

(1976) 09 GUJ CK 0005
In the Gujarat High Court

Prabhudas Chhaganlal and Another

APPELLANT

Vs

Babubhai Virabhai Miseria and Another

RESPONDENT

Date of Decision : 20-09-1976

Acts Referred:

COMPANIES ACT, 1956 — Section 397, 401

Criminal Procedure Code, 1973 (CrPC) — Section 307, 377, 378, 386, 389

Penal Code, 1860 (IPC) — Section 332, 504

Citation : (1977) CriLJ 1666 : (1977) GLR 147

Hon'ble Judges : N.H. Bhatt, J;D.P. Desai, J

Bench : Division Bench

Judgement

D.P. Desai, J.—This revision application raises a question of general importance as to the powers of the Sessions Judge in the matter of enhancement of sentence in exercise of his powers of revision conferred upon him by the provisions of Section 397 read with Section 399 of the Cri.P.C., 1973 (hereafter referred to as "the new Code"). The repealed Code of Criminal Procedure, 1898 will hereafter be referred to as "the old Code". The question has been referred to us by our learned brother A. N. Surti, J. observing that it was of some considerable importance.

2. The facts leading to the aforesaid question may now be stated. The petitioners before us (original accused Nos. 1 and 2) pleaded guilty to a charge for offences punishable Under Sections 332 and 504 of the I. P. C. before the learned Magistrate accepting the said plea sentenced each of them to a fine of Rs. 100/- only with rigorous imprisonment for 15 days in case of default for the former offence and to a fine of Rs. 50/- with rigorous imprisonment for seven days in case of default for the latter. The case was originated upon a complaint filed before police by one Supply Inspector alleging that on April 2, 1974 when he had been to the shop of the petitioners for checking and when he demanded the register, both the petitioners beat him with sticks. There was a third person also proceeded against in connection with this incident. But with his case we are not concerned in this revisional proceeding because his similar sentence as in the

case of the two petitioners on the plea of guilty for the same offences was not enhanced by the learned City Sessions Judge. The Supply Inspector who was an informant before police filed Criminal Revision Application No. 41 of 1974 before the City Sessions Court, Ahmedabad, praying for enhancement of sentence ; and the learned City Sessions Judge allowed that Revision Application and enhanced the sentence of each of the two petitioners to one month's rigorous imprisonment and a fine of Rs. 100/- with further rigorous imprisonment for 15 days in case of default for the offence punishable u/s 332 of the I. P. C., and to 15 days" rigorous imprisonment and a fine of Rs. 50/- with further rigorous imprisonment for seven days in case of default for the offence punishable u/s 504 of the I. P. C. Thus, having confirmed the order of fine and imprisonment in default for both the aforesaid offences, the learned Sessions Judge also imposed substantive sentences of one month's rigorous imprisonment and 15 days" rigorous imprisonment respectively for the aforesaid two offences. It is against this order in revision that the petitioners have approached this Court.

3. Two contentions have been raised before us. Firstly that the learned City Sessions Judge had no power to enhance the sentence in revision ; and secondly that in any case the said power should not have been exercised in the facts of the present case.

4. As the first contention involved question of general importance, advocated at the bar were permitted to intervene and make their submissions, Accordingly, D. K. Shah, D. G. Trivedi and K. J. Shethna intervened and made their submissions in support of the contentions of the petitioners. We are, no doubt, beholden on them for the assistance that they rendered in this case.

5. The relevant provisions are :

377. Appeal by the State Government against sentence.--

(1) Save as otherwise provided in Sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.

(2) If such conviction is in a 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 direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

378. 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), 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 acquittal passed by any Court other than a High Court.

(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 an other agency empowered to make investigation into an offence under any Central Act, other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of Sub-section (3) to the High Court from the order of acquittal.

(3) No appeal 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).

