

**(2006) 05 DEL CK 0129**  
**In the Delhi High Court**  
**Case No : Criminal A. No. 597 of 1999**

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| State     | Vs | APPELLANT  |
| Ram Gopal |    | RESPONDENT |

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**Date of Decision :** 12-05-2006

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 385, 386, 422, 512, 82  
Penal Code, 1860 (IPC) — Section 224, 302, 323, 34, 363

**Citation :** (2006) CriLJ 2805 : (2006) 131 DLT 156 : (2006) 90 DRJ 348 :  
(2006) 4 RCR(Criminal) 744

**Hon'ble Judges :** Manmohan Sarin, J; Manju Goel, J

**Bench :** Division Bench

**Advocate :** Mukta Gupta, Ravinder Chadha and Jagdish Prasad, for the Appellant; D.C. Mathur and P.R. Thakur, amices Curiae, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Manmohan Sarin, J.—In these batch of State appeals, respondents/accused have either been acquitted by the trial court or the State is seeking enhancement of sentence. It has not been possible to complete service of the respondents/accused in these appeals. The question arising for consideration is whether with respondent/accused remaining unserved, the appeals can be heard by following the procedure of declaring them proclaimed offenders and appointing an amices Curiae to represent their interest. The second class of case is where the respondents/accused were served at the stage of leave to appeal or after grant of leave but are not appearing thereafter. The procedure to be adopted in the latter class of cases is to be considered.

2. Before we consider the legal position in relation to the questions raised, it would be appropriate to set out the factual matrix in each of these appeals:

(i) Crl. A. No. 597/99 State v. Ram Gopal Respondent Ram Gopal, son of Ram Parkash, Village and PO Nawab Ganj, Distt. Gonda( U.P.) had been tried for an offence u/s 302 IPC. Trial court on the evidence adduced, held that it could not

be said that it was the respondent who had caused injury to deceased persons. The Court did not find evidence of the eye witness reliable and trustworthy and acquitted the respondent. State preferred the above appeal against acquittal. Vide orders dated 5.11.1999, delay in filing of the appeal was condoned, leave to appeal was granted and appeal itself was admitted. Bailable warrants against the respondent in the sum of Rs. 5,000/- were directed to be issued returnable on 22.2.2000. The bailable warrants issued were received back unserved. Repeated attempts to execute bailable and non-bailable warrants on the respondent failed. Repeated adjournments numbering over 22 were given between 22.2.2000 to 4.4.2005. It has been reported by the police that respondent had not visited his village for the last 13 years and his house/jhuggi stood dilapidated and virtually demolished. Parents of respondent had already died. Proceedings for declaring the respondent as a proclaimed offender have been completed by affixing a proclamation next to his jhuggi. Respondent has thus been declared a proclaimed offender enabling his arrest at any time without a warrant.

(ii) CrI. A. No. 506/2003 State v. Shamshad Respondent/ accused was prosecuted for the offence u/s 363/366/376 IPC. Vide judgment dated 17.10.1998, trial court held that the prosecution had failed to establish that the prosecutrix was a minor at the time of occurrence and had failed to lead evidence regarding age, based on X-ray and other tests carried out. Trial court held that prosecutrix was in love with the respondent/ accused and had willingly gone with him. Holding that prosecution had failed to prove guilt of accused, he was acquitted. Appeal was preferred with an application for condensation of delay in which notice was issued. From August,2001 to March,2002, accused/ respondent could not be served. Service report was that respondent had sold his house and land and left without leaving any address. Interestingly on 23.4.2002, one counsel Mr.Vilas Shan appeared on behalf of respondent. Directions were issued for paper book to be supplied to him. Respondent was thereafter represented by counsel on 15.7.2002 and 23.10.2002. On 24.7.2003, when none appeared on behalf of respondent the application for condensation of delay was allowed and leave to appeal was granted. Pursuant to grant of leave to appeal, directions were issued to the respondent to furnish bond to secure appearance in the sum of Rs. 5,000/-. An application was also moved by the respondent for recalling the order of grant of leave to appeal, which was passed in his absence as also the order condoning the delay in filing appeal. The application was dismissed as having been preferred without any instructions. Non-bailable warrants were also issued against the respondent which have remained unexecuted from 11.12.2003 till date. Attempts to ascertain the whereabouts of the respondent from the neighborhood as also members of the complainant's family have been of no avail. Respondent remains untraceable. The question which would arise for consideration in the present appeal is once respondent has been represented in the case in response to a notice issued in leave to appeal, and leave to appeal having been granted and order maintained despite effort by respondent to have it repealed having failed, can the matter be heard without his

being served with a notice of hearing of the appeal itself, by appointment of the amices curiae.

