

(1988) 01 BOM CK 0030

In the Bombay High Court

Case No : Criminal Application No. 1235 of 1983 in Criminal Appeal No. 1015 of 1980

Hemant Abaji Patil

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-01-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378
Maharashtra Government Rules of Business, 1975 — Rule 9

Citation : (1988) 1 BomCR 527

Hon'ble Judges : V.P. Salve, J; Sharad Manohar, J

Bench : Division Bench

Advocate : V.H. Gumaste and A.V. Bandiwadekar, for the Appellant; M.A. Rao, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Sharad Manohar, J.—Quite a fanciful point questioning the maintainability of this appeal is raised by Shri Gumaste, the learned Counsel appearing for the respondent-accused in this case. After hearing in fully, we are satisfied that it discloses nothing but the ipse dixit of the learned Counsel.

2. The facts necessary for formulating the point are as follows :

The respondent was charged with an offence u/s 302, Indian Penal Code, in the trial Court. The Court had passed an order of acquittal in his favour. The public Prosecutor sent the papers to the Legal Department for enabling the latter to take decision whether an appeal should be filed or not. In Criminal Application No. 147 of 1981 for condonation of delay in filing this appeal, there is a specific averment (in para III thereof) that the Public Prosecutor, who conducted the case in Sessions Court, sent a "proposal" to the Government on 4-7-1980 for filing an appeal against the said order of acquittal. A para-wise reply is given to this application for condonation of delay by the respondent-accused. This statement that the proposal for filing an appeal was sent by the Public Prosecutor to the

Government is not denied in the said affidavit. However, we hasten to add that this fact has got limited importance.

There is no dispute that inspite of the proposal from the Public Prosecutor, the Legal Department of the State Government took a decision not to file the appeal and communicated that decision to the Additional Public Prosecutor, Kolhapur, that they had decided not to file an appeal against that order of acquittal. Incidentally, we may mention that the letter sent by the Department of law and judiciary (dated 19-7-1980) mentions the subjects as, "proposal" for appeal in Session Case No. 64 of 1979. This means that the Public Prosecutor had made a "proposal" to the State Government to file the appeal.

3. In view of the fact that the Legal Department had developed cold feet in the matter of prosecution of the case further, the aggrieved parties filed Criminal Revision Application No. 561 of 1980 in this Court. Rule was issued by this Court on that revision application on 24-9-1980. After the rule was issued, Shri B.Y. Deshmukh, learned Advocate appearing for the petitioners in that Revision Application No. 561 of 1980, moved the Government, meaning thereby the Legal Department, to reconsider the decision not to file the appeal. It appears that the Legal Department did reconsider there decision and decided to file the appeal and gave necessary directions to the office of the Public Prosecutor, High Court, Bombay, to file the appeal. In this process, a delay of 55 days was cause. Hence while filing the appeal against the order of acquittal, an application namely, Criminal Application No. 147 of 1981, was filed by the Public Prosecutor for condonation of delay. Both the application for condonation of delay as well as the appeal were placed for admission before this Court. Simultaneously, the delay was condoned by this Court and the appeal was admitted.

In the application for condonation of delay (No. 147 of 1981), averments were made by the Public Prosecutor to the effect that the initial decision of the Legal Department was not to file the appeal. It was also stated that thereafter the Legal Department changed its view and has given direction to the Public Prosecutor's Office to file the appeal. Evidently, the averment was made with a view to point out to the Court the reason why the delay was caused. This Court was satisfied that this was a genuine reason for the delay and hence this Court even condoned the delay.

4. Taking advantage of these averments in the application for condonation of delay, the presents Criminal Application No. 1235 of 1983 is field by the Respondent-accused for dismissal of this appeal in limine on the ground that the appeal was not competent, because the instructions received by the Public Prosecutor's Office from the Legal Department by having a second look at the matter are illegal instructions.

In support of this contention, the point, which is denominated by us as fanciful point, is raised by Shri Gumaste. He places reliance upon Rule 9 of the Maharashtra Government Rules of Business, read with Entry No. 21 in Schedule

No. II thereof. The said Rule 9 runs as follows :

"All cases referred to in the Second scheduled shall be brought before the Council-

(i) by the direction of the Governor under Clause (c) of Article 167;

(ii) by the direction of -

(a) the Chief Minister; or

(b) the Minister-in-charge of the case with the consent of the Chief Minister:

Provided that, no case in regard to which the Finance Department is require to be consulted under Rule 11 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the Finance Minister has had opportunity for its consideration."

