

(1975) 04 MAD CK 0001

In the Madras High Court

Case No : Criminal M P. 1 and 213 of 1975, C.A. 384/74, Criminal M.P. 516/75 and C.A. 27/73

State of U.P.

APPELLANT

Vs

Poosu and Others

RESPONDENT

Date of Decision : 02-04-1975

Acts Referred:

Constitution of India, 1950 — Article 136

Citation : (1976) LW(Cri) 197

Hon'ble Judges : Ray, C.J.;Shinglal, J;Sarkaria, J;Jaswant Singh, J;Beg, J

Bench : Full Bench

Advocate : R.K. Karg, S.C. Agarwal and V.J. Francis and M/s. Ramamurthi and Co, for the Appellant; D.P. Uniyal and O.P. Rana, for the Respondent

Judgement

Sarkaria, J.—The common question referred to the Constitution Bench in these two cases is Whether the Supreme Court while granting

Special Leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-

bailable warrant for the arrest and committal to prison of the accused-Respondent who had been acquitted by the High Court ?

2. Mr. R.K. Garg, Counsel for the accused-Respondents herein, contends that while the Legislature has, in its wisdom, empowered the High

Court to cause an accused person to be arrested and committed (sic) to prison pending the disposal of the appeal against acquittal, no such power

has been conferred en the Supreme Court by the Code or any other statute. According to Counsel, in the absence of a specific statutory provision,

the inherent power of the Court to do complete justice under the Code or even under Article 142 of the Constitution cannot be invoked to order

deprivation of the liberty of a person who has been found innocent and acquitted by the High Court on all the charges against him because such an order would be violative of Arts. 14, 19(1)(a) to (g) and 21 of the Constitution. It maintained that even after the grant of special leave to appeal under Article 136 against an order of acquittal passed by the High Court, the acquittal and the findings on which it is based, remain fully in force during the pendency of appeal by the State. It is contended that once it is ensured that the accused-Respondent will be available to submit himself to the final orders of this Court that may be passed in the appeal under Article 136, the inherent powers of the Court under the Gede or under Article 142 exhaust themselves.

3. In support of his contentions, Counsel has referred to *The State of Uttar Pradesh Vs. Mohammad Nooh, and A.K. Gopalan v. State of Madras*

(1950) S.C.R. 88 , *Lala Jairam Das and Ors. v. King Emperor* 72 I.A. 120 ; *Sheo Swarup and Ors. v. The King Emperor* 61 I A. 398 ; and

M.G. Agarwal v. State of Maharashtra (1963) J S.C.R 405 : (1962) Supp. 1. S.C.R. 885 *Prem Chand Garg v. Excise Commissioner U.P.*

Allahabad (5-A.). At against this, Mr. Uniyal and Mr. O. P. Rana, submit that by virtue of Article 142 read with Article 136 of the Constitution,

this Court pending disposal of an appeal against an order of acquittal, is competent to exercise the same powers which are conferred on the High

Court by the Code of Criminal Procedure In support of this contention, Mr. Rana has referred to *State of U.P. Vs. Deoman Upadhyaya, Abdul*

Rehman Mahamed Yusuf v. Mahamed Haji Ahmed Agbotwala and Anr.

4. We are unable to accept the contention(sic) advanced by Mr. Garg.

5. To appreciate the point involved, it will be useful to have a look at the provisions of Section 427 of Code of Criminal Procedure 1893 and its

historical perspective. This section (which has been re-enacted as S. 390 of the new Code of 1973) provides:

When an appeal is presented u/s 411A Sub-section (2) or Section 417. the High Court may issue a warrant directing that the accused be arrested

and brought before it or any subordinate Court and the Court, before which he is brought may commit him to prison pending the disposal of the

appeal, or admit him to bail.