(iii) and (iv) CrI.L.P. Nos. 54/2005 and 83/2004 State v. Jai Kumar Das Respondent Jai Kumar Dass son of Mahadev Lal Sass was prosecuted for an offence u/s 224 IPC and 302 IPC registered vide FIR No. 241/98 and 254/98, P.S. Mukherjee Nagar. He was an inmate of the Beggar Home/Poor House. He is alleged to have murdered one Manoj Kumar and escaped from the Beggar Home. Trial court found inconsistencies and contradictions in the evidence and held that prosecution had failed to prove the guilt of the accused. Respondent/accused had a history of schizophrenia. Notice to the respondent for grant of leave to appeal was issued. Despite repeated attempts respondent had not been served. Parents of the respondent are dead. He has not visited his last known address for over a decade. There does not appear to be any possibility of serving the respondent being served.

3. Let us summarize the status in the appeals as noted earlier:

(i) CrI.A.597/1999 State v. Ram Gopal Leave to appeal had been granted to the State. Bailable warrants issued for the respondent have remained unserved. He has been declared a proclaimed offender after following the prescribed procedure. The respondent has not been served in appeal.

(ii) CrI.A.506/2003 State v. Shamshad In this case in the proceedings for grant of leave to appeal, respondent was represented by a counsel on various dates. An Application on behalf of respondent had also been moved for recalling of the order granting leave to appeal. Thereafter, there has been no appearance by the respondent or his counsel. It is not possible to serve the respondent in the appeal. Bailable and non-bailable warrants remained unexecuted. In these circumstances, whether the appeal can be heard by appointing an amices Curiae arises for consideration.

(iii) In CrI.L.P.54/2005 and CrI.L.P.83/2004 State v. Jai Kumar Das, notice of the application for grant of leave to appeal in both these cases had been issued to the respondent directing his personal presence. Repeated attempts to serve respondent who had a history of schizophrenia, have failed and his whereabouts are not known. Here again the question to be considered is whether in the absence of service, can appeal be heard after declaring him a proclaimed offender and after appointing an amices curiae.

4. The question whether an appeal against acquittal of an accused, where the respondent/accused is not served in appeal can be heard, was considered by the Gujarat High Court in State of Gujarat Vs. Narubhai Amrabhai Chunara Vaghri, . Respondent had been acquitted for the offence under Sections 367/323 read with Section 34 IPC after trial. State preferred an appeal which was admitted to hearing. Bailable warrants for the arrest of respondent/accused were issued. These remained unserved. The High Court took the view that when the accused with manifest manipulation, avoids service of notice upon him, he cannot be

subsequently permitted to say that appeal against him cannot be heard in his absence. Non hearing of the appeal would not subserve the ends of justice. The court concluded that if the appellate court found sufficient grounds for entertaining an appeal, the respondent's status as an accused person stood revived and Therefore the appellate court can finally hear and decide the appeal in his absence, after complying with the provisions of Section 82 Cr.P.C.

5. We find that the view taken by the Gujarat High Court in *State of Gujarat v. Narubhai Amrabhai Chunara Vaghri* (supra) is not in conformity with the judicial pronouncements of the Supreme Court. Reference is invited to a decision of the Supreme Court in *Anwar Hussain Vs. State of Uttar Pradesh and Another*, . This was a case where the Supreme Court on an appeal by Anwar Hussain set aside the order passed by the High Court. The High Court in an appeal filed by the State had set aside the order of acquittal at the back of the appellant without serving notice on him. The Supreme Court held it to be clearly impermissible and remanded the matter to the High Court, with a direction to dispose of the said appeal in accordance with law after notice to the respondent.

