

(1985) 07 PAT CK 0028

In the Patna High Court

Case No : Criminal Miscellaneous No. 812 of 1985

Ram Ishwar Choudhary and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 05-07-1985

Acts Referred:

Arms Act, 1959 — Section 25

Criminal Procedure Code, 1973 (CrPC) — Section 362, 374, 377, 378, 394

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304

Citation : (1986) 34 BLJR 274 : (1985) PLJR 1158

Hon'ble Judges : S.H.S. Abidi, J;Prabha Shanker Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prabha Shanker Mishra, J.—The petitioners, who are ten in number have moved this Court involving its inherent jurisdiction for a declaration that Government Appeal No. 14 of 1977, stood abated on the death of a respondent therein, namely Suryadeo Choudhary, son of Ram Milan Choudhary, resident of village Kussi, police station Karakat, district Rohtas who died during the pendency of the appeal, and accordingly the judgment in the said Government Appeal converting the acquittal of the respondents therein into conviction for various offences is a nullity.

2. In the trial thirteen persons were charged for the offences punishable under Sections 302, 302/34, 302/149, 147 and 148 of the Indian Penal Code and Section 25(1)(a) of the Indian Arms Act.

3. The learned 4th Additional Sessions Judge, Arrah, however, found petitioner No. 8, Sarju Choudhary and petitioner No. 6 Bhagwati Choudhary guilty u/s 304 part I of the Indian Penal Code and petitioner No. 1, Ram Ishwar Choudhary and petitioner No. 10 Anjani Choudhary guilty for the offence punishable u/s 304 part I read with Section 34 of the Indian Penal Code, and, accordingly convicted them and sentenced them to undergo rigorous imprisonment for five years each. He

also found them guilty for the offence u/s 25(1)(a) of the Indian Arms Act and sentenced them to undergo rigorous imprisonment for six months each.

4. While those four, who were convicted, moved this Court in Criminal Appeal No. 81 of 1977, the respondent State preferred two Government Appeals, being Government Appeal No. 14 and 15 of 1977. Government Appeal 14 of 1977 was directed against the acquittal of the petitioners and others by the learned Fourth Additional Sessions Judge, Arrah, Government Appeal No. 15 of 1977 was preferred to this Court by the respondent State for enhancement of the sentence passed against the four convicted accused persons u/s 304 part I and Section 304 Part I read with Section 34 of the Indian Penal Code.

5. All the three appeals were heard by a Bench of this Court consisting of brother P.S. Sahay, J. and brother Abidi., J. By a judgment delivered on 8-11-1984, petitioners Ram Ishwar Choudhary, Anjani Choudhary, Bali Choudhary, Lachman Choudhary and Sarju Choudhary have been convicted u/s 302/34 of the Indian Penal Code and other petitioners have been convicted u/s 302/149 of the Indian Penal Code; some of them have been convicted u/s 148 of the Indian Penal Code; some of them have been convicted u/s 147 of the Indian Penal Code and some are convicted u/s 25(1)(a) of the Indian Arms Act as well. Surajdeo Choudhary, who was one of the respondents in Government Appeal No. 14 of 1977, was one of them found guilty for the offence punishable u/s 302/149, Section 148 of the Indian Penal Code and Section 25(1)(a) of the Indian Arms Act.

6. At the hearing of the appeal Surajdeo Choudhary was duly represented by Mr. Brij Kishore Prasad and Rama Shanker Prasad, advocates. The fact that he had died on 17-2-1983 was not brought to the notice of the court any time before the hearing of the appeal or the judgment delivered on 8-11-1984. The petition invoking inherent jurisdiction of this Court, to avoid the judgment, has, however, been filed stating the fact that Surajdeo Choudhary died on 17-2-1983 within the jurisdiction of Sasaram Police Station and alleging that the respondent State did not bring the said fact to the notice of this Court deliberately and knowingly.

