

(1988) 03 MP CK 0023

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 158 of 1987

Mahant Ramratandas and another

APPELLANT

Vs

Mahant Narayandas and others

RESPONDENT

Date of Decision : 25-03-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : (1989) MPLJ 293

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Advocate : S.R. Phadnis, for the Appellant; M.L. Dalal for Respondent No. 1 and Pandey for Respondents Nos. 2 to 7 and 9, for the Respondent

Final Decision : Dismissed

Judgement

Gulab C. Gupta, J.

The petitioners in this application u/s 482, Criminal Procedure Code complain of denial of hearing by this Court on sentence imposed upon them in Criminal Appeal No. 328 of 1984 (State vs. Halkesingh and 3 others), decided on 20th September, 1988 wherein this Court had convicted them, for the first time of offence punishable u/s 324/34, Indian Penal Code and sentenced them to rigorous imprisonment for two years each. They contend that if this Court had heard them before deciding upon the sentence, they might not have been ordered to go back to jail after such a long lapse of time. The petitioners were charged for offence punishable u/s 302/34, Indian Penal Code but were acquitted by the Addl. Sessions Judge, Gadarwara in Sessions Trial No. 34 of 1982, decided on 29-11-1983. The appeal decided by this Court was the appeal against their acquittal wherein this Court written the verdict "guilty" against the petitioners and sentenced them, as aforesaid. There is no dispute that the petitioners were not heard on sentence after this Court held them guilty, as aforesaid. It is, therefore, a case where the petitioners were, for the first time convicted and sentenced by

this Court.

"Procedural fairness" is our judicial faith and is inbuilt in the Constitutional guarantee under Articles 14 and 21. These constitutional imperatives imposed a new obligation upon judges to constitutionalise the judicial process even if it may require donning a new robe and giving up the constitutional role of an umpire. This new obligation is fully explained in *Ranjan Dwivedi Vs. Union of India (UOI)*, wherein the Apex Court has found a constitutional duty to construe law to accord with the directive principles of the State policy. The judicial process has developed many other facets of "personal liberty" using this constitutional commitment as the basis thereof. Not only the freedom from physical restraint but all aspects of personal liberty are now included within the ambit and scope of the phrase appearing in Article 21 of the Constitution. *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, has elevated directive principles to a higher than before level and treated them as "conscience" of the Constitution. *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, added new dimension to the guarantee enshrined in Article 21 by providing that the procedure established by law must be reasonable, fair and just and not arbitrary, whimsical and fanciful. Jurists believe that *Maneka Gandhi's* case (supra) has become the spring board for a most spectacular evaluation of law relating to criminal prosecution. It must therefore be accepted as well-settled that it is the constitutional duty of this Court to not only act in accordance with law but also to act in a manner that guarantees procedural fairness to litigants before it. It should also be accepted as well-settled that the procedure to be followed by this Court must be reasonable, fair and just and not arbitrary, whimsical or fanciful.

We would, therefore, like to examine if we have while deciding Criminal Appeal No. 328/84 against the petitioners even unwittingly denied them their constitutionally guaranteed right of procedural fairness? This would necessarily involve adjudication of their claim that they have a right to be heard on sentence after this Court has decided to convict them for offence u/s 324/34, Indian Penal Code. Sections 235(2), 248(2) and 255(2) of the Code of Criminal Procedure, 1973 without doubt ensure them this right before the Sessions Judge or the Magistrate. There is, however, no such provision in Chapter XXIX dealing with appeals. Section 386, Criminal Procedure Code deals with powers of this Court in relation to an appeal from an order of acquittal and reads as under:

Powers of the Appellate Court -- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal u/s 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may--

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry 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.

There is no provision in this Chapter of the nature of section 235(2), 248(2) or 252(2) of the Code and therefore the respondent State argues that this Court was not bound to hear the petitioners on sentence as a Sessions Judge or a Magistrate would have heard. Learned counsel for the petitioners, however, claims that this Court's power to pass sentence on them obliges it to do so (according to law) which phrase would include any provision like section 235(2) of the Code.