386. 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 re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law,

(b) in an appeal from a conviction :--

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same ;

(c) in an appeal for enhancement of sentence :

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence ; or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same ;

(d) in an appeal from any other order, alter or reverse such order ;

(e) make any amendment or any consequential or incidental order that may be just or proper ;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement :

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

397. Calling for records to exercise powers of revision.--

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation : All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

399. Sessions Judge's powers of revision :

(1) In the case of any proceeding the record of which has been called for by

himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under Sub-section (1), the provisions of Sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

401. High Court's powers of revision.--

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

6. The First submission was that the new Code has created a right of appeal against sentence and conferred it only on the State Government and the Central Government (in certain specified cases). It was pointed out that except in the cases mentioned in Section 377(2), the State Government's right of appeal extends to "any case of conviction" which would take in conviction in a complaint instituted by a private party also. It was also urged that only the State is interested in the question of sentence and a private party can have no interest in it except perhaps to satisfy its vengeance. Therefore, the only remedy against

sentence was by way of appeal by the State Government, and any other remedy must be deemed to have been excluded. This argument, which looks attractive at first sight, when taken to its logical end would mean that sentence cannot be enhanced by invoking the revisional power even of the High Court. This result is now demonstrated to be untenable, in view of the decision of the Supreme Court in *Nadir Khan Vs. The State (Delhi Administration)*, . In that case the High Court's power to enhance sentence u/s 401 of the New Code was questioned in view of the provision for appeal u/s 377 of the Code, The Supreme Court negated this contention holding that the said power was preserved expressly by Section 401 ; and that the provisions of Section 401 read with Section 386(c)(iii) were supplemental to those u/s 377. This is because while exercising power of revision the High Court by virtue of Section 401 can exercise any of the powers inter alia u/s 386 exercisable in appeal.

7. Now, it is pertinent to note at this stage that the Legislature while providing for exercise of powers of revision by the Sessions Judge by Section 399(1) conferred upon the Sessions Judge "all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401." These are words of widest amplitude. The Legislature did not exclude Section 386(c) relating to enhancement of sentence while conferring these powers. Therefore, if by virtue of Section 401, the High Court can enhance suo motu sentence in revision, the Sessions Judge can as well do so suo motu in exercise of his powers of revision. And Sub-section (2) of Section 399 itself shows that for the purposes of Sub-sections (2), (3), (4) and (5) of Section 401, the Sessions Judge was practically equated with the High Court,

8. It was as a necessary sequel to the wide amplitude of powers conferred as above on the Sessions Judge that by Sub-section (3) of Section 399 the decision of the Sessions Judge in revision was made final in relation to the person who had invoked the revisional jurisdiction of the Sessions Judge, and no further proceeding by way of revision at the instance of such a person could even be entertained by the High Court. Nay, the Legislature went a step ahead and prohibited entertainment of further application in revision by the High Court at the instance of a person who had made an application to the Sessions Judge and vice versa. Therefore, to this limited extent the High Court and the Sessions Judge were made Courts of concurrent jurisdiction.

9. There is another angle also from which we can show that radical change was brought about by the new Code in respect of powers of revision of the Sessions Judge. It may be recalled that an order of acquittal could be interfered with by the High Court u/s 439 of the old Code in certain cases. But while exercising this power of revision the High Court could not convert a finding of acquittal into one of conviction. We find the same limitation imposed by Sub-section (3) of Section 401. And the most significant feature is that this Sub-section (3) is also made applicable to the Sessions Judge by Section 399(1). This is clear indication of Legislative intent that the wide amplitude of power conferred on the Sessions

Judge by Section 399(1) would also take in power to interfere with an order of acquittal, of course subject to the same limitation as the High Court.

10. It was contended that the words "so far as may be" occurring in Section 399(2) cut down the wide amplitude of power conferred by Section 399(1). This contention has no force. The words only indicate that provisions of Sub-sections (2), (3), (4) and (5) of Section 401 will in so far as they are applicable apply to the exercise of powers of revision by the Sessions Judge.

11. There is yet another feature which also was a necessary sequel to the new scheme of conferring wide powers on the Sessions Judge, authorising him to dispose of revision applications finally. And it is this. Old Section 438 which required the Sessions Judge to report to the High Court the result of examination of proceedings records of which were called for by him, is wholly omitted.

12. This new scheme also omits the provision for exercise of powers by the District Magistrate or Sub-Divisional Magistrate empowered by the State Government contained in the old Section 435 and makes all the Executive Magistrates whether exercising original or appellate jurisdiction inferior to the Sessions Judge for the purpose of powers of revision of the Sessions Judge Under Sections 397 and 398 of the new Code.

