

(2016) 04 KL CK 0022

In the High Court Of Kerala

Case No : Criminal L.P. No. 121 of 2016. (Against the Judgment in SC 632 of 2008 of the Court of the Additional Sessions Judge, Thalassery, Dated 24.2.2010).

Vanaja K.C.

APPELLANT

Vs

State of Kerala and another

RESPONDENT

Date of Decision : 06-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 2(wa), 357A, 372

Citation : (2016) 164 AIC 389 : (2016) 3 CriCC 177 : (2016) 2 ILRKerala 713 : (2016) 2 KerLJ 484 : (2016) 3 KHC 198 : (2016) 2 KLT 617

Hon'ble Judges : K.T. Sankaran;Raja Vijayaraghavan V, JJ.

Bench : Division Bench

Advocate : P.S. Sreedharan Pillai, T.K. Sandeep, Arjun Sreedhar and Arun Krishna Dhan, Advocates, for the Appellant; Director General of Prosecution Asaf Ali and K.S. Madhusoodanan, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

K.T. Sankaran, J. - This Criminal Leave Petition is filed by the victim (mother of the deceased) challenging the inadequacy of compensation as well as inadequacy of sentence in S.C. No.632 of 2008 on the file of the Court of the Additional Sessions Judge, Thalasseri. By the judgment impugned, the court below found the accused (2nd respondent herein) guilty of the offence under Section 302 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for life. No fine was imposed on the accused. The victim, contends in the appeal filed by her that the court below should have imposed death sentence on the accused and that compensation/fine should also have been imposed.

2. Originally, the Court of Session found the accused guilty of the offence under Section 302 of the Indian Penal Code and he was sentenced to undergo imprisonment for life. The accused preferred Criminal Appeal No. 395 of 2010 and the High Court, by the judgment dated 9.4.2010 allowed the appeal and set

aside the conviction and sentence. The petitioner, mother of the deceased, filed Crl. Appeal No. 2096 of 2010 before the Supreme Court. The Supreme Court allowed the appeal, set aside the judgment of the High Court and remanded the matter to the High Court for fresh disposal. Crl. Appeal No. 395 of 2010 filed by the accused is pending disposal before the High Court after remand by the Supreme Court. After remand, the mother of the deceased filed the present Criminal Leave Petition seeking leave of this Court to appeal challenging the judgment of the court below to the extent indicated above.

3. The second respondent (accused) contends that the victim has no right to file an appeal under the proviso to Section 372 of the Code of Criminal Procedure on the ground of inadequate compensation when no compensation was granted by the trial court and when no fine was imposed out of which compensation could be granted. The learned counsel relied on the decision in Ahammed v. Abdul Latheef (2011 (2) KLT 889). The second respondent also contended that the date of occurrence being before the date of commencement of Act 5 of 2009 by which the proviso to Section 372 was inserted, the victim cannot maintain an appeal under the said proviso. The second respondent also contended that an appeal by the victim challenging lesser sentence is not maintainable.

4. The definition of "victim" in Section 2(wa) and the proviso to Section 372 were inserted in the Code of Criminal Procedure by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) with effect from 31.12.2009. The definition of "victim" is the following:

"2. Definitions.- In this Code, unless the context otherwise requires,--

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.....

(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

5. Section 372 of the Code of Criminal Procedure provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. The proviso was inserted by Act 5 of 2009, which reads as follows:

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

6. The following questions of law arise for consideration in this case.

A) Whether the victim has a right to maintain an appeal under the proviso to Section 372 Cr.P.C. on the ground of "imposing inadequate compensation" when no compensation was granted by the trial court? Does the decision in Ahammed

v. Abdul Latheef (2011 (2) KLT 889) requires re-consideration?

B) Whether the victim gets a right of appeal under the proviso to Section 372 Cr.P.C. in a case where the date of occurrence was before and the judgment was pronounced after, the date of commencement of Act 5 of 2009?

C) Whether an appeal by the victim challenging lesser sentence is maintainable?

7. Question (A):- In the present case, the court below did not award any compensation to the victim. No fine was also imposed, out of which compensation could be awarded to the victim. The petitioner has filed the appeal challenging the judgment of the court below to the extent to which the court below did not award any compensation.

