

(2006) 04 GAU CK 0059
In the Gauhati High Court

State of Manipur

APPELLANT

Vs

Aheibam Ningol Yumnam Ongbi Mema alias Memcha Devi

RESPONDENT

Date of Decision : 21-04-2006

Acts Referred:

Citation : (2006) 04 GAU CK 0059

Hon'ble Judges : H.N.Sarma, J and T.Nanda Kumar Singh, J

Bench : Division Bench

Advocate : Kh.Mani Singh, Jalal Uddin, Advocates appearing for Parties

Judgement

1. Heard Md. Jalal IUddin, learned PP appearing on behalf of the appellant as well as Mr. Kh. Mani Singh, learned counsel for the respondentaccused.

2. This appeal U/S 377 CrPC is filed only against the sentence imposed by the Addl. Sessions Judge, Manipur East in Sessions Case No.102/89/2/90 dated 19.11.1990. Vide aforesaid judgment, the learned Addl. Sessions Judge, Manipur East convicting the accused U/S 325 IPC did not pass any order regarding the sentence rather allowed the accused to be released on probation U/S 4 of the Probation of Offenders Act, 1958 and to pay fine of Rs.4000/-. The prosecution case, inter alia, is that the accused and the victim are neighbour and the house compound of the accused lies on the north of the home of the victim who was a minor childboy aged about 12 years. On 21.5.1987 at about 5 p.m. the victim was playing with his cat in his court yard. An altercation with hot words took place between the accused and the deceased originating from barking by the dog of the accused. The victim stated that he would kill the dog and on hearing these words the accused came out from inside the house and picked up a stone and threw it with great force to the boy which hit his head resulting injury causing him unconscious. In spite of providing necessary medical treatment, the boy succumbed to the said injury on the next date at Regional Medical College, Imphal. An FIR was lodged by the mother of the victim, PW16, on 22.5.1987 before the O.C. Sugnu, Thoubal District relating to the incident, vide Exbt.P/1. On receipt of the information, a police lane being FIR No.30 (5)87 Sugnu P.S. U/

S 325 was registered against the accused. On receipt of the FIR, investigation was set in motion by the investigating officer and after causing necessary investigation and having found prima facie materials against the accused to be proceeded for trial U/S 304 IPC, charge sheet, Exbt. P/8, was filed against the accused.

3. On processes being issued the accused appeared and necessary police papers U/S 173 was furnished and charges U/S 302 IPC was framed to which she pleaded not guilty and claimed to be tried. During the course of trial, prosecution examined as many as 8 witnesses including the 2 investigating officers and the doctor who caused the autopsy of the deceased. The incriminating circumstances/materials that were unfolded against the accused during the course of trial were put to her and in her course of examination U/S 313 CrPC and in her answer to questions she had admitted the occurrence but denied the guilt levelled against her.

4. The accused examined one defence witness on her behalf and the defence plea, apart from denial was that the accused while coming out of his home was hit in the wooden frame of the door of his house and got hit on his head as a result of which he expired.

The learned Sessions Judge after meticulous consideration of the evidence adduced by the prosecution witnesses and also considering the defence version found that the accused is responsible for the death of the victim. However, the learned Judge found that there was no motive or intention on the part of the accused to kill the deceased and it was due to hot altercation between the accused and the deceased which enraged her on being heard that her dog would be killed by the deceased and as a result she threw away the stone to the deceased which hit on his head ultimately resulting to his death. On such consideration, the learned trial court convicted the accused U/S 325 IPC.

5. On the question of sentence, the learned Sessions Judge, hearing the parties considered the fact that the accused is a very young lady having breast feeding child and there was no material against her regarding the prior conduct and allowed her to go on probation by executing a bond of Rs.2000/ with a surety of like amount for a period of 2 years. Further the accused was also directed to pay fine for a sum of Rs.4000/ as compensation to the mother of the deceased boy, PW16.

6. The relevant portion of the judgment and order relating to the sentence is quoted herein below:

ORDER ON SENTENCE

Dated, Imphal, the 19th Nov, 1990

21. The accused is heard on the ground of sentence.

22. considering the fact that the accused is a very young woman having a breast

feeding child and in the absence of any material against her prior conduct, I think, it fit to release her on probation.