6. Reference is invited to a Judgment of the High Court of Nagpur in the case titled AIR 1954 231 (Nagpur) It was held that before an appeal against acquittal can be heard against the respondent he must be served with the notice u/s 422 Cr.P.C of the old Act or Section 385 of the present Cr.P.C. The court held that Criminal Procedure Code did not prescribe the procedure to be adopted where personal service of notice u/s 422 Cr.P.C cannot be effected on the accused. If an accused person despite proclamation remains absent, his property can be attached. Section 512 Cr.P.C provides for recording of evidence when the accused is absconding. It does not apply to proceedings in appeal. In the absence of any provision, to enable a court to proceed in the absence of an absconding accused in an appeal, the court has no option but to adjourn the case till such time, the accused is served or he appears before the court. The Nagpur High Court in reaching the above conclusion relied on the decision of the Supreme Court in *Dwarkaprasad v. The State* Criminal Appeal No. 1 of 1950-date of decision 6th October, 1950. In *Dwarkaprasad v. State*, the matter had come up to the Supreme Court, when the acquittal of the accused who had not been served with a notice u/s 422 Cr.P.C had been set aside. The Supreme Court held:

One thing, however, is clear, that although it was an appeal from a judgment of acquittal, no notice was served upon the accused as is required under S. 422, Criminal P.C. The provision of the section, as its language shows, is mandatory and a compliance with it an essential preliminary to the hearing of the appeal. The arrest of the accused under a non-bailable warrant cannot be the substitute of a notice of appeal as is required under law. Neither the warrant, nor any return in token of its being executed is in the record and obviously the warrant could not contain the particulars which should be contained in a notice under S. 422 Criminal P.C.

7. The High Court of Nagpur in *State Government, Madhya Pradesh* (supra) ruled

that when an accused despite proclamation remained absent, all that the court can do is to attach his property. The upshot of the above decision of the Nagpur High Court relying on the Supreme Court in Dwarkaprasad's case is that, where in an appeal the accused/respondent has not been served, then by proclaiming him a proclaimed offender or appointing a lawyer as an amicus Curiae, appeal cannot be heard. The case has got to be adjourned. In view of the above judicial pronouncements, we respectfully disagree with the view taken by the Gujarat High Court in *State of Gujarat v. Narubhai Amrabhai Chunara Vaghri* (supra).

8. We may also refer to *Rambachan Hardwar Vs. The State of Gujarat*, . The appellant/accused in the Special Leave Petition, challenged the judgment of the High Court of Gujarat. The High Court had set aside the order of acquittal of appellant and two others on merit. The appellant claimed that he did not have notice of the hearing of appeal. Further, the Advocate who had been appointed as amicus curiae for him had no authority to represent him. This submission was not accepted as the record showed that the appellant had been served with and notice issued on the appeal filed by the State in the High Court indicating that appeal could be taken up for hearing at any time after the 14th day. The appellant even had intimated that he was to engage a counsel for defending him. The Supreme Court held that there was no substance in the contention that the appellant had no notice of hearing of the appeal in the High Court or that the amicus Curiae appointed by the High Court had no authority.

9. From the foregoing it would be seen that where the respondent/accused has been served with notice of appeal, the Court can proceed to appoint an amicus curiae and it cannot be urged by the respondent/accused that the said amicus curiae had no authority.

10. At this stage, we may also notice decision of the Supreme Court in relation to appeals under the Criminal Procedure Code. Reference is invited to *Bani Singh and others Vs. State of U.P.*, and the earlier decision in *Shyam Deo Pandey and Others Vs. The State of Bihar*, and *Ram Naresh Yadav v. State of Bihar* AIR 1987 Sc 1500. Reference may also be made to a decision of the Division Bench of our Court in *Mohd. Tahir @ Khuddar v. State* CrI.A.452/1997 decided on 1st October, 2004 In *Shyam Deo Pandey v. State of Bihar* (supra), the Supreme Court held that if an appeal was not dismissed summarily and admitted to hearing, the same thereafter had to be disposed of on merits after perusal of the Court record. The appeal thus could not be dismissed for non-prosecution and even in the event of default the appellate court was to consider the case on merits after perusing the evidence on record and then pass a judgment. In *Ram Naresh Yadav v. State of Bihar* (supra) the Court had taken a slightly different view holding that the appellate Court could dismiss the appeal for non-prosecution in default of appearance of the appellant or the counsel.

