

(1953) 08 BOM CK 0021
In the Bombay High Court

State Government

APPELLANT

Vs

Vishwanath Nidhanji and Others

RESPONDENT

Date of Decision : 21-08-1953

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 417
Penal Code, 1860 (IPC) — Section 302

Citation : (1954) CriLJ 1042

Hon'ble Judges : Mudholkar, J;Choudhuri, J

Bench : Division Bench

Judgement

1. This is an appeal by the state Government u/s 417, Criminal P. C., against the acquittal of the respondents by the First Additional Sessions Judge, Amravati. All the respondents were tried jointly along with three other persons, Balwantsingh, Kamchandra and Chauthmal. The respondents were charged with offences under Sections 396 and 120-B, I. P. C. whereas the other three persons, were tried for offences under Sections 399 and 120-B, I. P. O. The respondent Champat was also charged with the offence u/s 302, I. P. C. and tried for the same. The Court of Session acquitted the respondents and other three persons of the offences for which they were tried. The State Government has not appealed from the acquittal of the three persons other than the respondents and has confined its appeal to the acquittal of the respondents of the offence u/s 396, I. P. C.

2. After the admission of the appeal, this Court ordered issue of notices to the respondents u/s 422, Criminal P. C. Notices were served only on respondents Maroti Dhobi, Gangaram and Champatrao but not on respondent Vishwanath.

3. On 16-2-1953 an application was made on behalf of the State for issue of a proclamation u/s 87, Criminal P. C., against Vishwanath. On 24-2-1953 this Court passed the following order on the application:

Shri W. B. Pendharkar for the State and Shri Kotwal for the pauper accused persons are heard. The application for issue of proclamation is supported by an affidavit. As respondent no. 1 Vishwanath was not found, he could not be

arrested and the notice u/s 422, Criminal P. C., could not also be served on him. We are satisfied that there is reason to believe that he is either absconding or concealing himself so that the warrant may not be executed. Issue proclamation u/s 87, Criminal P. C., and it be published in the manner laid down in Sub-section (2) of Section 37.

4. The proclamation was reported to have been" duly published and therefore the case was set down for hearing before Hemeon J. and one of us (Choudhuri J.) on 30-6-1953 when the following order was passed:

...The Additional Government Pleader requests one month's time to receive instructions on the point whether the appeal be proceeded with except against the absconding accused - Vishwanath - who is absent though a proclamation was published u/s 87, Criminal P. C., for his appearance in this Court today. One month's time granted.

5. Thereafter the appeal came up before us on 4-8-1953. On that date we ordered that we would hear the appeal in respect of the respondents other than Vishwanath as was done in - "Provincial Govt. C. P. & Berar v. Shyamlal", Cri, Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) (A) and deferred our order regarding Vishwanath till the conclusion of the hearing of the appeal against Maroti Dhobi, Gangaram and Champatrao. On 12-8-1953, the arguments in the appeal were concluded and we ordered that the appeal with regard to Vishwanath shall remain pending sine die" and that we would give reasons for this direction in our judgment.

6. The course which we followed of splitting up the appeal was, as we have already mentioned, followed by this Court in one case in the past - "Cri. Appeal No. 253 of 1949, D/- 21-7-1950 (Nag)" (A), in which the Division Bench consisting of Hidayatullah J. and one of us (Mudholkar J.) observed as follows:

Section 422, Criminal P. C., makes it obligatory on the Court to cause notice of appeal u/s 417, Criminal P. C., to be served on the accused person whose acquittal is challenged. The Criminal P. C. does not set out the procedure to be adopted where personal service of the notice cannot be effected on the accused person. What course should be followed in case personal service cannot be effected because the correct address of an accused person is not known, is not a matter which we are required to deal with at the moment. It may be that in such a case the provisions of Section 87, Criminal P. C., could be used by analogy. But even then, it is necessary to show that the accused person has either "absconded" or is "concealing himself" with a view to avoiding service of notice on him. That being the position, the appeal cannot go on in so far as Shyamlal and Champa are concerned. It would, however, be most undesirable to adjourn the whole appeal because such a course will not be fair to the remaining twelve respondents who have already had to appear in this Court a number of times and against whom the appeal has been pending for seven or eight months. We think that the appropriate course to be followed should be the one adopted by a

Division Bench of the Calcutta High Court in the case reported in - Superintendent and Remembrancer of Legal Affairs Vs. Golok Tikadar and Others, . In that case, notices were served only on 40 out of 58 accused persons, and it was argued that as only out appeal had been presented, it could not be heard until all the accused persons named in the memo of appeal had been served. The learned Judges, however, held that there had been in effect 58 appeals against 58 different accused persons and that there would be no legal bar to the separate hearing of the appeal against each separate accused person. They also observed that it was convenient to consolidate the appeals against the appearing respondents though it was not legally necessary so to do. They therefore proceeded to hear the appeal against those of the accused persons who had been served and left over the appeal in so far as those who had not been served were concerned. Accordingly, we proceed with the appeal in so far as respondents other than Shyamlal and Champa are concerned and separate the appeal as against each of these two latter persons.

