
(1984) 04 CAL CK 0019
In the Calcutta High Court

Parmal Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 27-04-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 234, 235, 360, 372, 374

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304, 323

Probation of Offenders Act, 1958 — Section 11, 19, 3, 4

Citation : (1984) 1 CALLT 54 : (1984) CriLJ 1302

Hon'ble Judges : N.G. Chaudhuri, J;Jitendra Nath Chaudhuri, J

Bench : Division Bench

Judgement

This Judgment has been overruled by : Prithvi Raj and Others Vs. Kamlesh Kumar and Another, AIR 2004 SC 4401 : (2004) CriLJ 4238 : (2004) 8 SCALE 82 : (2004) 8 SCC 303 : (2005) 1 UJ 265 : (2004) AIRSCW 5219 : (2004) 7 Supreme 16

N.G. Chaudhuri, J.—Six accused-respondents herein faced a Sessions trial on charges under Sections 148, 302/149, 302/34 and 323/34 I.P.C. The allegations made against them were that while Parimal Ghosh, Krishna Ghosh, Biren Pramanick, Gopinath Ghosh and Nitya Ghosh after watching their cultivation on a piece of char land were taking rest in a boat anchored in river Bhagirathi close to village Malinipara, P. S. Beldanga, District Murshidabad, the respondents formed themselves into an unlawful assembly with the common object of making murderous assault on the aforesaid persons, equipped themselves with deadly weapons locally known as Pattangi, Jabha etc, and attacked the abovenamed persons in the boat aforesaid soon after midnight between 24th and 25th April, 1980. Nitya Ghosh and Gopinath Ghosh succumbed to their injuries within a few hours of receiving them. After considering the evidence adduced, the learned Additional Sessions Judge 4th Court, Murshidabad, by his judgment D/-24.8.81 found the accused respondents guilty of the offences under Sections 148 and 304 (Part II) read with Section 149 I.P.C. for killing Nitya Ghosh and again u/s 304 (Part II) read with Section 149 I.P.C. for killing Gopinath Ghosh. He,

however, acquitted them of the charges under Sections 302/149, 302/34 I.P.C. and 323/34 I.P.C. The learned Judge fixed the next day, that is, 25.8.81 for hearing the accused in the matter of sentence as required u/s 235(2) of the Cr.P.C. (hereinafter to be referred to as the Code). By his order D/- 25-8-81 the learned Judge released the accused respondent Krishna Ghosh on probation u/s 360 of the Code and proposed to release other accused on probation u/s 4 of the Probation of Offenders Act, 1958 (hereinafter to be referred to as the Act) subject to receipt of probation officer's report regarding them.

2. Parimal Ghosh the informant and P.W. 1 has filed Criminal Appeal No. 352 of 1981 u/s 11(2) of the Act challenging the propriety of the orders of the learned Additional Sessions Judge. He has also filed two revision applications u/s 397 read with Section 401 of the Code numbered as Criminal Revision Petitions 2177 and 2178 of 1981 questioning the propriety of the findings of the learned Additional Sessions Judge and the orders passed by him. The appeal and the revisional applications are taken up for analogous hearing as common questions of law and fact were canvassed.

3. The first question which confronts us is whether or not a revision application lies when an order has been passed u/s 360 of the Code and Section 4 of the Act. The second question confronting us is : if a revisional application does not lie, then who will file the appeal. More precisely, has the informant (de facto complainant) any right of an appeal u/s 11 of the Act.