In *Mohammad Giasuddin Vs. State of Andhra Pradesh*, , it was held that before passing an order of sentence it is mandatory for the Court to hear the prosecution and accused on the question of sentence. This is also the view taken by the Supreme Court in *Bachan Singh Vs. State of Punjab*, , and *Muniappan Vs. State of Tamil Nadu*, . In *Santa Singh vs. State of Punjab*, AIR 1976 SC 2386, the Supreme Court held that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances -- extenuating or aggravating -- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. This according to the Supreme Court are factors which have to be taken into account by the Court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the Court can hear the accused in regard to these factors hearing on sentence and then pass proper sentence on the accused. This according to the Supreme Court is rationale of section 235(2) of the Code. In *Muniappan Vs. State of Tamil Nadu*, , the Court emphasised that hearing contemplated by section 235(2) of the Code was not the empty formality and "the Judges must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence." The Court in this case also clarified that after conviction of an accused person his record, what remains is the question of sentence in which not merely the accused but the whole society is the State. These and many other cases of the Apex Court and this Court leave no doubt in the mind of this Court that pre-sentence hearing is an important part of procedural fairness and is embodied in the Court for that reason alone. Since the Code contains the elaboration of "procedural fairness" guaranteed by Article 21 of the Constitution the procedure established by the Code becomes a part of Constitutional guarantee under Article 21 and cannot be denied to him. The argument, however, presupposes that there is no such denial as this Court does not provide such a guarantee in section 386 of Chapter XXIX of the Code. This Court, however, is not inclined to interpret the constitutional guarantee in a manner that it may provide a different procedure in

this Court which may be less beneficial to an accused person. If pre-sentence hearing is provided before the Sessions Judge and Magistrate only because it is just, fair and reasonable procedure there is no reason why this just, fair and reasonable procedure should not form part of procedure before this Court. To interpret laws in a harmonious manner is the obligation of this Court. Under the circumstances, this Court would while dilating upon the words "according to law" has included the right of an accused person to presentence hearing where none has been granted. In other words if an accused person is acquitted of the offence charged and had no opportunity on hearing of sentence, the said accused person would be afforded for hearing if the appellate Court disagrees with the findings of the trial Court and holds him guilty of the offence charged. In *S. K. Jadhav vs. State of Maharashtra*, AIR 1971 SC 841, it has been held that the appellate Court should not exceed the maximum limit of sentence which the trial Magistrate is empowered to impose, indicating that what is beneficial to an accused before the trial Magistrate cannot become pre-judicial only because the matter has been brought to the appellate Court. Under the circumstances, the words "according to law" would include the manner in which the accused person would have been sentenced by the trial Judge. Therefore, it is the considered view of this Court that such accused persons who did not have any opportunity of pre-sentence hearing before the Magistrates and Sessions Judges would have the right of pre-sentence hearing in this Court and if they are convicted by this Court. This would, therefore, indicate that the complaint of the petitioners that they were denied of their right of pre-sentence hearing is justified.

In view of the aforesaid conclusion, the judgment of this Court, dated 20th Sept., 1988 in Criminal Appeal No. 328 of 1988 would be suffering from ght of pre-sentitiating the sentence as laid down in Santa Singh's case (supra). The failure of justice must, therefore, be treated stray as implicit in the case. It should, therefore, be the obligation of this Court to correct the said illegality. The submission of the learned Government Advocate, however, is that this Court having signed the judgment has become functus officio and the illegality can be corrected in the appeal filed against the judgment. According to the learned Government Advocate, powers u/s 482 of the Code are not available to this Court in view of section 362 thereof which prohibits review of judgment except to correct a clerical or arithmetical error. Admittedly, there is no power of review conferred on the court by the Code. Section 362 of the Code provides that no Court shall alter or review its judgment or final order after it has signed the same, save as otherwise provided by this Court. Section 482 of the Code really saves the inherent powers of the High Court to make such order as may be necessary to give effect to any order of this Court or to prevent the abuse of the process for any Court or otherwise to secure the ends of justice. The inherent powers are really wide and indefinable and are recognised to meet those cases for which no provision is made in the Code. It was, therefore, clarified in *R.P. Kapur Vs. The State of Punjab*, , that where there are express provisions of law there is no inherent power in the High Court to override them. Under the

