
(2016) 04 CAL CK 0001
In the Calcutta High Court
Case No : C.R.R. 2741 of 2015

Nirmal Kumar Batabyal

APPELLANT

Vs

The State of West Bengal and Anr.

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Constitution of India, 1950 — Article 141

Criminal Procedure Code, 1973 (CrPC) — Section 2(wa), 372, 378(3)

Citation : (2016) 3 AICLR 661 : (2016) 2 CalCriLR 534 : (2016) 3 CalHCN 304 :
(2016) 3 CalLT 164 : (2017) 1 CriCC 186 : (2016) CriLJ 3527 : (2016) 3
RCRCriminal 238

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Tarun Kanti Ghosh, Lutful Haque, G.K. Chowdhury, Advocates, for
the Respondent

Final Decision : Allowed

Judgement

Joymalya Bagchi, J. - Order dated 16.06.2015 passed by the learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly, in Criminal Appeal No.01/2015 dismissing the appeal as not maintainable has been assailed.

2. The factual matrix giving rise to the instant case is to the effect that the petitioner herein being the Teacher-in-Charge of Ramnagar Atul Vidyalaya, Hooghly lodged a first information report against opposite party no. 2, Mintu Kumar Patra, alleging that the said Mintu who was a student of the aforesaid educational institution had produced a mark-sheet of Madhyamik Examination purportedly issued by the West Bengal Board of Secondary Education before the petitioner showing that he had passed the said examination. Relying on such mark-sheet, the petitioner issued a character certificate to the said student. Subsequently from a communication by the Board it came to the knowledge of the School that the mark-sheet was a forged document. Accordingly, First Information Report being Khanakul P.S. Case No.55 dated 29.07.1097 under

Section 468/471 IPC was registered for investigation against the opposite party no.2. Upon conclusion of investigation charge-sheet under sections 468/420/471 I.P.C. was filed against the aforesaid opposite party no.2. Charge was framed under Section 471 IPC. In conclusion of trial, however, the accused person stood acquitted of the aforesaid charge. Against such acquittal, the petitioner as a victim of the aforesaid crime filed an appeal under the proviso to Section 372 Cr.P.C. before the learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly.

3. Learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly, dismissed the appeal, inter alia, holding that the said appeal is not maintainable at the behest of the petitioner as the only remedy available was by way of an appeal under Section 378 sub Section (1) Cr.P.C.

4. Mr. Sengupta, learned counsel appearing for the petitioner submitted that the petitioner himself was the victim of the offence as he was induced to issue a character certificate in favour of the opposite party no.2 on the strength of the forged mark-sheet. That apart, his client had also been authorized to file the appeal for and on behalf of the West Bengal Board of Secondary Education whose certificate had been allegedly forged by the opposite party no.2 and used as a genuine one. In support of his contention he filed a supplementary affidavit annexing an authorisation issued by the Secretary of West Bengal Board of Secondary Education authorizing the petitioner to file the aforesaid appeal. He further submitted that proviso to Section 372 Cr.P.C. provided for the forum of the said appeal namely, the Court of Sessions where the appeal would ordinarily lie from an order of conviction of the trial Court. He, accordingly, prayed for setting aside of the order passed by the lower appellate court and prayed for the appeal be heard out on merits.

5. Mr. Haque, learned counsel appearing for the opposite party no. 2 opposed the prayer of the petitioner. He submitted that the petitioner is not a victim as defined under 2(wa) of the Code of Criminal Procedure and is not entitled to file the appeal. The opposite party no. 2 had obtained an honourable acquittal and, therefore, ought not to be vexed by a person who had no authority to institute the appeal. The authorization issued on behalf of the Board of Secondary Education was not placed before the lower appellate court. He further contended that in view of the law declared in *Satya Pal Singh v. State of M.P. and Ors.* reported in 2015 (10) SCALE 444 the impugned order did not call for interference.

6. In the light of the aforesaid submissions, the issues which fall for decision are as follows:-

(a) Whether the petitioner can be said to be a victim under Section 2(wa) of the Code of Criminal Procedure?

(b) If so, whether he was entitled to prefer an appeal against the order of acquittal before the Court of Sessions?

7. With regard to issue no.1, it has been argued on behalf of the petitioner that he had preferred the appeal as a victim both in his own capacity as well as being authorized by the Board whose certificate is alleged to have been forged. It is true that the authorization had not been placed before the lower appellate court. However, the said authorization has been placed before me by way of supplementary affidavit and I have no reason to disbelieve the same. There cannot be any dispute that the Board whose certification was allegedly forged is a "victim" of the crime. It is trite law that if a person is duly authorized on behalf of a victim, he is entitled to maintain an appeal on its behalf. That apart, I find that the allegation as disclosed in the charge-sheet is to the effect that the petitioner had been induced to issue a character certificate on the strength of the forged document. It has been contended that the petitioner would not have issued such character certificate had he not been duped by user of the forged certificate. Accordingly, he ought to be considered as a victim in his own right.