13. It is worth noting that notwithstanding the recommendation of the Law Commission in its 14th Report to exclude "petitions against order of acquittal and for enhancement of sentence" from the powers of the Sessions Judge to pass final orders in revision, the Legislature did not make any such exclusion while conferring powers on the Sessions Judge by Section 399(1). The law Commission in its 14th Report had observed as under :

A further measure which will relieve congestion in this category of work needs consideration. Could some of the revisional powers now being exercised by the High Courts be entrusted to Sessions Judges? The Judicial Reforms Committee of Uttar Pradesh recommended that Sessions Judges should be given full powers to hear and determine all criminal revisions except revisions against orders of acquittal and revisions for enhancement of sentences.

The evidence before us generally favoured the grant of revisional jurisdiction to this extent to the Sessions Judges.

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We are, therefore, of the view that Sessions Judges may well be invested with powers to pass final orders in revision in all matters other than petitions against orders of acquittal and for enhancement of sentence."

As part of the argument that revision against sentence in the Sessions Court is excluded by the provision of appeal but the same is not excluded in case of High Court, it was pointed out that the words "or which otherwise comes to its knowledge" occurring in Section 401(1) do not occur in Section 399. It was

urged that on account of this phrase the High Court can interfere suo motu with sentence in revision. We do not think this argument can hold good. Section 397 does not limit the exercise of power to call for record and examine the correctness, legality or propriety inter alia of any sentence only, at the Instance of a party, and not suo motu.

14. Thus, there is no escape from the conclusion that the Sessions Judge has power to enhance sentence in revision subject to the limitation set forth in Sub-section (4) of Section 401 viz. in a case where an appeal lies and no appeal is brought, proceeding by way of revision cannot be entertained at the instance of the party who could have appealed. In a way this sub-section would also provide an answer to the argument that in view of conferment of right of appeal against the sentence, interference with sentence in revision is excluded. The Legislature could have wholly excluded exercise of power of revision where an appeal lies. Instead, there was partial exclusion of revisional proceeding at the instance of the party who could have appealed.

15. We may now refer to a peculiar situation posed before us by way of illustration (of course with a view to persuade us to hold that exercise of revisional jurisdiction by the Sessions Judge in the matter of enhancement of sentence is excluded). A person is convicted in a police case and is sentenced to a small term. The informant before police moves the Sessions Judge in revision to enhance sentence ; and does not make the State a party. The State being unaware of this revisional proceeding files an appeal against sentence to which the informant would evidently not be a party. The Sessions Judge while the appeal is pending disposes of the revisional applications holding that the sentence was quite adequate in view of the circumstances of the case. The High Court in hearing the appeal would be faced with this order of the Sessions Judge by the accused who is a party to both the proceedings, This, runs the argument, would virtually deprive the High Court of its appellate jurisdiction. Or, if the High Court ignores this order holding that it is not bound by it and enhances the sentence there would be two conflicting orders--one in favour of the accused by the Sessions Judge and the other against him.

16. We do not think that this peculiar situation as illustrated can change the interpretation of the relevant provisions or affect the object of the Legislature to widen the revisional jurisdiction of the Sessions Judge. However, we may observe passingly that the difficulty posed is not incapable of being surmounted. Thus, while entertaining a revisional application, at the instance of a private party, the Sessions Judge may well issue a notice to the State, as the State is vitally interested in question of enhancement or otherwise of the sentence. The Sessions Judge may defer hearing of the revisional application till the period prescribed for filing of an enhancement appeal by the State or by the Central Government, as the case may be, is over ; and when he is informed that such an appeal has been filed, he may as well stay the hearing of the revisional application so that the right of appeal conferred on the State or the Central

Government, as the case may be, is not adversely affected by any order that the Sessions Judge may pass in the revisional proceeding. We are confident that the Sessions Judge will take effective steps in order to see that the difficulty posed in the aforesaid illustration does not arise in actual practice.

17. Our conclusion, therefore, is that a Sessions Judge can entertain an application in revision against sentence and enhance the sentence in revision in certain cases. It is clear that by making of this provision, the cases of enhancement of sentence at the instance of private party which would have normally gone to the High Court in respect of sentences passed by Magistrate subordinate to the Sessions Court, would now go to the Sessions Court ; and thereby the object of relieving congestion of the work in High Courts in part will be achieved to some extent. We must, however, make it clear that interference in revision with an order of sentence or order of acquittal is subject to the limitations laid down by the Supreme Court ; and this power cannot be exercised as if the Sessions Judge is hearing an appeal. Thus, in respect of enhancement of sentence in revision the enhancement can be made only if the Court is satisfied that the sentence imposed by the trial Court is unduly lenient, or that in passing the order of sentence, the trial Court has manifestly failed to consider the relevant facts, (Vide *Alamgir and Another Vs. The State of Bihar*, . Similarly, in *Ram Narain and Others Vs. State of Uttar Pradesh*, , it was laid down that sentence can be enhanced if it was "so manifestly inadequate as to have resulted in failure of justice."