23. The accused is, therefore, released under Section 4 of Probation of Offenders Act .She is to execute a bond of Rs.2,000/ with a surety of like amount for keeping peace and be of good behavior for a period of two years.

24. She is to pay a sum of Rs.4000/(Rupees four thousand) only to Smt. Dashumati Devi, mother of the deceased Meghachandra Singh as compensation within a period of one month of today.

Bonds are to be executed within a fortnight from today.

The seized stone (Ext.M.O.1) shall be destroyed after expiry of the period of appeal against the judgment and order.?

7. The aforesaid order relating to the sentence has been challenged in this appeal. It is worthwhile to mention herein that initially the State filed the appeal U/S 378(3) of the CrPC challenging acquittal of the accused U/S 302 IPC. Later on by filing a miscellaneous application which is registered as Cril.Misc. Appln. No.1 of 2006, the appellant prayed for rectification of the cause title of the appeal from Section 378 CrPC to Section 377 CrPC contending, inter alia, that the insertion of Section of Section 378 in the appeal was typographical mistake and ought to have been an appeal U/S 377 CrPC. The aforesaid application was heard and it was end upon considering the submissions of the learned PP that the appeal has been filed, in fact, against the penalty imposed by the learned trial court and it should be treated as an appeal U/S 377 and not U/S 378 of the CrPC. Considering the submissions made on behalf of the appellant and upon hearing the learned counsel for the accused, the said prayer was allowed vide order dated 17.2.2006. Consequently, present appeal is an appeal challenging the sentence only passed by the learned Sessions Judge in the aforesaid case.

8. We have heard Md. Jalal Uddin, learned PP for the appellantState and Mr. Kh. Mani Singh, learned counsel appearing on behalf of the accusedrespondent.

Md. Jalal Uddin, learned PP challenging the findings of the learned Sessions Judge relating to the sentence has submitted that the learned Sessions Judge committed grave illegality by convicting the accused U/S 325 IPC and thereby allowing her to go on probation by executing a bond in exercise of the powers U/ S 4 of the Probation of Offenders Act, 1958. It is, further, submitted that the materials available on record prove beyond reasonable of doubts that the accused killed the deceased by hitting him by a stone and accordingly the conviction of the accused U/S 325 is bad in law and quashing the same and sentence U/S 302 IPC may be imposed. It is, further, submitted by the learned PP that the learned trial court committed grave error of law in allowing the accused/petitioner to be released on probation of offenders act in such a heinous crime. On the other hand, Mr. Kh. Mani Singh, learned defence counsel had submitted that it is clear from the deposition of prosecution witnesses that

although the accused threw away the stone to the deceased which hit on his head there was no absolutely no intention to kill the deceased by the accused and accordingly the learned Sessions Judge was well justified in convicting the accused U/S 325 only. It is, further, submitted that looking into the nature of the case, the circumstances which led to commit the crime, the previous conduct of the accused and she being a lady and that apart the occurrence having been taken place on 21.5.1987, the learned Sessions Judge rightly allowed the accused to be released on probation U/S 4 of the Probation of Offenders Act, 1958 and there is no justification for enhancing the sentence as prayed for by the appellant.

Both the learned counsel referred us to the various statement of prosecution witnesses and other materials available on record. During the course of hearing, the learned PP referred to the following decisions:

- (1) 1990 4 SCC 718;
- (2) 1996 CrLJ 2817;
- (3) 1996 CrLJ 2313;
- (4) AIR 1977 SC 1177;
- (5) 1985 CrLJ 1361;
- (6) (2001) 3 SCC 439.

Mr. Kh. Mani Singh, learned defence counsel has relied on the following decisions:

- (1) 1994 CrLJ 1219;
- (2) 1994 CrLJ 1220;
- (3) 1995 CrLJ 3642;
- (4) 1988 AIR SC 2127;
- (5) 1977 AIR SC 1991;
- (6) 1975 AIR SC 2216.

9. We have considered the rival submissions made by the learned counsel for the parties. We have also meticulously gone through the statements of prosecution witnesses deposed before the learned trial court and other materials available on record.