Section 2(wa) of the Code, inter alia, reads as follows:

"`victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

8. A perusal of the said provision would show that the said definition takes within its beneficial fold all persons who suffer any loss or injury by reason of an act or omission which constitutes the crime.

9. The allegations in the charge-sheet show that the petitioner was induced to issue a character certificate in favour of the accused on the strength of a forged certificate. If such allegations are true then there cannot be any escape from the conclusion that the petitioner had suffered wrongful loss and injury by issuing an incorrect character certificate being swayed by such forged document. It is another thing whether prosecution is able to prove such allegations or not. However, in view of the nature of the allegations in the prosecution case, I am of the opinion the petitioner may be considered as victim of the crime in his own capacity. Apart from that, he has also been authorized to file an appeal on behalf of the Board, whose certificate had been allegedly forged. Hence, the petitioner is entitled to prefer the instant appeal both in his own capacity as a victim as well as the representative of the Board in the instant case.

Let me now dwell upon issue no.2.

The proviso to Section 372 was amended by the Act 5 of 2009 gives legislative expression to the recommendation of the Law Commission made in its 154th report to provide victims of crime access to justice against orders of acquittal.

Section 372 as amended by Act 5 of 2009 reads as follows:

"No appeal to lie unless otherwise provided.-

No appeal shall lie from any judgment or order of a Criminal Court except as

provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

10. The aforesaid proviso was incorporated by the amending Act 5 of 2009 and provided a right to the victim to prefer appeal against or order of acquittal to a Court to which an appeal against order of conviction would ordinarily lie from judgments of the trial Court.

11. Hence, the said provision not only gave a right to appeal but also laid down the forum before whom such appeal is to be presented namely, the court in which an appeal would ordinarily lie against the order of conviction passed by the trial Court. In the factual matrix of the instant case, such a court would be the Court of Sessions and not High Court.

12. Relying on Satya Paul Singh (supra) it has been argued that right to appeal under the proviso of section 372 Cr.P.C. is not an independent one and has to be exercised in the light of the other provisions of the Code namely, Section 378 of the Code of Criminal Procedure. Accordingly, it was submitted that even if the petitioner is admitted to be a victim in the instant case he ought to have preferred the appeal before the High Court after seeking leave in terms of Section 378(3) of the Code of Criminal Procedure.

13. Section 378 of the Code of Criminal Procedure reads as follows:-

"Appeal in case of acquittal. -[(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5), -

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal

a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

b) to the High Court from an original or appellate order of an acquittal passed by an Court other than a High Court [not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.]

(3) [No appeal to the High Court] under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

14. An analysis of the said section would show that the said provision provides for appeal in the following cases by specified agencies:-

Nature of case

Forum and procedure of appeal

Agency who may prefer such appeal

1) Order of acquittal by Magistrate in cases involving cognizable and non-bailable offences.

Court of Sessions (No leave under subsection (3) section 378 Cr.P.C. is necessary)

Public Prosecutor upon direction of District Magistrate.

2) Any original or appellate order of acquittal passed by any Court other than High Court (except those referred to in the above clause)

High Court after obtaining leave under sub-section (3) of section 378 Cr.P.C.

Public Prosecutor upon direction of State Government or upon the direction of the Central Government if the case is investigated by CBI or any other Central agency under any Central law.

3) Any order of acquittal in a case instituted upon a complaint.

High Court after obtaining special leave under subsection (5) of section 378 Cr.P.C.

Complainant.

15. From the aforesaid chart it is clear that the locus to file appeal under section 378 Cr.P.C. is vested in the Public Prosecutor upon the direction of District Magistrate, State or Central Government, as the case may be, and the complainant in complaint cases. Right of the victim to file an appeal against acquittal (except where the victim is the complainant) is traceable to proviso to section 372 Cr.P.C. and not to the aforesaid provision of law. When the right to appeal is derived from the proviso of section 372 Cr.P.C. which also provides the forum for such appeal, I am of the considered opinion that such appeal must be filed before such forum itself.

16. In *Satya Pal* (supra), an order of acquittal passed in a case of murder was challenged by the victim, namely, the father of the deceased, before the High Court. The Apex Court while dealing with such a situation, inter alia, held that the proviso must be read along with the substantive provision of section 372 read with sub-section (3) of Section 378 of the Code of Criminal Procedure. Accordingly, it was held, leave to appeal procedure as laid down in section 378(3) Cr.P.C. is required to be obtained even in case of appeal preferred at the behest of a victim under the proviso of section 372 Cr.P.C. as the right vested in the said proviso is not an independent one but must be read in the light of other provision of the Code. In other words, in the event the victim prefers an appeal in terms of the proviso under section 372 Cr.P.C., procedure to institute such appeal would be in terms as laid down in Section 378 of the Code of Criminal Procedure particularly sub-section (3) thereof. The Apex Court, however, in the aforesaid case did not have the occasion of dealing with an order of acquittal passed by a Magistrate where the appeal against such order at the behest of the victim would lie before the Court of Sessions in terms of the proviso to Section 372 of the Code of Criminal Procedure and may not require a leave in terms of section 378 (3) Cr.P.C.