7. This application has been admitted to hearing to consider, whether any ex facto notice of the death taking place during the pendency of the appeal can be taken by the court after the judgment is delivered and signed and abatement can be applied accordingly, and whether the abatement shall apply to the whole appeal when one of the respondents dies during the pendency of the appeal.

8. Mr. Trikha, who has appeared for the petitioners at the hearing of the appeal, has contended (i) that the appeal in case of acquittal shall abate even if one of many respondents in the case dies; (ii) the abatement shall bring to an end the proceeding in appeal, so that nothing shall remain for determination by the court. In other words the appeal shall become nonest and shall so remain, whether any judgment is delivered or not. The judgment in that event will be a nullity; and (iii) this Court shall only recognise the fact that the appeal had

abated on the death of Surajdeo Choudhary, a co-respondent of the petitioners in Government Appeal No. 14 of 1977 and declare the judgment void.

9. Mr K.K. Verma, learned Advocate General, who has represented the respondent State before us, has, however, contended that this Court shall have no jurisdiction to go into any such question in view of the specific bar u/s 362 of the Code of Criminal Procedure. Section 482 of the Code of Criminal Procedure shall not authorise this Court to review, alter or rescind the judgment already delivered. In any event the appeal did not abate as a whole but only in so far as the deceased respondent in the appeal is concerned.

10. I shall examine the contentions raised by learned Counsel before us a bit closely, because Mr. Trikha has brought to our notice an order recorded by the Supreme Court in appeal against acquittal before it in the case of State of Maharashtra Vs. Eknath Yeshwant Pagar and Another, . which has said:

It is stated by the counsel for the respondents that respondent No. 1 is dead. According to the prosecution, respondent No. 1 is the main accused and the second respondent was merely an abettor. Both were acquitted by the High Court. Hence this appeal to this Court. Since the appeal abates against the first respondent on account of his death and the second respondent has already been acquitted, appeal against the second respondent becomes infructuous. The appeal is accordingly disposed of.

11. Chapter XXIX of the Code of Criminal Procedure (hereinafter referred to as the Code) contains provisions for appeals from convictions, in case of acquittal and appeal by the State Government against sentence. This chapter in Section 394 provides for abatement of appeals and says--

(1) Every appeal u/s 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant;

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation--In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister". The proviso as well as the explanation to Sub-section (2) of this section is a new provision. Read together, they exempt an appeal against a conviction and sentence of imprisonment from abatement on the death of the appellant, if his near relative obtains leave of the court to continue the appeal.

Section 377 of the Code provides for appeal by the State Government against

sentence on the ground of its inadequacy in any case of conviction on a trial held by any court other than a High Court by directing the Public Prosecutor to present an appeal to the High Court. There was no such provision under the Code of Criminal Procedure, 1898. Section 378 of the Code Provides for appeal in case of acquittal. It says:

(1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-section (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 Establishments Act, 1946 (25 of 1946), or by any other agency empowered to make investigation an offence under any Central Act other than this Code the Central into 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) In, any case, the application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall lie under Sub-section (1) or under Sub-section (2).

Sub-sections 1, 2, 4, 5, and 6 correspond to Sub-sections 1, 2, 3, 4, and 5 respectively of 1898 Code. Sub-section (3) is a new provision. There are verbal changes in Sub-section 2, 5 and 6 from what their corresponding provision under the 1898 Code contained.

Section 374 of the Code provides for appeals from convictions at different forums against convictions by the courts having specified jurisdiction. This has combined together provisions made under Sections 408, 410 and 411 of the 1898 Code. Sub-section (2) thereof, which is the relevant provisions, provides--

Any persons convicted on a trial held by a Sessions Judge or an Additional Judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed, may appeal to the High Court.

