
(2013) 10 DEL CK 0240
In the Delhi High Court
Case No : Criminal L.P. 356 of 2012

State	Vs	APPELLANT
Virender Yadav and Another		RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 437A, 446, 82, 83
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21

Citation : (2014) 1 AD 389 : (2014) 1 JCC(Narcotics) 4

Hon'ble Judges : Kailash Gambhir, J; Indermeet Kaur, J

Bench : Division Bench

Advocate : Dayan Krishnan, Additional Standing Counsel Criminal and Ms. Manvi Priya, for the Appellant; Sunil Tiwari, Advocate, for the Respondent

Judgement

Kailash Gambhir, J.—Present criminal leave petition has been preferred by the State challenging the judgment dated 22nd October 2011

passed by the learned Additional Sessions Judge, Fast Track, New Delhi, thereby acquitting the accused persons for the offence punishable u/s 21

of NDPS Act. Notice of this criminal leave petition was directed by this court vide orders dated 24th September 2011, pursuant thereof,

respondent No. 2 had appeared alongwith his counsel. But so far as respondent No. 1 is concerned, he remained unserved. Non-bailable

warrants were directed by this court against respondent No. 1 vide order dated 1st August 2013 but the same also remain unexecuted. Therefore,

fresh Non-bailable warrants were also executed against him for today but without there being any change in the position. Mr. Dayan Krishnan,

learned Additional Standing Counsel (Criminal) for the State submits that respondent No. 1 is already an accused in FIR No. 380/2008 u/s 21 of

NDPS Act, Police Station, Connaught Place, New Delhi and in the said case also, respondent No. 1 has not been appearing and consequently the

proceedings u/s 82 of Criminal Procedure Code, 1973 (hereinafter referred to as the "Cr.P.C.") for declaring him a proclaimed offender have been

initiated by the learned trial court. Learned Additional Standing counsel (Crl.) for State submits that the State has made all efforts to trace him

which includes circulation of his photographs to all the beat staff and the secrete informers. Further the search of respondent No. 1 has also been

carried at several places like Palika Bazar, Hanuman Mandir, Bangla Saheb Gurudwara, New Delhi Railway Station. However, despite best

efforts, his whereabouts could not be ascertained.

2. As per learned Additional Standing Counsel (Criminal) for the State, in the absence of any information with the police about his latest address, it

is now difficult to execute the Non-bailable warrants against him. Learned Additional Standing Counsel (Criminal) requests that the present criminal

leave petition be adjourned sine die and as and when respondent No. 1 appears in the said criminal case or is traced otherwise, then the State shall

be allowed to move an application to seek revival of the present leave petition.

3. We have heard learned Additional Standing Counsel for the State.

4. Section 437A, Cr.P.C. was introduced by Clause 40 of the Code of Criminal Procedure (Amendment) Bill, 2006. It has been enacted as Code

of Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009) (the Amending Act) and enforced with effect from 21.12.2009. The same

is reproduced as under:-

1. Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall

require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any

appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

2. If such accused fails to appear, the bond stand forfeited and the procedure u/s 446 shall apply.

5. The above provision mandates that before the conclusion of the trial and before the disposal of the appeal, the trial court or the appellate court,

as the case may be, shall require the accused to execute bail bond with sureties

to appear before the High Court as and when such court issues notice in respect of any appeal or petition, filed against the judgment of the respective courts and such bail bonds shall be in force for six months.

The provision further envisages that the bail bond shall be in force for the period of six months. Clause 2 of Section 437A Cr.P.C. deals with the

consequences where the accused fails to appear before the appellate court then, it will result in forfeiture of his bond and the procedure u/s 446

Cr.P.C. shall be followed against him. Notes on Clause 40 (by which 437A was introduced) of the Bill provides the purpose of the amendment as

follows:

to provide for the Court to require accused to execute bail bonds with sureties to appear before the higher Court as and when such Court issues

notice in respect of an appeal against the judgment of the respective Court

6. Thus the said section was introduced by the Legislature with the solemn object that till the order of acquittal passed by the learned trial court

attains finality the accused is legally bound to appear before the next appellate court.

7. Once the leave to appeal is granted to the State, such appeal acquires the same status as is conferred on the accused to challenge the order of

conviction and sentence in terms of Section 374 Cr.P.C. The presence of the accused even though he has been acquitted by the learned trial court

is imperative before the appellate court because, if after the order of acquittal, he runs away, then he will be successful in defeating and deflecting

the course of justice. After the grant of leave by the appellate court it is for the accused to contest the appeal and to support the order passed by

the learned trial court. It is a settled legal position that the appeal is the continuation of the trial court proceedings and order of conviction or

acquittal, if it is challenged by either the accused or the State, will become final after the decision is given by the appellate court.