8. The learned counsel for the second respondent submitted that in view of the decision in Ahammed v. Abdul Latheef (2011(2) KLT 889), the victim cannot file an appeal under the proviso to Section 372 Cr.P.C. on the ground of "imposing inadequate compensation" when the court below did not award any compensation at all. In Ahammed v. Abdul Latheef (2011(2) KLT 889), a learned single Judge of this Court held that from a reading of the proviso to Section 372 of the Code, it is quite clear that what can be challenged thereunder is inadequacy of compensation and not, failure or omission to order compensation. It was held by the learned single Judge that only if compensation is ordered, the question of adequacy or inadequacy of compensation would arise. No compensation having been ordered in that case by the court below, the learned single Judge held that no appeal could be filed by the victim or legal heir of the victim under the proviso to Section 372 of the Code challenging failure or omission on the part of the court to award compensation.

9. The learned counsel for the petitioner submitted that the decision in Ahammed v. Abdul Latheef (2011(2) KLT 889) requires reconsideration. He submitted that it would be unjust to hold that the victim cannot file an appeal under the proviso to Section 372 Cr.P.C., when no compensation was ordered by the court below and it would be harsh to hold that an appeal would lie only when the court below has ordered compensation at least to a limited extent.

10. In this context, it is necessary to consider the scope and ambit of the amendment introduced by Act 5 of 2009. By the Amendment Act 5 of 2009, which came into force on 31.12.2009, the definition of victim was inserted in Section 2(wa), a proviso was inserted to Section 372 and a new section, Section 357A, providing for victim compensation scheme was inserted in the Code of Criminal Procedure.

11. In the statement of objects and reasons of the Code of Criminal Procedure (Amendment) Act, 2008, it is stated:

"At present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system.

There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair-trial to persons of unsound mind who are not able to defend themselves."

12. In the 154th Report of the Law Commission, recommendation was made for comprehensive amendments to the Code of Criminal Procedure including the insertion of the proviso to Section 372, insertion of the definition of "victim", and insertion of a provision for "victim compensation" etc..

13. If it were to be held that a victim would get no right to file an appeal under the proviso to Section 372 Cr.P.C. in case the court below has not awarded any compensation and the victim can file an appeal if the court below has awarded some compensation, it would lead to undesirable and unintended results. If the Court does not grant any compensation to the victim, who can challenge that judgment and claim compensation? The State cannot. If the victim also cannot challenge that judgment and claim compensation, it would result in injustice. Going by the decision in *Ahammed v. Abdul Latheef* (2011(2) KLT 889), if the court below has awarded some compensation, the victim can file an appeal under the proviso to Section 372 and claim more compensation. The challenge in such an appeal would be on the ground of imposing inadequate compensation by the court below. The legislature did not intend that a victim to whom no compensation was awarded would have no right to challenge the judgment in appeal, but, a victim to whom howsoever negligible an amount is granted can file an appeal. What was intended, and the only possible interpretation that could be made, is that a victim can file an appeal under the proviso to Section 372 even in a case where the court below did not grant any compensation at all. The legislature wanted to confer rights on the victims. A definition for "victim" was provided by the amendment. A right of appeal was provided to the victim when the compensation awarded is inadequate. Section 357A was also introduced providing for a victim compensation scheme. In spite of all these provisions, if it were to be held that the victim would have no right to file an appeal when the Court did not grant any compensation at all, it would result in taking away a right vested in the victim under the proviso to Section 372 Cr.P.C.

14. What is the meaning of "inadequate compensation"? It means sufficient compensation was not granted. If no compensation is granted, then also it can be said that the compensation is inadequate. The term "inadequate compensation" will comprehend within its scope non-granting of compensation also. While interpreting the scope of Order 41, Rule 27 of the Code of Civil Procedure, the Supreme Court in *Jaipur Development Authority v. Smt.Kailashwati Devi* (AIR 1997 SC 3243) held that it is not one of the conditions of Order 41, Rule 27 that the party seeking to introduce "additional" evidence must have also been one who has led some evidence in the trial court. It was held that such a view would amount to introducing an additional condition not contemplated in the Rule. The Supreme Court held that no distinction was intended by clause (aa) of sub-rule (1) of Rule 27 Order 41 between a party who

has produced some evidence in the trial court and one who has adduced no evidence in the trial court.