Section 394 of the Code, which provides for abatement says:

(1) Every appeal u/s 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

12. One cannot fail to take notice of the fact that Sub-section (2) of Section 394 confers a right to appeal to the High Court to any person convicted and sentenced to imprisonment for more than seven years, who for the purpose of Sub-section (2) of Section 394 of the Code is described as the appellant. The right to appeal in any case of acquittal is conferred upon the State Government against an original or appellate order of acquittal passed by any court other than a High Court. u/s 394(1), indeed, it is the death of the accused which has been made to cause abatement of the appeal u/s 378 of the Code. Several persons convicted in a case may together join in a common appeal preferred by them, but the appeal by each one of them, although in common with others, is an appeal by him against his own conviction, as each accused, on his conviction, becomes, in the event of an appeal preferred the appellant in his individual capacity. So in the case of acquittal every individual accused is pronounced not guilty. Section 378 of the Code provides for a common appeal against acquittal of more than one accused, but in the event of appeal filed, each accused individually has to take the appellate order and the High Court can confirm the original or appellate order of acquittal in the case of one and in the case of other reverse the acquittal and convict him. The expression "the accused" used in Section 394(1) of the Code in this sense has to confine to the case of the individual accused who is dead without affecting the appeal against acquittal, so far other accused are concerned.

13. In the order of the Supreme Court (*supra*), however it is recorded--

...Since the appeal abates against the first respondent on account of his death and the second respondent has already been acquitted, appeal against the second respondent becomes infructuous....

Indeed, the abatement is noticed in the case of the deceased first respondent; there is no abatement so far the second respondent is concerned, The court has said--",...appeal against the second respondent becomes infructuous...." for the reason that he had already been acquitted and, according to the prosecution, respondent No. 1 was the main accused and the second respondent was merely an abettor. There is no law laid down by the Supreme Court that the appeal against acquittal has to abate in a case in which one of many accused dies during the pendency of the appeal. It is not possible to accept Mr. Trikha's contention that the appeal stood abated because one of the accused died during the pendency of the appeal and the court could not proceed to hear the appeal and pronounce its judgment against the other accused who were alive on the date of the hearing of the appeal and the pronouncement of the order reversing the

order of acquittal and convict them instead." Every appeal. . . shall finally abate on the death of the accused" in Section 394 of the Code, as noticed by the Supreme Court, shall mean the appeal against the deceased respondent. The appeal, so far the deceased respondent is concerned, stood abated on account of his death. There was none in his place as the accused who could be convicted by the court. This Court could not convict a dead person. The judgment of this Court convicting him is undoubtedly void.

14. The learned Advocate General has, however, drawn our attention to Section 362 of the Code of Criminal Procedure, which says:

Save as otherwise provided by this code or by any other law for the time being in force, no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same, except to correct a clerical or arithmetical error.

"Clerical error" has been invariably extended to apply to an error apparent on face of instrument, record, indictment or information. Black's Law Dictionary, Fifth Edition, page 229 has taken from judicial pronouncements the meaning given to this expression and said." It may include errors, mistakes, or omissions by clerk, writer, counsel or judge which are not the result of exercise of judicial function as also signature by judge to judgment which does not express judicial desire or intention. Since as applied to judgment and decrees a mistake or omission by the clerk, counsel, judge or printer, which is not the result of exercise of judicial function is a clerical error, and indeed no judge shall pronounce a dead person guilty on the face of specific provisions u/s 394 of the Code. I have no hesitation in holding that conviction of the deceased, Suryadeo Choudhary in the appeal is an error which can be corrected notwithstanding the bar provided u/s 362 of the Code. This apart. Section 482 of the Code says:

Nothing in this code shall be deemed to limit or effect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any court otherwise to secure ends of justice.