4. Before we proceed to answer the questions posed we should give an indication as to the line of arguments advanced by Mr. Bagchi, the learned advocate for the appellant/petitioner. He reads out to us the judgment assailed and portions of evidence to contend that the time, place and circumstances of the occurrence clearly established planned and willful murders to attract Section 302 I.P.C. His further argument is that the accused respondents should properly have been convicted of offences u/s 302 read with Section 149 I.P.C. Mr. Bagchi contends that in any event the learned Judge was wrong in finding the accused guilty of offences u/s 304 (Part II) read with Section 149 I.P.C. when he himself observed "From the nature of the instrument used by them and the vital parts of the body of Nitya Ghosh where they drove the instrument, it could be inferred that they had the intention of causing such bodily v injury as was sufficient in the ordinary course of nature to cause death". Mr. Bagchi argues that taking & view most favourable to the accused respondents they could not escape conviction for offences u/s 304 (Part I) read with Section 149 I.P.C. Mr. Bagchi proceeds on to argue that if the accused respondents were guilty of offences u/s 304 (Part I) I.P.C. they would, be punishable with imprisonment for life; and in the event of such conviction the offenders could not be dealt with u/s 360 of the Code or Section 4 of the Act. Mr. Bagchi's contention is that in the facts and circumstances of the present case particularly of two murders, the learned Judge was totally wrong in resorting to the above noted provisions of the Code and Act.

5. We are required to analyze the provisions of the Code and the Act on the

subject under consideration as they are closely interwoven. It is common knowledge that appeal is a creature of statute. Appeals under the Code are not an exception. In fact Section 372 of the Code provides "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". Section 374(3)(c) of the Code provides for an appeal from an order passed by a Magistrate u/s 360 of the Code. While Section 11 of the Act provides for appeals against orders passed under Sections 3 and 4 of the Act, Analyzing the provisions of the Code, we find that a person convicted may appeal to different courts depending on the court by which he has been convicted as provided in Section 374 of the Code. A perusal of Section 374 of the Code in isolation from other provisions may convey the impression that appeal will lie in all cases of conviction irrespective of sentence. But this impression wears off when we encounter a non obstante clause at the outset of Section 376 providing "Notwithstanding anything contained in Section 374, there shall be no appeal by a convicted person in any of the following cases namely...."

6. Reading together Section 374 with Section 376 Clause (b) we reach the conclusion that a person convicted of an offence by a Court of Session and sentenced to more than three months" imprisonment is entitled to file an appeal. As regards an appeal against an order of acquittal the right vests exclusively in the State as indicated by Section 378 of the Code subject to the reservation of limited rights in favour of the complainant under Sub-section (4) when the case was instituted on complaint. Thus we find that subject to some restrictions on sentence a convict is always entitled to appeal against the order of conviction, whereas against an order of acquittal the State has a right of appeal subject to limited reservations made for complainants on whose complaint the case was instituted. It will be noted, when an order is passed u/s 360 of the Code the court passes the order consequent to conviction, but instead of sentencing the convict passes an order as contemplated in the section. The right of appeal conferred u/s 376 is not available to such a convict dealt with under the section as he has not been sentenced. For him special provision for appeal has been made in Section 374(3)(c) of the Code. Almost similar provision has been made in Section 11(2) of the Act, namely:

Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.? (1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order u/s 3 or Section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the Court by which he is found guilty declines to deal with him u/s 3 or Section 4 and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the Court to which appeals ordinarily lie from the sentences of the former Court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made u/s 3 or 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law:

Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was found guilty.

7. From a perusal of Sub-section (1) of Section 11 it is seen that orders under, Section 3 or 4 of the Act may be passed by (1) the trial Court, (2) the Appellate Court, and (3) also by any Court in revision. Obviously occasion for exercise of such power by the Appellate Court or the Court of revision will arise only when the person convicted comes up before it. But for express provisions of Section 11(1) of the Act and specific powers conferred, the Appellate Court or revision Court could not exercise those powers, resorting simply to Section 386 and Section 401 of the Code. In short Section 386 of the Code does not enable any Appellate Court to exercise any power under the Act; and this deficiency has been made good by Section 11(1) of the Act.

