

(2014) 12 DEL CK 0291

In the Delhi High Court

Case No : Criminal Appeal No. 701 of 2014 and Crl. M.B. No. 1197 of 2014

Virender Bidhuri

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 372

Delhi Police Act, 1978 — Section 47

Penal Code, 1860 (IPC) — Section 147, 148, 149, 186, 279

Probation of Offenders Act, 1958 — Section 11, 11(4), 12, 4, 5

Citation : (2014) 12 DEL CK 0291

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Ramesh Gupta, Senior Advocate and F.A. Khan, Advocate for the Appellant; Rajat Katyal, APP, S.K. Rungta, Senior Advocate and Prashant Singh, Advocate for the Respondent

Judgement

Dr. S. Muralidhar, J.

Introduction

1. This appeal is directed against the judgment dated 23rd May 2014 passed by the learned Additional Sessions Judge ("ASJ") in Criminal Appeal No. 56 of 2013 filed by Respondent No. 2 seeking setting aside an order dated 30th August 2013 passed by the learned Metropolitan Magistrate ("MM") South-East in the case arising out of FIR No. 40/05 registered at Police Station ("PS") Sarita Vihar whereby while holding him guilty of the offence under Section 379 IPC, the learned MM had ordered release of the Appellant herein on probation of good conduct given him the benefit of Sections 4 and 12 of the Probation of Offenders Act, 1958 ("POA"). The learned MM had released the Appellant on probation of good conduct for a period of one year subject to his furnishing a personal bond in the sum of Rs.50,000 with one surety in the like amount. Additionally, the Appellant was asked to pay a compensation of Rs. 3 lakhs to the government in

terms of Section 5 of the POA. The learned ASJ set aside the said order of the learned MM.

2. By a separate impugned order dated 23rd May 2014, the learned ASJ sentenced the Appellant to one year's rigorous imprisonment ("RI") with a fine of Rs. 50,000 and in default to undergo three months' simple imprisonment ("SI") for the offence under Section 379 IPC.

3. Mr. Ramesh Gupta, learned Senior counsel appearing for the Appellant informs the Court that apart from paying the sum of Rs. 3 lakhs to the government in terms of the order dated 30th August 2013 of the learned MM, the Appellant has also deposited the fine amount of Rs. 50,000 as ordered by the learned ASJ.

Background facts

4. The background to the present appeal is that FIR No. 40 of 2005 at PS Sarita Vihar was registered against the Appellant under Section 379 IPC on the complaint of Respondent No. 2. The allegation was that the Appellant had committed theft of the "in" register, "out" register, gate pass, bill book, "out" job order file, "in" job order file and "in" and "out" surveyor register belonging to Respondent No. 2 after having made the preparation for causing death or hurt in order to commit theft as it was alleged that the Appellant was in possession of a country made pistol at the time he committed the theft.

Proceedings before the MM

5. By a judgment dated 2nd August 2013, the learned MM concluded that the evidence was insufficient to hold the Appellant guilty of the offence under Section 382 IPC but sufficient to find him guilty for the offence under Section 379 IPC since the country made pistol which the Appellant was alleged to be carrying was not seized during investigation. Moreover, none of the eye witnesses stated in Court that the Appellant had pointed any gun towards them.

6. The question before the trial Court next was as regards the sentence that should be awarded to the Appellant. In the order dated 30th August 2013, the learned MM first noted that the report of the Probation Officer ("PO") stated that except in two cases i.e. FIR No. 102 of 2005 at PS Sangam Vihar registered under Sections 386/ 387/ 34 IPC and FIR No. 198 of 2001 at PS Okhla Industrial Area (OIA) registered under Sections 147/ 148/ 149/ 186/ 353 IPC, in all other cases the Appellant had been acquitted or the matter had been settled. There was no conviction against the Appellant except a fine of Rs. 50 in FIR No. 75 of 1989 under the Forest Act.

7. The learned MM in the said order dated 30th August 2013 then noted the submissions made on behalf of the Appellant which inter alia was that he was a social activist and a political person and false cases had been lodged against him to jeopardise his political career. It was sought to be contended that the FIR itself was in retaliation to the Appellant having sent a complaint to government bodies seeking removal of certain illegal containers parked in the Tughlakabad area. FIR

No. 102 of 2005 was also by the same Complainant. FIR No. 198 of 2001 was registered when the Appellant and certain others were sitting on a peaceful demonstration.

