
(2009) 07 SIK CK 0003
In the Sikkim High Court

Surendra Prasad

APPELLANT

Vs

Niraj Thapa and Another

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

Citation : (2009) CriLJ 4516 : (2010) 1 Crimes 839

Hon'ble Judges : Aftab H. Saikia, C.J

Bench : Single Bench

Judgement

Aftab H. Saikia, C.J.—Heard Mr. Ajoy Rathi and Ms. Sushma Pradhan, learned Counsel for the petitioner. Also heard Mr. Karma Thinlay, learned Additional Public Prosecutor and Mr. T. Namgyal, learned Counsel appearing for the respondent No. 1 in the instant revision petition.

2. Since the delay in question has already been condoned vide order dated 3-7-2009 passed in Crl. Misc. Application No. 08/2009 as well as keeping in view the question of law raised in this revision petition and as agreed to by the learned Counsel for the parties, who have already entered appearance on their behalf respectively, we propose to dispose of this revision petition today itself at the admission stage.

3. The basic question of law involved in the instant revision petition is as to whether a criminal appeal can be disposed of on merits by the appellate Court without hearing the appellant or his or her engaged counsel. The answer is in negative.

4. Law is settled on this question. In Ram Naresh Yadav v. State of Bihar, reported in AIR 1987 SC 1500 : 1987 Cri LJ 1856, the Supreme Court has candidly observed that in criminal matters convicts must be heard before matters are decided on merit. In paragraph 2, it is observed as under:

2. It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when

criminal appeals are called out it would hamper the working of the Court and create a serious problem for the Court. And if this happens often the working of the Court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits....But the matter can be disposed of on merits only after hearing the appellant or his counsel. The Court might as well appoint a counsel at State cost to argue on behalf of the appellants. Since the order of conviction and sentence in the present matter has been confirmed without hearing either the appellants or counsel for the appellants, the order must be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf.

5. Even the relevant provisions of Code of Criminal Procedure, 1973 (for short, "the Cr. P.C.") provide for such hearing. Sections 384 and 386, Cr. P.C. contemplate as under:

384. Summary dismissal of appeal.- (1) If upon examining the petition of appeal and copy of the judgment received u/s 382 or Section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that:

(a) no appeal presented u/s 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented u/s 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented u/s 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented u/s 383, has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented u/s 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in Section 393, if satisfied that it is necessary in the interests of Justice so to do, hear and dispose of such

appeal in accordance with law.

386. Powers of the Appellate Court.- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal u/s 377 or Section 378, the accused, if he appear, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may:

(a) in an appeal from an order of acquittal. reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction:

(i) reverse the finding and sentence and acquit or discharge the accused, or Order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence - ,

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(3) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

6. A bare reading of these two sections would manifestly go to indicate that the appellant or his pleader deserves a reasonable opportunity of being heard in support of his appeal. Under such circumstances, there is no hesitation to hold that the Appellate Court is duty bound to hear the appellant or his pleader when the criminal appeal is taken up for disposal on merits.

7. By means of this Criminal Revision Petition, the petitioner has challenged the judgment and Order dated 16-2-2009 passed by the learned Sessions Judge (South and West) at Namchi, South Sikkim in Criminal Appeal No. 17 of 2006 whereby the judgment and order dated 18-11-2006 passed by the learned Judicial Magistrate (South) at Namchi, South Sikkim in P.R. Case No. 1 of 2006 convicting the petitioner herein u/s 16(1)(a)(ii) and 16(1A) of the Prevention of Food Adulteration Act, 1954 (for short, "the Act"), and sentencing him to undergo a simple imprisonment of 1 (one) year with a fine of Rs. 2,000/- (Rupees two thousand) only, has been confirmed with a modification of sentence to undergo 6 (six) months" simple imprisonment with a fine of Rs. 1,000/- (Rupees one thousand) only.

8. The brief facts of the case would be relevant for proper resolution of this Revision Petition.

9. The respondent No. 1, being the Food Inspector, on 10-11-2006 at around 11.00 a.m. having inspected the shop of the petitioner at Kewzing Road, Ravangla Bazar, collected the sample of pan masala, on suspicion of being adulterated article, which were kept for sale in an open bag and sent the same for its analysis to the Public Analyst at Guwahati. As per the report dated 4-3-2006 of the Public Analyst, the said sample of pan masala contained coal-tar colour which was not permissible for use under the Act and the same was said to be adulterated. , ,

10. Accordingly, a complaint was filed before the learned Chief Judicial Magistrate, South at Namchi against the petitioner by the respondent No. 1 alleging violation of the provisions of the Act and seeking punishment of the petitioner under the law as already indicated above.