15. In *N.T. Veluswami Thevar v. G. Raja Nainar* (AIR 1959 SC 422), the Supreme Court held that if on a true construction, a statute leads to undesirable and unintended results, the Courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But if on a construction of a statute, two views are possible, one which results in an anomaly and the other, not, it is the duty of the Courts to adopt the latter and not the former.

16. In *Kurien v. Saramma Chacko* (1964 KLT 1 : 1964 KHC 1), a Full Bench of the Kerala High Court held that if the language in the material or substantive provisions is capable of two constructions, one helpful in giving effect to the legislative intent and the other not, then Courts must accept the former construction and reject the latter. But if the language of the material provisions yields only to one interpretation and that against the intent of the legislature, Courts are helpless and they can only point out the defect or lacuna to the legislature and leave the legislature to make the necessary amendment. Moreover, in a case where Courts are dealing with a beneficial legislation, if there is any doubt about the meaning of a provision, it should be resolved in favour of the parties for whose benefit the legislation was made. In *Jivabhai Purshottam v. Chhagan Karson and others* (AIR 1991 SC 1491), the Supreme Court held:

"Therefore, if there is any doubt about the meaning of sub-section (2-A) that doubt should be resolved in favour of the tenant, for whose benefit the amending Act was passed."

17. In *The Central India Spinning and Weaving and Manufacturing Co. Ltd., The Empress Mills, Nagpur v. The Municipal Committee, Wardha* (AIR 1958 SC 341), a Constitution Bench of the Supreme Court held that an interpretation of the Rules would lead to absurdity has to be avoided.

18. We are of the view that a true construction of the expression "imposing inadequate compensation" occurring in the proviso to Section 372 Cr.P.C. would lead to only one result, i.e., a victim gets a right to file an appeal challenging the judgment of the court below when the court below has either granted no compensation or granted compensation which is not adequate. Non-granting of any compensation would also amount to grant of inadequate compensation. An interpretation which would lead to absurdity should be avoided. If the interpretation that when no compensation is granted the victim would have no right to file an appeal is accepted, it would result in absurdity. A fair, reasonable and pragmatic interpretation would be that a victim would get a right of appeal under the proviso to Section 372 even in a case where the court below did not grant any compensation at all. With respect, we disagree with the view taken in *Ahammed v. Abdul Latheef* (2011 (2) KLT 889). We hold that in the present case, the appeal by the victim is maintainable.

19. Question (B):- In the present case, the date of occurrence was on 27.1.2005.

The court below pronounced the judgment on 24.2.2010. The Amendment Act 5 of 2009 came into force on 31.12.2009. The question is whether to enable the victim to file an appeal under the proviso to Section 372, it is necessary that the date of occurrence should be after the date of commencement of the Amendment Act 5 of 2009.

20. In Balakrishnan Master v. Ramachandran Master (2011 (4) KLT 160), a similar question arose for consideration before a learned single Judge of this Court. It was held in Balakrishnan Master's case as follows:

"8. The question is whether the right of appeal conferred on the victim by the proviso to Section 372 of the Code, has to be determined with regard to the date of order of acquittal or conviction of the accused for a lesser offence or order providing inadequate compensation, or, with respect to the date of incident giving rise to the prosecution of the accused. What is conferred by the Amendment Act 5 of 2009 on the victim is a substantive right to prefer an appeal in certain circumstances as specified, and that alone. Act 5 of 2009 has come into effect from 31.12.2009. Such right is available to a victim where a judgment is rendered by the court on or after 31.12.2009, provided, any one of the three circumstances covered by the proviso is involved in the case. The right is dependent on the judgment rendered by the court and not in relation to the incident which gave rise to the prosecution of the accused, whether or not it was at the instance of the victim. Any person who has suffered any loss or injury by the act or omission of the accused who had been prosecuted, and thus qualified to be a victim as defined under the Amendment Act 5 of 2009, gets a vested right after the coming into operation of the aforesaid Act to prefer an appeal in the event such prosecution of accused has resulted in a judgment giving rise any one of the three situations specified under the proviso to Section 372 of the Code. Where there is no doubt that what is conferred under the proviso to Section 372 of the Code enabling the victim to prefer an appeal in the circumstances specified is a substantive right conferred on him by the Statute its effect cannot be nullified taking a view that the applicability of the proviso inserted has to be reckoned with reference to the date of incident in the case which led to the prosecution of the accused. Any such view would be against the letter and spirit of the aforesaid proviso and also the very purpose for which a right of appeal is conferred on the victim, illustrating and defining the person falling thereunder, and specifically limiting to what situation such a right could be exercised.