17. It is trite law that a judgement is an authority for the proposition which actually decides and not what logically follows therefrom [*State of Orissa v. Sudhansu Sekhar Misra*, (AIR 1968 SC 647)]. I am, therefore, of the considered opinion that the ratio in *Satya Paul* (supra) is inapplicable to the facts of the present case which involves an appeal from an order of acquittal passed by the learned Magistrate at the behest of the victim. Proviso to section 378 Cr.P.C. clearly lays down that the forum to prefer such appeals (at the behest of the victim) against orders of acquittal passed by a learned Magistrate is the Court of Sessions and not the High Court. No such right of appeal is vested in the victim under section 378 Cr.P.C. save and except when the victim is also the complainant. Clear intendment of the proviso to lay down the forum of appeal cannot be rendered otiose or nugatory by referring to section 378 Cr.P.C. It is a settled principal of interpretation that all the provisions of the Act are to be read harmoniously and an interpretation ought not to be resorted to which would render a part of a provision otiose. In fact, in *Dwarka Prasad v. Dwarka Das Saraf*, (1976) 1 SCC 128 [relied upon in *Satya Pal* (supra)] it was held that the whole section including the proviso has to be read in a harmonious manner

throwing light on each other (Para-18). Further in Commissioner of Commercial Tax, Board of Revenue, Madras and Anr. v. Ramkishan Shrikishan Jhaver (AIR 1968 SC 59), a Constitution Bench of the Apex Court held, although a proviso ordinarily operates as an exception to the main provision in exceptional cases it may operate as a substantive provision also. Whether a proviso operates as a substantive provision or not must be derived from its contents and not its form (see paras 8 to 12). Similar view is expressed in State of Orissa v. Debaki Debi and Ors. (AIR 1964 SC 1413) (Para-21) and in Motiram Ghelabhai v. Jagan Nagar [(1985) 2 SCC 279]. Furthermore, if the words of the proviso are clear and do not yield to any other view, it must be given its full effect and it would be futile to examine whether the said proviso operates as a substantive provision or an exception to the main provision [see Commr. of Income-tax, U.P. v. Jagannath Mahadeo Prasad reported in [AIR 1969 SC 209 (para-5)].

18. Judged from this angle, as the clear and unequivocal words of the proviso to section 372 Cr.P.C. alone create a right as well as a forum for appeal for the victim (other than a complainant) against orders of acquittal, it would be impermissible by any known mode of construction to whittle down such clear words of the proviso and render them otiose by reference to other provisions of the Code including section 378 Cr.P.C. This issue never fell for decision in Satya Pal (supra) and the said report cannot be considered an authority on such proposition.

19. It may also be interesting to note that even Section 378 of the Code of Criminal Procedure had undergone an amendment in 2005 vide Code of Criminal Procedure Amendment Act, 2005 i.e. Act 25 of 2005. By the said amendment, it was provided for the first time that an appeal against an order of acquittal passed by a Magistrate in certain cases shall lie before the Court of Sessions at the behest of the Public Prosecutor upon direction of the concerned District Magistrate. While creating such forum of appeal under sub-section (1) (a), sub-section (3) of Section 378 of the Code of Criminal Procedure was also amended and the requirement to obtain leave to prefer an appeal was restricted only to appeals preferred before the High Court and not for the ones which were to be filed before the Court of Sessions in terms of Section 378(1)(a), as aforesaid. This amended scheme of the Code makes the legislative intendment clear that no leave under sub-section (3) of section 378 Cr.P.C. is required even in cases where appeal against acquittal is preferred before the Court of Sessions under section 378 Cr.P.C. itself.

20. In view of the aforesaid discussion, I hold as follows:-

a) A victim in a police case may prefer an appeal before the Court of Sessions against an order of acquittal passed by the learned Magistrate in terms of proviso to section 372 Cr.P.C. provided an appeal against an order of conviction in such cases lay before the Sessions Court. No opinion is expressed in respect of a victim in a complaint case as the factual matrix of this case does not require me to dwell on such controversy.

b) In the event, the victim prefers an appeal to the Court of Sessions in terms of the proviso to Section 372 of the Code of Criminal Procedure, no leave is required to be granted by the High Court in terms of sub-section (3) of section 378 Cr.P.C. as amended by Act 25 of 2005 which restricts such leave only to appeals preferred before the High Court and not before any other forum.

21. In view of the aforesaid discussion, I set aside the order passed by the learned lower appellate court. I remand the appeal for fresh hearing in accordance with law.

22. I am informed that the appeal is barred by limitation and an application for condonation of delay under section 5 of the Limitation Act has also been filed with the said appeal. Accordingly, I direct the trial court to consider the said application for condonation of delay first and if the court is inclined to condone the same after hearing the respective parties, register the appeal and deal with the same on merits.

23. The revision petition is accordingly, allowed.

24. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.