8. The learned MM also adverted to the submission made on behalf of the Appellant that the Complainant had misbehaved with the PO. The learned MM then discussed the facts and circumstances as well as the report of the PO in detail. He also noted that the PO had in her report made serious allegations against the Complainant and how he was trying to influence the PO. He also threatened and allegedly molested her. The learned MM also noted that the Appellant had not been involved in criminal activities for the last more than 8 years and that itself showed that there was a tendency to improve and become a responsible citizen. It was observed that in the event that the Appellant failed to adhere to the conditions for release on probation then he would be sentenced as per the punishment provided under Section 379 IPC. Accordingly, the order granting the benefit of probation and requiring the Appellant to pay a compensation of Rs. 3 lakhs to the government under Section 5 of the POA was passed.

Maintainability of the appeal

9. Aggrieved by the said order dated 30th August 2013 of the learned MM, Respondent No. 2 filed Criminal Appeal No. 56 of 2013 before the learned ASJ. Although the question of maintainability of the appeal was not argued before the learned ASJ, before this Court Mr. Gupta, learned counsel for the Appellant has pointedly raised that issue. He points out that in terms of proviso to Section 372 Cr PC, an appeal could be filed only in three circumstances. One was, when there was an acquittal of the accused. The second was when the conviction was for a lesser offence or where inadequate compensation was awarded. In the present case since none of the said elements existed, no appeal was maintainable in the first place. Mr. Gupta submitted that although a revision petition could have been preferred, it was not. Also in terms of the Section 11 of the POA, an appeal by a person aggrieved by the order of release on probation was maintainable. However, the appeal was not under Section 11 of the POA.

10. In reply Mr. S.K. Rungta, learned Senior counsel appearing for Respondent No. 2 urged that the Court would have to take a more liberal view of the words "inadequate compensation" occurring in the proviso to Section 372 Cr PC. Alternatively, he submitted that an appeal was anyway preferable under Section 11 of the POA and the appeal before the learned ASJ could be treated as being under that provision, even at this stage. He submitted that in terms of Section 11 (4) POA the learned ASJ was justified in proceeding to impose a substantive sentence.

11. The proviso to Section 372 Cr PC admits of only strict construction and with none of the conditions provided therein having been satisfied in the present case, the appeal by Respondent No. 2 under Section 372 Cr PC was not maintainable

before the learned ASJ. Nevertheless, an appeal under Section 11 of the POA could have been filed. In that event, the scope of the appeal would be limited to examining the validity of the order of the learned MM releasing the Appellant on probation. If Respondent No. 2 succeeded in the appeal on merits, consequential orders would have to be passed.

12. The Court is of the view that considering that the incident took place nearly two decades ago, it is in the interest of justice that the appeal filed by Respondent No. 2 should be treated as having been filed under Section 11 POA. Further, in terms of Section 11 (4) POA it was within the powers of the learned ASJ to proceed to award a sentence to the Appellant if he was of the opinion that the order of the MM granting release on probation was unsustainable in law.

Validity of the order of the MM releasing the Appellant on probation

13. The question that arises next is whether the Appellate Court, i.e. the Court of the learned ASJ, was justified in reversing the order passed by the learned MM granting the Appellant the benefit of probation. In this connection it was submitted by Mr. Rungta that given the criminal antecedents of the Appellant, there was no justification in granting him the benefit of release on probation.

14. What appears to have weighed with the learned ASJ in reversing the order of the learned MM granting the Appellant the benefit of probation was that the Appellant was a "Bad Character/history sheeteer of PS Govind Puri; that he was involved in 13 criminal cases as was observed by the High Court in Writ Petition (Crl.) No. 311 of 2011 decided on 19th October 2011; that he was involved in a case under Section 302 IPC registered at PS: Chhata, District Mathura, UP arising out of FIR No. 101 of 1993 and that he was involved in a case CC No. 27/06/2013 for the offence under Section 506 IPC which is pending in the Court of learned MM, Saket Courts.

15. The learned ASJ, however, does not appear to have gone into the exact details of the above cases. In the first place it requires to be noticed that the decision of this Court dated 19th October 2011 in Writ Petition (Crl.) No. 311 of 2001 dealt with the issue of justification for the name of the Petitioner being kept as "Bad Character in bundle B". The Petitioner had approached this Court seeking quashing of his history sheet. It was pointed out that he was not a habitual offender and had been convicted only for two offences which again did not fall within Section 47 of the Delhi Police Act. In the said order dated 19th October 2011 the Court, inter alia, noted that the Appellant was involved in 13 cases. Of the 13 cases, three viz., FIR No. 40 of 2005 registered at PS Sarita Vihar, FIR No. 102 of 2005 registered at PS Sangam Vihar and FIR No. 198 of 2001 registered at PS: OIA were shown to be pending trial. Of the above cases, the present case is FIR No. 40 of 2005. As far as the remaining 10 cases were concerned, the Petitioner was shown convicted in FIR No. 25/89 under the Forest Act and in FIR No. 909 of 2004. All the other cases noted in the above order of this Court are either ones where the Appellant was acquitted or closed as

