice."

This was a case under the repealed Code of Criminal Procedure, 1898. The observations applied to a case wherein the appeal against acquittal was preceded by a conviction and sentence by the trial Court and in such a case, show cause notice was not essential. By implication, learned counsel for the applicant argued that, in an appeal against acquittal which was not preceded by a conviction and sentence, rules of natural justice by issue of show cause notice ought to be observed. Some force does appear in the submission of the learned counsel for the appellants. However, when the law has already been laid down, in Dagdu's case (supra), with reference to Code of 1973, I need not engage myself with regard to the provisions of repealed Code.

In view of the foregoing discussions, I am of the opinion, that appeal Court, on finding the accused guilty of the charge for the first time, must hear the accused on the nature and quantum of sentence as required by Section 248(2) of the Code.

Learned counsel appearing for the State argued that Section 362 prohibits all Courts from altering or reviewing its judgment when once it has signed it. Reliance was placed on State of Orissa Vs. Ram Chander Agarwala and Others, . Reference was also made to Section 393 which attaches finality to judgment passed by the appellate Court. There cannot be any controversy to the proposition that this Court has no power of review, once the judgment has been pronounced. These inhibitions however do not come in way of exercising inherent powers to undo grave miscarriage of justice or correcting inadvertent breach of mandatory provision of law. A Division Bench of this Court in State of Madhya Pradesh v. Narain Datta 1965 MPLJ 964 : AIR 1966 MP138 observed :-

"Undoubtedly, u/s 561A, Criminal Procedure Code this Court has the power to alter or review its own judgment, if it was passed without jurisdiction or in default of appearance, or without notice to the accused."

Yet in another case Harrabai v. State of M. P., Misc Cri. Case No. 381/1970 dated 21-12-1970 reported in 1972 MPLJ S. Note 57, Hon. Shri A. P. Sen, J., as he then was, held that where a mandatory provision of law has been overlooked resulting in miscarriage of justice, the High Court can review its order and correct such

error even though the case has already been decided. I therefore hold that Sections 362 and 393 of the Code do not come in the way while exercising inherent powers, to correct a vital flaw in my judgment.

In the present case, both the accused were acquitted by the trial Court. The appeal filed by the complainant was allowed. Both the accused were convicted u/s 407 Indian Penal Code and were sentenced to imprisonment and fine both, without giving any opportunity of hearing on the nature and quantum of sentence in violation of Section 248(2) of the Code. Therefore, the sentences passed on them are vitiated. The error which crept in my judgment through inadvertence, I must correct the same. Accordingly I set aside the sentences awarded to both the applicants.

The counsel for applicants as also the complainant and the State were heard on question of sentence. The applicants brought to my notice that applicant No. 1, the father of the applicant No. 2, is aged 72 years. Both parties have compromised their dispute as per deed Annexure "A". In consideration of payment of Rs. 1,50,000/- by the applicants, the society withdrew the civil suit also filed by it against the applicants. A copy of resolution of the society authorising non-applicant Ashok Kumar to compromise is on record. Even though the offence for which the applicants have been convicted is non-compoundable yet the fact of compromise can be taken into account in determining the quantum of sentence. See Ram Pujan and Others Vs. State of Uttar Pradesh, . Both the accused are first offenders. Seven years" period has elapsed since the date of offence. There is no allegation of similar incidents, against the applicant subsequent to the date of incident. Considering the fact of compromise circumstances in which the offence was committed and the age, character and the antecedents of the applicant, -no needful purpose would now be served by sending them to jail. I therefore direct that both the applicants be released on probation of good conduct for a period of 3 years on their entering into bonds on a sum of Rs. 5,000/-, each with one surety each in the like amount, to appear and receive sentence when called upon during the said period of 3 years and in the meantime the applicants are directed to keep peace and be of good behaviour.

In view of the foregoing discussions, the petition is allowed. The sentences passed on the applicants in criminal appeal No. 1090 of 1981 are hereby set aside and instead the applicants are released on probation for a period of three years as indicated in para 15 above. This order shall form part of judgment dated 22-11-1985, in said Criminal Appeal No. 1090 of 1981.