8. Sub-section (2) starts with a non obstante clause namely, "Notwithstanding anything contained in the Code". The implication of the clause is that although appeals against such orders have not been provided for in the Code even then because of the provisions of the subsection an appeal shall lie; the Court of appeal, however will be determined with reference to Section 374 of the Code. In the present case the order appealed against has been passed by an Additional Sessions Judge. The conclusion is, therefore, inescapable that u/s 374(2) of the Code read with Section 11(2) of the Act an appeal shall lie to the High Court. Sub-section (4) of Section 11 indicates that the Appellate Court or the High Court in exercise of powers of revision may set aside any order passed under Sections 3 and 4 of the Act and in lieu thereof pass sentence on such offenders according to law.

9. Now the question is whether a revisional application lies in the present case against the orders of the Additional Sessions Judge. Relying on the decision in the case of Aravinda Mohan Sinha Vs. Prohlad Chandra Samanta, , Mr. Dilip Dutt, the learned advocate for the accused respondents, contends that in view of clear

provision for appeal u/s 11 of the Act, revision applications under the Code are misconceived. No one will dispute the correctness of the above proposition which is founded on Section 401(4) of the Code laying down that where an appeal lies no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. We have thus no difficulty in reaching the conclusion that an order having been passed by an Additional Sessions Judge and an appeal having been provided by Section 11(2) of the Act; the said appeal is ordinarily entertainable by the High Court. But the snag lies here in the fact that no order u/s 4 has actually been passed by the learned Additional Sessions Judge, while Section 11(2) of the Act contemplates appeal against an order actually passed. The other difficulty is that an order passed by the Additional Sessions Judge u/s 360 of the Code, has not been made appealable by Section 374(3)(c) of the Code which is restricted to appeals in respect of orders of a Magistrate only.

10. We now proceed to consider if a de facto complainant has a right of appeal under the Act. Mr. Bagchi contends that a complainant can file an appeal under the Act and in support of his contention he relies on the decision in *Baidyanath Prasad Vs. Awadhesh Singh and Others*, . In the said case a complainant filed an appeal in the Court of Sessions Judge, against an order passed by a Magistrate u/s 3 of the Act. The Additional Sessions Judge hearing the appeal dismissed the appeal on the ground that the complainant had no locus standi to file the appeal. The High Court, however, held "in any view of the matter, since the language of Sub-section (2) of Section 11 is comprehensive, flexible and unrestricted as to the person who can prefer an appeal there is no justification for confining a right of appeal only to the convicted person or even to the State when the State is conducting the prosecution, but it must be taken that the privilege of filing an appeal on the narrow question of propriety of an action u/s 3 or 4 of the Act is conferred upon the complainant as well". The Patna High Court arrived at the above conclusion by recalling that a complainant can file a petition in revision against an order of acquittal and therefore had great interest in conviction and sentence. Mr. Bagchi points out that for similar reasons the Orissa High Court in the single Judge decision in *Rajkishore Jena v. Raja* reported in AIR 1971 Orissa 193 held that even a private complainant in cases of State prosecution can appeal u/s 11 of the Act. Orissa High Court, however, dismissed the revision application filed by the complainant as he had a right of appeal to Sessions Court u/s 11(2) of the Act against the impugned order passed by a Magistrate. We will simply note that the Orissa High Court's observations with regard to competence of a complainant to file an appeal u/s 11(2) of the Act were made in decision on a revisional application not in an appeal filed by the de facto complainant. Mr. Bagchi next relies upon the decision of the Karnataka High Court in *The State of Karnataka Vs. Chandrappa and Another*, . Relying on certain observations made in this case Mr. Bagchi contends that a private complainant can file an appeal u/s 11(2) of the Act. With respect, we are unable to accept the above contention, because, the High Court construed the order impugned before it as an order imposing sentence and the appeal was one filed u/s 377 of the Code for

enhancement of sentence. It did not therefore, fall for decision of the Karnataka High Court if a complainant as distinguished from the State could file an appeal u/s 11(2) of the Act.

11. So far we have got the Patna High Court decision cited as authority for the proposition that even private complainants can file appeal u/s 11(2) of the Code.