untraced or cancelled. Therefore, of the 13 cases only two cases FIR Nos. 198 of 2001 of PS OIA and FIR No. 102 of 2005 of PS Sangam Vihar are still pending trial. The High Court in its order dated 19th October 2011 clarified that the maintenance of the history sheet in bundle B was only preventive and was in the nature of "maintenance of records of the involvement of the person with no surveillance." It is noted that in view of the orders passed by the High Court in Writ Petition (Crl.) No. 311 of 2011 the DCP South-East had already downgraded the Appellant to bundle B "in view of the fact that the Petitioner has no involvement after the year 2005."

16. In the impugned order of the learned ASJ dated 3rd May 2014 it was observed that in the case arising out of FIR No. 909 of 2004 under Sections 341, 506 and 279 IPC, no order on sentence had been passed by the learned MM as regards the offence under Section 279 IPC. The other two offences in the said FIR i.e. Section 341 and 506 IPC had been compounded. Although by a separate order the learned ASJ directed the learned MM to proceed further and pass an order on sentence, Mr. Gupta has placed before the Court a copy of the order passed by learned MM passed on 14th May 2014 stating that he had become functus officio and further orders cannot be passed. For all practical purposes that case is no longer pending and cannot be treated as a case of conviction against the Appellant. Since the offences under Sections 341/ 506 IPC in FIR No. 909 of 2004 were compounded, the effect of compounding is to treat it as an acquittal. Therefore, the learned ASJ was not justified in observing in the impugned order that he was convicted in the said case.

17. As regards the case CC No. 27/06/13 it has been mentioned in the memo of appeal before the learned ASJ by Respondent No. 2 that this was a fresh complaint filed by the brother of Respondent No. 2 under Section 506/ 34 IPC. Mr. Gupta states that the Appellant has not received summons in the said complaint yet. Mr. Rungta also is unable to state that if any summons has been issued in the said complaint.

18. As regards the involvement of the Petitioner in FIR No. 101 of 1993 registered at PS Chhata, District Mathura, UP under Section 302 IPC, Mr. Gupta has placed before the Court the copy of the closure report filed in the said case by the police in 1993 itself. It was fairly stated by Mr. Gupta that these records were obtained by the Appellant only recently and were not available when the appeal was pending before the learned ASJ. Be that as it may, since the closure report was filed way back in 1993 clearly the Appellant cannot be said to be involved in the said case.

19. Resultantly, the only conviction that the Appellant underwent prior to the case on hand was in the case under the Forest Act where he had to pay a fine. In view of the above, it cannot be said that the grant of benefit of probation by the learned MM to the Appellant was not justified.

The probation order has worked itself out

20. The very rationale of the benefit of probation is that every "sinner" is capable of being reformed and has a future. This Court called for a report of the PO to the conduct of the Appellant in the one year since the passing of the order of the learned MM. In a report sent under a cover letter dated 29th November 2014, the PO has confirmed that there has been no adverse report against the Appellant; that he has been engaged in politics since 1990; that he is working as a National Secretary of JD (U) from the Badarpur assembly constituency since 2006. As per the record of PS Govindpuri he is not involved in any other criminal case. It is thus evident that at least since 2005 (barring the complaint filed in 2013 by the brother of Respondent No. 2 under Section 506/ 34 IPC in which no summons have been issued as of date) there has been no criminal case against the Appellant. The issue of criminal antecedents has to be adjudged in the context of merely the number of cases where a person's "involvement" is shown, but the nature of the cases, the time period in which they were instituted, the logical conclusion, if any, reached in the cases and what the conduct of the person has been in the recent past. A person should not have to suffer the adverse effects of past involvements indefinitely if in fact he has been acquitted in the cases or has been able to legally erase the effects of such involvements.

21. There is another factor that requires to be considered. When the present appeal was admitted, the impugned order of the learned ASJ was stayed. As a result the order passed by the learned MM on 30th August 2013 granting benefit of probation to the Appellant continued to operate and as already noted has served its purpose. Accepting the plea of Respondent No. 2 at this stage would amount to reversing an order that has worked itself out. The clock cannot be put back.

Conclusion

22. Consequently, the Court sets aside the impugned judgment dated 23rd May 2014 and the consequential order of the same day passed by the learned ASJ in Criminal Appeal No. 56 of 2013 and restores the order dated 30th August 2013 passed by the learned MM.

23. The appeal is allowed and application is disposed of.

24. The record of the trial Court as well as the Appellate Court be sent back forthwith.