11. The trial Court, having examined as many as three witnesses including respondent No. 1 and also upon hearing the learned Counsel for the parties, found that the prosecution was successful in proving its case against the petitioner beyond reasonable doubt and accordingly, the petitioner was convicted under the provisions of law, stated above and sentenced him as already mentioned hereinabove.

12. Being aggrieved by such conviction and sentence so passed by the trial Court as indicated above, the petitioner preferred the appeal before the learned Sessions Judge (South and West) at Namchi, South Sikkim and the same was registered as Criminal Appeal No. 17 of 2006.

13. The order sheets so annexed in this Revision Petition clearly indicate that from the date of initiation of the appeal i.e. 28-12-2006 till the date of passing the order, the petitioner was all along appearing before the Appellate Court. However, on the date of passing of the impugned judgment and Order i.e. 16-2-2009, the petitioner could not appear because on the penultimate date i.e. 15-2-2009, the mother of the petitioner died for which he had to rush to his home village in the State of U.P.

14. It is pleaded herein that the impugned judgment and order was passed without hearing the appellant or his learned Counsel as both were absent.

15. Mr. Rathi, the learned Counsel for the petitioner has strenuously argued that the impugned Judgment and Order itself, on the face of it, is Illegal and unauthorised because a criminal appeal is not permissible under the law to be disposed of on merits without hearing the petitioner or his counsel.

16. On the contrary, both Mr. Thinlay, the learned Additional Public Prosecutor and Mr. Namgyal, the learned Counsel appearing for the respondent No. 1 have jointly argued that the petitioner was very much aware of the date fixed for hearing on 16-2-2009 and the same is evident from the statement made in paragraph 5 of this revision petition, which is quoted as under:

5. That on 21-11-2008 the present petitioner was present in person before the Ld. Sessions Court and filed a petition praying for time to engage a counsel for conducting the said Criminal Appeal, as he had to go to hospital for the treatment of his ailing mother and the next date was fixed for hearing on 16-2-2009.

17. It is further stated on behalf of the respondents that the absence of the petitioner and his learned Counsel on the date of hearing i.e. on 16-2-2009 was intentional and the learned Sessions Judge was Justified and correct in passing the impugned judgment and order on merits without hearing the appellant.

18. It is contended by both the learned Counsel for the respondents that even the petitioner did not take any step for filing any petition for adjournment on the date of hearing and the same has been clearly reflected on the impugned judgment and order itself.

19. Having carefully scanned and examined the impugned order and upon hearing of the learned Counsel for the parties at length, this Court is of the firm view that the impugned order was passed without hearing the appellant or his counsel. It is also seen that on 16-2-2009 the appellant was absent for the first time due to his mother's death on 15-2-2009 as reflected from the averments made in the connected Criminal Miscellaneous Case No. 8 of 2009.

20. Under such facts and circumstances of the case and also having regard to the settled law as cited above, this impugned order deserves to be interfered with and consequently the impugned judgment and Order stands quashed and set aside.

21. The matter stands remitted to the learned Sessions Judge (South and West) at Namchi and on receipt of the certified copy of this order the learned Sessions Judge (South and West) at Namchi shall dispose of the instant appeal in accordance with the law after giving the reasonable opportunities of hearing to the petitioner.

22. At this stage, Mr. Rathi, the learned Counsel for the petitioner, on instruction

on behalf of the petitioner, has submitted that the appellant-petitioner is a very poor person with a family comprising of his wife and three children and is living hand to mouth by running a small pan shop. It is also stated that he has already served the sentence of one month in incarceration against the sentence of six months passed by the learned Sessions Judge (South and West) at Namchi. In the said premises, he does not want to pursue the appeal further and the entire matter may be closed here itself by upholding the conviction of the petitioner and sentencing him for the period undergone by waiving the fine so imposed.

23. Having considered the facts and circumstances so narrated by the learned Counsel for the petitioner in its entirety and also upon hearing the learned Counsel for the respondents including the learned Additional Public Prosecutor as well as on due consideration of the mitigating circumstances, this Court is of the considered view that the interest of justice shall be met if the submission of the learned Counsel for the petitioner is approved. It is ordered accordingly. Consequently the conviction of the petitioner has been maintained and he is sentenced for the period already undergone as he is under detention from 3-6-2009 till today completing one month. The petitioner is discharged from the liability of payment of fine as ordered in the impugned judgment.

24. In view of the above discussions and observations, this Revision Petition stands disposed of.

25. The petitioner who is in jail be released forthwith if he is not required in any other case.