6. It may be noted that this provision was for the first time enacted in the Code

of 1882, Bat even before its enactment, the High Court as a matter of judicial practice, had the power pending the appeal against an order of acquittal, to secure the attendance of the accused- respondent by bailable or non-bailable warrants. As pointed out by Panigrahi C.J. in State v. Badapalli Adl and Ors. ILR 1955 Cut 589 ; ""what was formerly the judicial practice received statutory recognition in the year 1882 when this provision in Section 427. Crl. P.C. was introduced."" ""In Empress of India v. Mangu and ors. I.L.R All, 340; (which was decided several years before the addition of this provision in in the Code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in Queen v. Gobin Tewari ILR 1987 Cal. 281; Again in Queen-Empress v. Gobardhan ILR 1887 All 528 Sir John Edge, Chief Justice without laying down any inflexible rule, emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while bis fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in State v. Badapalli Adi and others. ILR 1955 Cut 589 (supra).

7. Viewed in this perspective, it is clear that even before the enactment of this prevision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused-Respondent or enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

8. As far back as 1824, in the English case, Bana v. Methuen and Ors. 2 Boms(sic) 228; Best J. following an older precedent, enunciated the rule that:

When an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence.

9. This is the rationale of Section 427. As soon as the High Court on perusing a petition of appeal against an order of acquittal, considers that there

is sufficient ground for interfering, and issuing process to the Respondent, his status as an accused person and the proceedings against him, revive.

The question of judging his guilt or innocence in respect of the charge against him, once more becomes sub judice.

10. Similar is the position when the Supreme Court, in its discretion, grants special leave to appeal under Article 136 of the Constitution, against an order of acquittal passed by the High Court.

11. Art 136 confers on the Supreme Court, the same power which was vested in the Crown to grant special leave to appeal to His Majesty-in-

Council (which in practice meant the Judicial Committee of the Privy Council in England) to convicted persons from India. This Article is couched

in very spacious phraseology. The power under it can be exercised in respect of ""any judgment, decree, determination, sentence or order in any

cause, matter passed or made by any court or tribunal in the territory of India"". As pointed out by this Court in *K.M. Nanavati v. State of Bombay*

(1967) 1 S.C.R. 497 ""this wide and comprehensive power in respect of any determination of any court or tribunal must carry with it the power to

pass orders incidental or ancillary to the exercise of that power"". That is why, Article 142 in equally extensive terms gives this Court power ""to

make such order as is necessary for doing complete justice in any cause or matter before it and any decree so passed or order so made shall be

enforceable throughout the territory of India."" With the same end in view, Clause (2) of that Article (subject of course to law, if any, made by

Parliament) gives this Court ""all and every power to make any order for the purpose of securing the attendance of any person"".

12. Thus there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent

by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has u/s 427. Whether in the circumstances of the

case, the attendance of the accused-Respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests

entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerize and reduce into immutable

formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the

various factors, such as, "the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility

of his absconding, larger interest of the public and State": See *The State v. Capt. Jagjit Singh* (1962) 3 S.C.R. 622 . In addition, the Court any also

take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is

likely to elapse before the appeal comes up for final hearing in this Court. In the context, it must be remembered that this over-riding discretionary

jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or

clearly erroneous (sic) and results in a gross miscarriage of justice.

13. Nor do we find any merit in the contention that an order directing the re-arrest and detention of an accused-Respondent who had been

acquitted by the High Court of a capital offence, in any way, offends Article 2] or any other fundamental right guaranteed in Part III of the

Constitution. Such an order is made by this Court in the exercise of its plenary jurisdiction conferred by Articles 136 and 142 of the Constitution.

By no stretch of imagination can it be said that such an order deprives the accused-Respondent of his liberty in a manner otherwise than in

accordance with procedure established by law.

14. It is not necessary to burden this judgment with a discussion of the rulings cited by Mr. Garg. Suffice it to say that the facts of those cases were

entirely different and they have no bearing on the point in issue before us.

15. For all the foregoing reasons, we answer the question posed at the common cement of this judgment in the affirmative and dispose of the

reference accordingly.