18. In respect of exercise of powers of revision against acquittal, the Supreme Court said that the same can be exercised "only in exceptional cases where the interests of public justice required interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice." It was not to be exercised only because the lower Court has taken a wrong view of law (Vide *D. Stephens Vs. Nosibolla*, . In another decision the Supreme Court said that the jurisdiction in revision against acquittal should be exercised only In exceptional cases, where there is some glaring defect in the procedure or there is a manifest error on a point of law ; and consequently there has been a flagrant miscarriage of justice. (Vide *Chinnaswamy v. State of Andhra Pradesh* AIR 1962 SC 1738) : 1963 Cri LJ 8. In this decision, the Supreme Court gave some illustrations indicating cases of the aforesaid kind which occur in para 7 in the following words ;

We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be ; where the trial Court has no jurisdiction to try the case but has still acquitted the accused, or where the trial Court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appeal court, or where the acquittal is based on a compounding

of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal ; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4).

The principles laid down by the Supreme Court in the aforesaid two decisions were reiterated by the Supreme Court in Khetrabasi Samual etc. Vs. The State of Orissa, .

19. Thus, the Sessions Judges in exercise of their enlarged powers in revision will have to bear in mind these limitations, under the law settled by the Supreme Court.

20. In view of the aforesaid reasons, the first contention advanced on behalf of the petitioners cannot be entertained.

21. So far as merits of the case are concerned, it is clear that in the facts of this case, the sentence awarded by the trial Court was so unduly lenient that it created an impression adverse to the administration of justice that in a given case where a public servant is assaulted and beaten with sticks, the trial Court can let go the offender on payment of a fine of a small amount of Rs. 100/-. As shown by the learned Sessions Judge, the assault with sticks by the petitioners resulted in as many as nine weal marks on the complainant, The complainant had gone, after all, for discharging his duties of checking and had demanded the registers only. If public servants are beaten to this extent in such cases, it would be well-nigh impossible to enforce regulatory provisions of law dealing with certain essential commodities. The learned Magistrate considered three factors only viz. the offence being the first offence, the accused being young people and the beating having been resorted to out of provocation for which they were repenting. He failed to consider the most relevant factor as to causing of as many as nine weal marks to the complainant. We feel that the sentence of fine of Rs. 100/- for the offence u/s 332 of the I.P.C. was imposed rather in an arbitrary manner. Interests of justice do require enhancement of his sentence. So far as sentence for the offence punishable u/s 504 of the I. P. C., is concerned, we see no reason why the learned Judge should have enhanced that sentence. That sentence could not have been said to be unduly lenient in view of the nature of the offence.

22. We are, therefore, of the opinion that the enhancement of sentence for the offence u/s 504 of the I. P. C., was not called for in the present case in view of the limitations aforesaid on the exercise of powers.

23. In the result, we pass the following order :

(1) The order of enhancement of sentence passed against the petitioners for the offence u/s 332 of the I. P. C., by the learned City Sessions Judge is confirmed. Warrant of arrest of the petitioners will, therefore, issue if the sentence is not

already undergone.

(2) The order of enhancement of sentence passed by the learned City Sessions Judge in respect of the offence punishable u/s 504 of the I. P. C., is set aside ; and in that connection the order of sentence for that offence passed by the learned Magistrate is restored. Rule will be made absolute in these terms.

(3) Mr. Desai requests for certificate under Article 134(1)(c). We do not consider that the question raised is a difficult question of law which should require further consideration by the Supreme Court as observed in *Sunder Singh Vs. State of Uttar Pradesh*, .

(4) However, in order that the petitioners may be enabled to move the Supreme Court for special leave, we grant four weeks" time to the petitioners to surrender, on condition that each of them executes a bond in the sum of Rs. 1500/- (fifteen hundred only) with a surety in the like amount. Bail bonds to be executed on or before 27-9-76 in the trial Court. If so executed the warrant for arrest will not be executed till Oct, 20, 1976.