12. With great respect we are unable to endorse the reasons given by the Patna High Court in support of its conclusion. When a complainant files a revision application he cannot expect complete reversal of the judgment in the shape of conversion of an order of acquittal into one of conviction. The scope of revision and appeal being thus different, drawing of an analogy between the two seems to us to be inappropriate. We have other reasons to differ also. The Code has given the complainant right to apply in revision and in a small category of cases right of appeal against an order of acquittal, but he has, not been given any such right to his grievance in the matter of sentence. In the matter of sentence unlike Section 234, Section 235(2) of the Code requires the Court to hear the accused only, although the trial might have originated in a petition of complaint. Denial of the right of hearing to the complainant in the matter of sentence had its obvious justification. If the complainant had been given a right of hearing on sentence he would be praying for imposition of the maximum sentence motivated by a feeling of revenge and retribution. So the matter has been left to the discretion of the Court considering the age, circumstances, nature of offence, the prospect of reform and rehabilitation of the accused, the Court is expected to impose a proper sentence within the limits of law and in the larger background of social security. If the accused feels aggrieved with the correctional sentence, he may file an appeal u/s 374 or 375 of the Code and in the appeal invite the Court to exercise powers u/s 11(2) of the Act. If the sentence is considered inadequate, the State may file an appeal u/s 377 of the Code. If no sentence has been imposed and the accused has been dealt with under the provisions of the Act, in the broader interests of the society, the State, in our opinion, is competent to file an appeal. The significant fact is that the Code has omitted to give the complainant any say in the matter of sentence. We thus reach the conclusion that against an order passed under Sections 3 and 4 of the Act, the complainant has no right of appeal. Appeal No. 352 of 1981 u/s 11(2) of the Act now under our consideration having been filed by the complainant is in our opinion incompetent and the memo is liable to be rejected.

13. The de facto complainant's appeal being rejected we take up for consideration his applications u/s 401 Cr.P.C. not with a view to consider the order of the Addl. Sessions Judge passed on 25.8.81 which could have been a subject matter of appeal if it did not suffer from deficiencies already noted. We take up for consideration the order dt. 2.4.81 convicting the respondents u/s 304 (Part II) read with Section 149 I.P.C. to examine its legality and propriety. We have earlier summarized the arguments of Mr. Bagchi to the effect that the conviction should have been for graver offences with heavier punishment u/s 302

read with Section 149 I.P.C. or u/s 304 Part I read with Section 149 I.P.C. From a consideration of the materials on record which we called for and examined, we hold that Mr. Bagchi's arguments have some substance. The learned Judge does not appear to have given sufficient attention to the number of persons making the attack at that hour of night in the boat on the deceased with the instruments used and the fatal consequences following to determine if causing of death was preplanned and if the manner of attack was indicative of a keen desire to execute the plan, apart from the parts of the body whereon the injuries were effected. We are thus satisfied that there has been a miscarriage of justice in this case necessitating a retrial.

14. Allowing the revisional applications on contest we set aside both the orders dt. 24.8.81 and 25.8.81 passed by the learned Additional Sessions Judge and direct that the respondents be tried afresh on the charges already framed and the evidence already on record.

15. The learned Judge holding the retrial will consider carefully whether the evidence adduced justifies conviction of the accused u/s 304 (Part II) read with Section 149 I.P.C. or they should be convicted for graver offences. He will not, in any way be influenced by observations of ours on this point. If he arrives at the conclusion that the accused are liable to be convicted u/s 304 (Part II) read with Section 149 and are entitled to the benefit of provisions of the Act he will hear the accused in the matter of sentence u/s 235(2) of the Code afresh and will prepare separate notes in respect of each accused on the point of age, character, antecedents physical or mental condition of the offender and the extenuating circumstances under which the offence was committed apart from their marital status and domestic obligations. After taking into consideration the above points the learned Judge will decide if the accused will be punished with sentence or will be dealt with under the provisions of the Act or u/s of Section 360(10) of the Code and Section 19 of the Act and decide if there is any scope for dealing with the accused under the provisions of the Code.

Jitendra Nath Chaudhuri, J.

I agree.