circumstances, if the provision of section 362 of the Code would apply, this Court would not be able to exercise its powers u/s 482 of the Code. In the opinion of this Court, however, the bar u/s 362 of the Code does not apply in the instant case, as the impugned order being an order vitiating the sentence, there is, in law, no judgment as required under this provision. It is well-recognised that where an order has to be passed after hearing and no opportunity had been given to be heard, the order would not satisfy judgment under this provision and the High Court would be able to re-consider the matter. (See *In Re: Tadi Somu Naidu and Another*, ; *Ramesh Pada Mandal Vs. Kadambini Dasi*, and *State vs. Kunjan Pillai*, AIR 1952 TC 210). A Single Bench of this Court has also adopted this line of reasoning in *Shyam Bihari Vs. State of Madhya Pradesh*, , by observing as under:

The words "save as otherwise provided" in section 369 do not refer to section 561-A. These words refer to the express provisions of the Code which empower the Court to alter or review its judgment in certain specified cases. Hence the High Court has no inherent powers to alter or review its own judgment in a criminal case once it has been pronounced or signed. There are however, exceptions to the above principle, such as cases where the earlier decision was without jurisdiction or in default of appearance without an adjudication on the merits or without notice of hearing to the parties. (Para 4).

This Court is, therefore, of the opinion that bar u/s 362 of the Code is not sufficient to prohibit this Court from doing justice by exercising its powers u/s 482 of the Code which has the object to securing the ends of justice.

Since we have heard the learned counsel for the petitioners on the quantum of sentence also there is no impediment now in deciding the valuability of the submissions made in this behalf. As noticed earlier the petitioners have been convicted u/s 324/34, Indian Penal Code which finding has been reached in accordance with law and is not required to be considered. The petitioners have submitted that they were arrested on 22-11-1982 and remained in jail for one year 7 days as undertrial prisoners. According to them, they were released from jail consequent upon the judgment of acquittal dated 29-7-1983. From the record of the trial Court it appears that these petitioners were not on bail during the trial. They are without doubt entitled to set-off of this period in the period of sentence already undergone. Their case is that there is no male member in their family and they are all cultivators having sown crops in their fields which are standing. They have also said that there is nothing against them during the period they were released pursuant to the judgment. It is further submitted that they are not the main accused and they have been convicted only with the aid of section 34, Indian Penal Code. They, therefore, pray that it would not be in the interest of justice to send them to jail again and they deserve to the sentence already undergone. It is true that deceased Halke was the main culprit and that the appellants have been convicted because of their presence on the spot and association with Halke. There also appears to be no record of criminality against

them at least after their release. This Court had definitely held that though these petitioners had come together and caught hold of Premsingh, there was no intention on their part to kill Premsingh. That is the reason why they have been convicted u/s 324/34, Indian Penal Code. Taking an overall view of the matter this Court would find no justification for sending these petitioners back to jail. According to this Court, the interest of justice would be served if they are sentenced to the period already undergone together with fine of Rs. 1,000/- each. On realization of the fine the same shall be paid to Ramlakhan (P.W. 1), the son of the deceased Premsingh, as compensation. In default of payment of fine the petitioners will suffer one year's further rigorous imprisonment. Our judgment dated 20-9-1988, passed in Criminal Appeal No. 328 of 1984 is accordingly modified.