Entry No. 21, which is very fondly relied upon, runs as follows :

"Any proposal for the withdrawal or a prosecution by Government against the advice tendered by the Legal Department."

Relying upon these two provision, argument is advanced that the appeal was not competent in the absence of the case being brought before the Council of Ministers. The argument is that a decision to file the appeal ought to be taken by the Council of Ministers and since there is no evidence to show that the Council of Minister took such a decision, there is no proper instructions, to the Public Prosecutor's Office to file the appeal and, in the absence of such instructions the act of the Public Prosecutor in filing the appeal is bad. Consequently, the argument must run, our order admitting the appeal is equally bad.

5. In our opinion the argument is quite misleading, apart from being of the most pre prosperous character.

In the first place, to our mind, Rule 9 does not require that the decision to file an appeal against an order of acquittal is required to be taken by the Council of Ministers at all. Entry No. 21 contemplates the question of withdrawal of the appeal or prosecution of the appeal. The concept of filing of the appeal and prosecution of the appeal are different concepts. The question of prosecution of the appeal comes only after the same has been field, not before hand.

Moreover, what is provided by Rule 9 of the Rules of Business is the manner in which the particular question can be brought for the consideration of the Council of Minister. What Rule 9 contemplates is that if such a question is to be considered by the Council of Minister, it has got to be done by the direction either of the Governor or the Chief Minister or of the Minister-in-charge of the case with the consent of the Chief Minister. No matter cannot be brought for the consideration of the Council of Ministers unless one of these three authorities have given direction that it be brought before the Council of Ministers. This does not mean that no other authority can consider this questions. There is no

disputes here that the initial decision not to file the appeal was not taken by the Council of Ministers. If filling an appeal is a matter for the Council of Ministers, equally not filling an appeal would be a matter for the Council of Ministers. The contention that once the decision is taken by the Legal Department not to file the appeal, it cannot have a second look at the matter is basically erroneous condition.

6. This brings us to the main point involved in this matter, namely, that every Governmental authority must have power to have a second look at the validity, legality or properties of its own decision at all the times. No rule of law was brought to our notice showing that once the Legal Department takes the view that the case in question does not deserve of being taken to the High Court, the officer of the Legal Department enjoined with the work of taking such a decision becomes functus officio. There may be certain cases and kinds of orders where the officer in question becomes functus officio moment he has taken a final decision in that behalf. For instance certain decision are taken by the administrative officers, which are of a quasi-judicial character and against those decisions, an appeal is provided before the higher authorities. It may be that in such cases once the order is passed by the officer, he may become functus officio. But, even such a position will have its own rider. It may be possible for the officer concerned to review his own decision, just as the Courts have, normally speaking power to review to their own decision. However, we need not go into that aspect of the power and jurisdiction of the officers concerned. By and large, it is an inarguable proposition that if a wrong decision is taken by an officer of the Government, he is permanently restrained from having a second look at the correctness of the order passed by himself. In our opinion, the proposition needs just to be stated to be rejected.

7. Moreover, the position before us is that the revision application (No. 561 of 1980) filed by the aggrieved party is very much there before us for being disposed of along with the appeal. We have no doubt that while granting rule on the said application, as well as while admitting the appeal, the question of advisability of re-examining the correctness of the decision was very much considered by this Court. If this is the position, then the officer in question, who held a second look at his own order not to file the appeal, was very much justified in directing that the appeal be filed to this Court.

8. But, most of all, we are not agreeable to the contention of Shri Gumaste that the decision to file an appeal or not to file an appeal against any order of the lower judiciary can rest on the sweet will of some one officer of the Government. Ours is a country governed by the rule of law. The concept of rule of law is inseparable from the concept of administration of justice. An officer in the Legal Department cannot be said to be having the final powers of deciding whether an appeal should be filed or not. In fact, we put it across to Shri Gumaste that in spite of the application of Shri Deshmukh to the Legal Department to reconsider their decision not to file an appeal, the Legal Department had stood

fast to its view, this Court would be justified in a fit case, to issue appropriate writ against the Government to file the appeal. This is so for the very simple reason that the administration of justice is not a special preserve of some one officer of the Government.

9. In our opinion, the application is extremely misconceived and hence the same is hereby dismissed.