In *Bani Singh and others v. State of UP* (supra) the Court observed that the view taken in *Shyam Deo Pandey's* case appeared to be sound. In *Bani Singh's* case, the Supreme Court held that the plain language of Section 385 Cr.P.C. makes it

clear that if the appellate Court does not consider the appeal fit for summary dismissal, it must call for the record. Section 386 Cr.P.C., mandates that after the record is received, the appellate Court may dispose of the appeal after hearing the accused or his counsel. These Sections do not contemplate dismissal of appeal for non-prosecution simplicitor. The Court held that the law does not envisage dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the appeal.

11. The Division Bench of Court in Mohd. Tahir @ Khuddar v. State (supra) was considering the case where the appellant did not surrender after enjoying interim suspension of sentence. The appellant's counsel was also not available. The Court, in these circumstances, considered the situation arising where after filing of an appeal, the appellant either failed to engage a counsel to argue or the counsel does not appear or declines to argue or the appellant fails to appear. It reached the conclusion that the appellate court would not dismiss the appeal for non-prosecution. The prudent course would be to appoint an amicus curiae who could then argue the matter on behalf of the appellant and thereby ensured that no aspect of the case remained obscure from the Court.

12. In view of the principles enunciated in Dwarkaprasad's case and State Government, Madhya Pradesh v. Vishwanath Nadhanji and others (supra) and the judgments of the Supreme Court referred to in preceding paras, the following orders are required to be passed:

i) CrI.A. 597/1999-State Ram Gopal CrI.L.P. 54/2005 and CrI.L.P.83/2004-State v. Jai Kumar Das, where the respondents/accused having not been served at all even with the notice for leave to appeal against the order of acquittal, the said appeal/leave to appeal cannot be heard in the absence of the respondents by appointing of an amicus Curiae, the State cannot be absolved of the obligation of serving the respondents in appeal. The aforesaid appeal and leave to appeal are accordingly adjourned sine die.

ii) CrI.A.506-2003 State v. Shamshad In this case, after issuance of show cause as to why leave to appeal should not be granted even though the respondent was not reported as served, counsel appeared on 23rd April, 2002 and entered appearance on behalf of the respondent. Subsequently, the counsel did not appear and the delay in filing of the appeal was condoned and leave to appeal was also granted. Directions were issued to the respondent to furnish bond for appearance. An application was moved on behalf of the respondent for recalling the order of grant of leave to appeal and condoning the delay. This application was dismissed. Non-bailable warrants were issued and respondent after grant of leave was not served with the notice of actual date of hearing of the appeal. This would be a case where the counsel entered appearance and took positive steps by seeking to have the order of grant of leave recalled but failed. This case thus cannot be treated at par with cases where the respondent/accused has not been served. Respondent having full knowledge of the leave to appeal, opposed the grant of leave to appeal and sought to have the order recalled. This is a case

where the respondent/accused appeared in appeal proceedings and presented himself at the stage prior to and after grant of leave. He had knowledge of the appeal and is keeping himself away. The proceedings for declaring him a proclaimed offender can be resorted to and after the same, the court can appoint an amicus Curiae to represent his interest and proceed with the matter based on the decision of the Supreme Court in *Rambachan Hardwar v. The State of Gujarat* (supra).

We, accordingly, appoint Mr. Rajesh Mahajan, Advocate as an amicus Curiae and direct the appeal to be set down for hearing.

13. We direct that in cases of State seeking leave to appeal where notice to show cause as to why leave to appeal be not granted, was issued but the record had not been received, the Court may call for the records of the case and examine the same in depth even in the absence of the respondent and if it is of the view on scrutiny and study of the record that the notice needs to be discharged, it may choose to so proceed. However, where the Court is of the view that notice issued in the leave to appeal should be proceeded further, it may attempt service of the notice and if the same is not feasible, the State appeals be adjourned sine die after the respondent had been declared as the proclaimed offender and the properties, if any, be attached.