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11. When such be the position of law, where a right is conferred on the victim to prefer an appeal in the circumstances enumerated under the proviso to Section 372 of the Code by the Amendment Act (Act 5 of 2009), such right will be presumed to be retrospective applying to orders subsequently made in

pending proceedings, as and when the amendment came into force, that is, on 31.12.2009.

12. Prospective operation of the proviso to Section 372 of the Code will not enable the victim to prefer appeal where judgment had been rendered prior to the coming into force of the Amendment Act 5 of 2009. In cases where judgment is rendered on or after 31.12.2009, after the commencement of the Act 5 of 2009, and that too, where any of the circumstances covered by the proviso, the victim has a right to prefer an appeal before the competent court to which an appeal ordinarily lies in the event of conviction of the accused in such case. The incident giving rise to the prosecution of the accused was before the commencement of the operation of the proviso to Section 372 of the Code cannot be given any merit in deciding the right conferred on the victim to prefer the appeal, which has to be looked into with reference to the date of commencement of the amending Act and also the circumstances enabling the victim to prefer the appeal against the accused."

21. The Patna High Court in Parmeshwar Mandal v. State of Bihar and others (2014 Cri.L.J.1046 : 2014 KHC 2393), held thus:

"25. Hence, clearly it could not be the intention of the Legislature to vest this right of appeals in only those victims in whose cases the occurrence had happened after the amendment. If that could be accepted as a necessary condition for exercise of the right by a victim, then, for years to come, this right of the victim to prefer an appeal in terms of the said proviso would have remained illusory, in spite of the amendment. The Central Government, by Notification No. S.O. 3313(E) dated 30th December, 2009, appointed 31st day of December 2009, as the date for the Act 5 of 2009 to come into force, which was published in Gazette of India, Ext.Pt. II, Section 3(ii), dated 30.12.2009. Hence, in absence of any express intention notified by the Legislature to the contrary, it has to be concluded that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders were passed by any criminal court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of the date of occurrence, institution of the case, cognizance or commitment."

We respectfully agree with the view taken by the learned single Judge in Balakrishnan Master's case and the view taken by a Division Bench of the Patna High Court in Parameshwar Mandal's case. Accordingly, we hold that the appeal by the victim is maintainable since the judgment was passed by the court below after the date of commencement of Act 5 of 2009.

22. Question (C):- It is clear from the proviso to Section 372 that an appeal by

the victim is maintainable in three circumstances, namely, (1) against any order passed by the Court acquitting the accused; (2) against any order passed by the Court convicting the accused for a lesser offence; and (3) against any order passed by the Court imposing inadequate compensation. Convicting an accused for a lesser offence is not the same as convicting the accused for a lesser term of imprisonment or a type of sentence which is lesser in gravity. Conviction for a lesser offence would mean that the prosecution alleges a particular offence but the court finds the accused guilty for a lesser offence. For example, if the prosecution case is that the accused committed an offence under Section 302 IPC, but the Court finds the accused guilty of the offence under Section 304 IPC. Such a conviction is conviction for a lesser offence. Awarding a lesser term of imprisonment or not awarding capital punishment is not at all a conviction for a lesser offence. The expression used in the proviso to Section 372 is "convicting for a lesser offence". Conviction, and not the sentence, is the relevant aspect. Therefore, we hold that the appeal filed by the petitioner contending that the accused should have been awarded the capital punishment is not maintainable.

23. For the aforesaid reasons, we hold that the appeal filed by the petitioner (victim) is maintainable to the extent indicated above. We have already condoned the delay in filing the application for leave. The Registry will number the appeal.