In order to give effect to the order of conviction recorded by a Bench of this Court against the petitioners, it is indeed this Court's duty to take notice of the abatement. The counsel who represented the petitioners as also the deceased respondent, Suryadeo Choudhary, did not inform the Court about his death, unlike information given to the court in the case of State of Maharashtra (Supra). The CPC contains elaborate provisions as to when and how abatements may take effect and who may apply for setting aside abatement. The 1976 amendment Act to the said Code has introduced responsibility upon the counsel representing the party to inform about his or their death to the court, so that the heirs and legal representatives may be substituted. The Code of Criminal Procedure contains no such provision, except stating u/s 394 of the code that the appeal shall finally abate on the death of the accused or on the death of the appellant, as the case

may be. The court has no means to know about the death or otherwise of the accused. Then informed by the counsel about the death of the accused, it cannot, in its judicial discretion, proceed with the hearing of the appeal without recording abatement. If it is not informed about the death and it accordingly proceeds to decide and record its order, the error is not in its judgment but in the absence of the information by the counsel representing the party and in its ignorance about the death. The pronouncement against a dead person, as I have already noticed, in such a situation, is not act of judicial discretion but mistake due to clerical recalcitrance on the part of the parties, who alone could/can inform it about such a death.

15. Lengthy arguments have been advanced before us about the scope of Section 482 of the Code and several decisions have been placed. It has been invariably pointed out that Section 482 of the present code has a different parameter. The Supreme Court has pointed out that on a plain reading of Section 482 it would follow that nothing in the code which include Sub-section (2) of Section 397 also shall be deemed to limit or affect the inherent power of the High Court see AIR 1978 S.C 407. It has also pointed out--"But if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers." In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, . Fazal Ali, J, speaking for the court has said:

It may be noticed that Section 482 of the present code is the ad verbatim copy of Section 516A of the Old Code. This provision confers a separate and independent power on the High court alone to pass orders *ex debito justitiae* in cases where grave and substantial injustice has been done or where the process of the court has been seriously abused. It is not merely a revisional power meant to be exercised against the orders passed by subordinate Courts. It was under this section that in the old code, the High courts used to quash the proceedings or expunge uncalled for remarks against witnesses or other persons or subordinate courts. Thus, the scope, ambit and range of Section 561A (which is now Section 482) is quite different from the powers conferred by the present Code under the provisions of Section 397. It may be that in some cases there may be overlapping but such cases would be few and far between. It is well settled that the inherent powers u/s 482 of the present Code can be exercised only when no other remedy is available to the litigant and not where a specified remedy is provided by the statute. Further, the power being an extraordinary one, it has to be exercised sparingly. If these considerations are kept in mind, there will be no inconsistency between Sections 482 and 397(2) of the present Code.

16. A dead person has got no remedy, no right to enjoy, no obligation to fulfil. Abatement is an act to be performed by others to close the proceeding in the court against the deceased accused. Why then Section 482 of the Code, cannot be invoked to record the abatement and close the case so far the deceased

respondent is concerned?. In my view, it shall be shutting eyes and ignoring what a court must do if the court has to say that it has pronounced the judgment and it has now no power to record the abatement.

17. So far the petitioners are concerned, they have hardly a case either on the basis of the abatement or as a consequence of the abatement. Suryadeo Choudhary is dead, appeal against him stood abated, the judgment convicting him is non est. So far these petitioners are concerned, they have been convicted on the basis of the consideration of the evidence in which they have been found to have performed one or the other part in the transaction resulting in the death of three persons. It is not possible to hold that in their case, the appeals had become infructuous due to the death of the main accused, that is to say, Suryadeo Choudhry. Suryadeo Choudhry undoubtedly had some role in the assault and the court had found material for convicting him u/s 302/149, 148 of the Indian Penal Code and Section 25(1)(a) of the Arms Act, but his death during the pendency of the appeal has not affected the case of the others at all.

18. In my considered view, since the appeal against the acquittal of Suryadeo Choudhary had abated, this fact has to be recorded and the judgment accordingly pronounced in so far as he is concerned shall be ingored. There is no merit in the application of the petitioners and there can be no interference in the judgment of conviction recorded by this Court in their case. Subject to the direction above, this application is accordingly, dismissed.

S.H.S. Abidi, J.

19. I agree.