Here too, it would not be fair to the respondents who are served and represented before us to be kept in suspense regarding their fate till such time as Vishwanath could be found or served with the notice of appeal.

7. Having heard the appeal against the respondents other than Vishwanath we decided to adjourn the appeal "sine die" in so far as Vishwanath is concerned. The course which we have taken in this case is different from that taken by this Court in - "The State v. Hanumat", Cri. Appeal No. 129 of 1951, D/- 14-3-1952 (Nag) (C). That was also an appeal by the State Government against the acquittal of the respondent. There was however only one respondent to that appeal. The respondent was not served with a notice of appeal and therefore a proclamation u/s 87, Criminal P. C., was issued by this Court. Evidence was also recorded by this Court that the respondent was absconding. The respondent was represented in this Court by a counsel appointed by the State Government for defending him. This was regarded by the Division Bench consisting of Hemeon and Sen JJ. to be sufficient compliance with the requirements of the law and the appeal was heard and decided by this Court. In the concluding paragraph of the judgment the learned Judges observed as follows:

We may point out that the respondent could not be personally served u/s 422, Criminal P. C., and the warrant of arrest could not be executed as he has absconded. Proclamation was issued u/s 87, Criminal P. C. He has not been arrested so far and has not put in appearance in this Court. Shri Samiullah Khan, an advocate of this Court, was engaged by the State Government as a counsel on his behalf. He argued the case and supported the judgment of acquittal. Steps will be taken by the District Magistrate to arrest him and send him to prison for carrying out the sentence.

8. The respondent then went up in appeal against the decision of this Court to the Supreme Court. Their Lordships set aside the decision of this Court and in the course of the judgment observed:

It is contended on behalf of the appellant that no notice, u/s 422, Criminal P. C., was served on him of the appeal filed by the State Government in the High Court. It is clear from the record that though a notice was issued, it was not served on the appellant as he was not traceable. We are, therefore, of the opinion that the order of the High Court converting his acquittal into a conviction without serving a notice on him, as provided in Section 422, Criminal P. C. is bad and must be set aside. An opportunity must be afforded to the appellant to contest the appeal preferred by the State Government in the High Court. In the result, therefore, we set aside the order of the High Court convicting him on the charge made against him and remand the appeal to that Court for rehearing in accordance with the provisions of law.

9. After the remand of the appeal by the Supreme Court the respondent was actually served, arrested and produced in Court. Thereafter the appeal was heard and decided on merits.

10. There is yet another decision of the Supreme Court in a case which, was taken up in appeal from the decision of this Court. That appeal is - "Dwarkanprasad v. The State", Criminal Appeal No. 1 of 1950, D/- 6-10-1950 (SC) (D). In that case also the acquittal was set aside by this Court even though notice u/s 422, Criminal P. C., was not served on the respondent. Dealing with the matter their Lordships observed:

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 u/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 u/s 422, Criminal P. C.

Shri Singhai had appeared in this Court as counsel for the respondent Dwarkanprasad having been engaged by the father of Dwarkanprasad. According to their Lordships this was not sufficient and that the respondent could not be deemed to have been duly represented in the appeal.

11. These decisions of their Lordships leave no doubt whatsoever that before an appeal against an acquittal can be heard against a respondent, he must be served with a notice u/s 422, Criminal P. C. It may be that a respondent may be absconding nevertheless that would be no ground for hearing an appeal in his absence. Where a person accused of an offence is absconding, Section 87, Criminal P. C. empowers the Court to issue a proclamation against him. Issue of a proclamation however is not equivalent to a substituted service. Indeed, as was pointed out in - "Cri. Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) (A)", the Criminal P. C., does not set out the procedure to be adopted where personal

service of the notice u/s 422, Criminal P. C., cannot be effected on the accused person. If an accused person despite proclamation remains absent all that the Court can do is to attach his property. If an accused person was wanted for a trial before a Magistrate or the Court of Session and was absconding, all that could be done would be to record evidence in his absence u/s 512, Criminal P. C. Where the person is not the sole accused taut is tried along with one or more accused persons and is absconding then u/s 540A, Criminal P. C., the Judge or Magistrate has discretion either to adjourn such inquiry or trial, before him. or order that the case of the absconding accused be taken up or tried separately. Of course, neither Section 512 nor Section 540A, Criminal P. C., applies to an appeal. We have referred to them only to show the importance which is attached by the Court to the presence of an accused person in Court or to his representation before it. In our judgment in the absence of a provision which would enable a Court to proceed with an appeal in the absence of an absconding accused we have no option but to adjourn the case in so far as Vishwanath is concerned till such time as he is served or he appears before this Court.

* * *

12. Accordingly we allow the appeal, set aside the acquittal of each of the three respondents, convict each of them u/s 396, I. P. C. and sentence them to suffer rigorous imprisonment for seven years.