8. So far as the non-appearance of the accused persons in the appeal preferred by the state challenging the order of their conviction after

suspension of their sentence by the Appellant Court is concerned, a recent judgment of the Hon^{ble} Apex court in the case of Surya Baksh Singh

Vs. State of Uttar Pradesh, , has succinctly stated the legal position. The situation which we are confronted with in the present criminal leave to

appeal and in various such other leave petitions preferred by the State is that invariably in all such state appeals the State is not able to serve the respondent mainly because the respondent is not found at his last address or has shifted to some new address. After an order of acquittal is passed in favour of such an accused, whether intentionally or unintentionally, he moves out from his residence where he lastly resided. To deal with this malady, the legislature had introduced Section 437A Cr.P.C. on the statute book. The provision of Section 437A Cr.P.C. is not being strictly adhered to by Subordinate Judiciary dealing with the criminal matters as told to us by the learned Standing Counsel, and therefore, we feel it imperative to direct the learned Metropolitan Magistrates and the Sessions Judges, dealing with the trial of the criminal cases or exercising the Appellate powers, to strictly comply with the mandate of Section 437A Cr.P.C. and also require the accused and the surety to annex their latest passport size photographs along with their latest residential proof at the same time. Consequently, the final judgment passed by the learned Magistrates or Sessions Judges shall carry an endorsement that necessary bail bond with surety, in compliance with the order, has been furnished by the accused along with latest passport size photographs and residential proof. The strict observance to the said provision by the Magistrates and the Sessions Courts to a large extent shall prevent unscrupulous persons from absconding to defeat the course of justice.

9. Adverting back to the facts of the present case, we find that this Court has not yet granted leave to appeal to State and the present criminal leave to appeal is still at the service stage. Non-bailable warrants issued against respondent No. 1 remained unexecuted as he was not found at both of his addresses, as were available in the police record. In fact, the permanent address which he had furnished was found to be incorrect as Village Badgaon where he is stated to be residing even does not exist.

10. The Division Bench of this Court in the case of State Vs. Ram Gopal, , while dealing with a batch of petitions and some of them being State appeals, was confronted with similar issues and held as under:-

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) Crl. A. 597/1999- State Ram Gopal Crl. L.P. 54/2005 and Crl. 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 amices 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) Crl. 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 amices 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 amices 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.

11. As would be seen from the above, while dealing with the absenteeism of the accused, in the leave to appeal preferred by the State, where such

an accused had already appeared, the direction given was that the proceeding for declaring such an accused as a proclaimed offender can be

resorted to and after the same, the court may appoint amicus curiae to represent his interest and thereafter proceed with the matter. The Division

Bench also placed reliance on the decision of the Apex Court in Rambachan Hardwar Vs. The State of Gujarat, .

12. In Ram Chand Hardwar (supra), the accused challenged the decision of the High Court because the High Court had appointed amicus curiae

to represent the accused, as the accused had failed to appear in the appeal even after the notice was served upon him. In that case the High Court

did not take any step to first direct the proceeding for declaring such an accused as a proclaimed offender.

13. We are also of the view that so far as the initiation of the proceeding for declaring accused, a proclaimed offender, is concerned, the same can

be resorted to, after the High Court accepts the state appeal and set aside the order of acquittal and before that stage if for any reasons the

accused, after being served, fails to appear, the High Court can proceed to appoint an amicus curiae to represent him in the appeal and then

decide the case on merits.

14. So far as the cases where leave to appeal is preferred by the State against the order of acquittal and the court after hearing the preliminary

arguments of the state counsel and on examination of the Trial Court record, finds that the case deserves issuance of show cause notice to the

respondent(s), it shall direct the state to make all attempts to serve notice to the

respondent(s) in terms of the address furnished by the respondent(s) in his bail bond. Where such an appeal is preferred against a judgment passed by the Sessions Court after the introduction of Section 437A of the Cr.P.C. and the respondent does not cause an appearance despite the steps taken in this regard, a notice shall also be directed by the court to the sureties as per address disclosed by the sureties in the bond furnished by them before the Sessions Court. In all such cases, if the respondent is not served despite the efforts made by the State, the court shall adjourn such appeals sine die while directing the learned Trial Court to initiate the proceedings for declaring the respondent, a proclaimed offender, in terms of Sections 82-83 of the Cr.P.C. Further, even after, adjourning such appeals sine die and declaring the respondent, a proclaimed offender, the State shall continue to make all possible efforts to trace the respondent and shall not sit silent by the mere fact that their job is over after such a person has been declared as a proclaimed offender.

15. In cases where leave to appeal is preferred by the state against judgment passed by the learned Sessions Court, prior to introduction of Section 437A of the Cr.P.C., the state shall make all possible efforts to serve the respondent(s) and if despite making all possible efforts the respondent(s) are not served then the same procedure be followed for adjourning such State leave to appeal sine die and simultaneously directing the proceeding to declare such an accused as a proclaimed offender in terms of Sections 82-83 of the Cr.P.C.

16. Applying the aforesaid principles in the facts of the present case, the present leave to appeal filed by the state is adjourned sine die as respondent No. 1 has not been appearing in this matter and proceedings for declaring him as a proclaimed offender has already been initiated by the learned Trial Court in another case pending against him u/s 21 of NDPS Act.

17. The State is directed to revive the present leave to appeal, at any stage, if the state is able to apprehend respondent No. 1 in the said FIR No.

380/2008 or otherwise. Copy of this order be sent to all the District Judges for its circulation to all Additional Session Judges and Metropolitan

Magistrates for necessary compliance.