10. There is no dispute at the bar that the present appeal is filed U/S 377 of the CrPC. It is also an admitted fact that the accused has not challenged the impugned order of judgment and order of conviction before the appellate court. Although the accused is entitled to plead for acquittal U/S 377(3) of the CrPC, the accused has not exercised that right at the time of hearing of this appeal. In fact, the accused has accepted her conviction U/S 325 CrPC. The impugned

judgment discloses that, in fact, no sentence has been imposed by the learned Sessions Judge while convicting the accused U/S 325 and without imposing such sentence the accused was allowed to go on probation and to pay a sum of Rs.4000/ as compensation to PW16, the mother of the deceased. Admittedly, the aforesaid compensation is not imposed as a fine but was imposed U/S 357(3) of the CrPC to compensate the mother of the deceased.

Section 377 CRPC specifically provides that an appeal under the said section can be filed only against sentence on the ground of its inadequacy. However, we find that in the instant case no such sentence had been imposed. This leads us for consideration as to whether in the absence of imposition of any sentence whether such an appeal U/S 377 would be maintainable in law. In this connection, we may conveniently refer to the decisions of the Apex Court rendered in the case of State of U.P. vrs Nand Kishore Misra: AIR 1991 SC 763. The Apex Court in Nand Kishore Misra (Supra) held at para5 as follows:

¶5. The plain language of Section 377(1) makes it clear that the State Government can file an appeal to the High Court against the sentence on the ground of its inadequacy. In a case where the conviction is recorded by the trial court but instead of awarding sentence of imprisonment the convict is released on probation under the provisions of the relevant special law then it is a case where no sentence at all has been awarded and as such the provisions of S.377(1) are not attracted. The respondent has been released on probation under S.4 of the Act. The Act itself lays down the procedure for appeal against an order passed by the trial court under S.3 or 4 of the Act. S.11(2) reproduced above specifically provides that an appeal against an order under S.3 or 4 of the Act shall lie to the court to which the appeals ordinarily lie from the sentence of the trial court which obviously means the next superior court in the hierarchy. Ordinarily appeals lie from the sentences awarded by the Magistrate to the court of Sessions. The High Court was, therefore, justified in holding that the appeal filed by the State of U.P. before the High Court was not competent.?

The ratio of Nand Kishore Misra (supra) was also followed by a Division Bench of Karnataka High Court in the case of State of Karnataka vrs D.S.P. Bhatta: 1996 CrLJ 2817, on the point of nonmaintainability of an appeal U/S 377(1) CrPC when the convict was released on probation U/S 4 of Probation of Offenders Act, 1958. In the said case also the Karnataka High Court held, inter alia, that such an appeal U/S 377(1) CrPC in enhancement of sentence is not maintainable.

10. Situated thus, finding it difficult by the learned PP to survive the appeal, further, submitted that the High Court in exercise of its powers U/S 386 can invoke its jurisdiction in the matter of inadequacy of sentence. In support of this submissions, the learned PP has relied on the decisions of the Apex Court reported in (1990) 4 SCC 718. Section 386 provides the powers of the appellate court such powers can be exercised in a properly constituted appeal after entertaining such an appeal. When an appeal U/S 387 is taken up for consideration, the appellate court U/S 386(c) CrPC is required to exercise the

power as provided therein. In the instant case, we find that the appeal U/S 377 itself is not maintainable in view of the fact no sentence had been imposed against upon the accused, and consequently the exercise of powers U/S 377(c) does not arise in the instant case. It was, further, submitted by the learned PP that the court can suo moto also take necessary action in an appropriate case like the present one. We are afraid that in the event of failure of the appellant to maintain the appeal U/S 377 it would be justified for us to exercise the suo moto powers of revision. Such suo moto powers can be exercised when there is no challenge against the impugned order; but the facts of the present case are otherwise. Accordingly the said prayers made by the learned PP also can not be entertained.

11. In the instant case, the occurrence took place on 21.5.1987 and already 19 years had elapsed. It is submitted by the learned defence counsel that both the accused and the informant families are being neighbors and are residing peacefully forgetting the incident. The unfortunate incident took place due to a sudden altercation and the deceased succumbed to the injury which was caused without any premeditation of mind of the accused. Accordingly we feel that the ends of justice would not be met if the accused who is now a middle aged lady of about 50 years is again jailed by imposing the sentence which was not imposed by the learned trial court. The State has not preferred any appeal against the acquittal of the accused U/S 302 IPC.

12. In the light of the aforesaid consideration, we hold that the present appeal for enhancement of the sentence is not maintainable and accordingly the same is dismissed. No costs.