Hanumant Dass vs Vinay Kumar & Ors on 5 April, 1982

Equivalent citations: 1982 AIR 1052, 1982 SCR (3) 595, AIR 1982 SUPREME COURT 1052, 1982 (2) SCC 177, (1983) 1 APLJ 33.1, (1982) IJR 195 (SC), 1982 BBCJ 135, 1982 CRI APP R (SC) 138, 1982 UP CRIR 214, 1982 CRILR(SC MAH GUJ) 267, (1982) SC CR R 170, (1982) 1 SCJ 372, (1982) ALLCRIR 233, (1982) MAD LJ(CRI) 426, 1982 SCC (CRI) 379(2)

Author: R.B. Misra

Bench: R.B. Misra, O. Chinnappa Reddy

PETITIONER:
HANUMANT DASS

Vs.

RESPONDENT:
VINAY KUMAR & ORS.

DATE OF JUDGMENT05/04/1982

BENCH:
MISRA, R.B. (J)
BENCH:
MISRA, R.B. (J)
REDDY, O. CHINNAPPA (J)

CITATION:
1982 AIR 1052 1982 SCR (3) 595
1982 SCC (2) 177 1982 SCALE (1)310

ACT:

Party to an appeal against conviction/acquittal-Necessary party-occurrence of offence taking place in the territorial limits of one State, but the trial takes place in another State, pursuant to an order of transfer by the Supreme Court-In the appeal by the accused before the High Court, which is the necessary party respondent-Public Prosecutor of the State where the offence took place or of the State where the trial took place-Code of Criminal Procedure, 1973, sections 2(4), 24, 224, 378, 385 and 432(7), scope of.

Records, summoning of-Whether non-summoning of records vitiates the order in appeal, Code of Criminal Procedure, 1973 section 385(2), explained-Setting aside of the judgment is not possible unless the ingredients of section 465 Criminal Procedure Code are satisfied.

HEADNOTE:

Vinay Kumar, the husband of the deceased Asha and his mother Chhano Devi were charged, convicted for the offence of burning alive the deceased and sentenced to life imprisonment on a complaint by Hanumant Dass the father of the deceased and the appellant in Criminal Appeal 45 of 1982 by the Sessions Judge Gurdaspur, Punjab. The offence is alleged to have been committed within the territorial limits of the State of Himachal Pradesh, but on an application of the complainant the case was transferred by an order of the Supreme Court inasmuch as the accused were the brother-in-law and mother-in-law of a Judge of the High Court of Himachal Pradesh. In appeal by tho accused the High Court of Punjab issued, on 22-6-1981, notice for 6-7-1981 to the Advocate General of Punjab only and on that date heard the appeal and acquitted both the accused. Hence the appeal by the complainant and the special leave by the State of Himachal Pradesh.

Dismissing the appeal and the Special Leave Petition, the Court,

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HELD: 1. The charge levelled against the High Court that it was in a hot haste to decide the appeal at the earliest possible is incorrect in view of the order dated 22-6-1981 passed by the High Court of Punjab. [600 B]

2:1. Section 385 of the Code of Criminal Procedure is a mandatory provision and the requirement of the section must be satisfied. In the appeal before tho High Court State of Punjab was made a party and notice of the appeal was also given to the Advocate General of Punjab. From sections 2(4), 24, 225, 378 and 432 it is evident that there shall be a Public Prosecutor for conducting any prosecution appeal or other proceeding on behalf of the Central

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Government or State Government in the High Court. If notice has been given to the Public Prosecutor, namely, the Advocate-General of Punjab the requirement of law has been fulfilled. [601 B-C, 603 C-D]

2:2. Section 432 of the Criminal Procedure Code defines "appropriate Government" as meaning (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under any law relating to a matter to which the executive power of the Union extends, the Central Government; (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed. According to this section the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence was committed. [603 C-D]

State of Madhya Pradesh v. Ratan Sing & Ors., [1976]

Supp. S.C.R. 552, applied.

3. To contend that the High Court disposed of the appeal even without summoning the record is incorrect. No specific allegation has been made in the Special Leave Petition that the record was not summoned. The tenor of the judgment of the High Court indicates that the record must have been there before the High Court. There is copious reference to the materials on the record which could be possible only when the record was there before the court. Besides, the counsel for the appellant made a statement before the court that on the finding of fact recorded by the High Court he was entitled to an acquittal and in this view of the matter even if the record had not been summoned that would not be fatal. Further proviso to sub-section (2) of section 385 itself provides "...the court may dispose of the appeal without sending for the record," in a certain situation. The rigour of sub-section (2) of section 385 which provides that "the Appellate Court shall then send for the record of the case...." has been taken away by the proviso in a certain situation. If the appellant himself says that the appeal can be allowed on the findings recorded by the Sessions Judge, the non-summoning of the record, if it was at all so, would not be fatal. The complainant was present with his counsel, the State Advocate-General was also present. If there had been any grievance about the record, they would have raised an objection. Their non-objection on this point is also an indicator that the record was there or in any case, the summoning of the record was not thought to be necessary by the parties. [604 E-H, 605 A-B]

4. On merits also there is no case for the appellants since each and every aspect of the matter has been thoroughly discussed by the High Court which has referred to the error committed by the Sessions Judge in the approach of the case and also in making unwarranted assumptions. There is no eye witness. The fate of the case hinges upon the circumstantial evidence. The High Court has dealt with the two dying declarations, one recorded by the Doctor and the other by the Assistant Sub-Inspector. The High Court also took into consideration the oral dying declaration on which the prosecution strongly relied. But even that declaration does not implicate the accused. [605 G-H, 606 A-B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 45 of 1982.

From the Judgment and Order dated the 9th July, 1981 of the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No. 333-DB of 1981, AND S.L.P. (Crl.) No. 2948 of 1982.

R.L. Kohli and R. C. Kohli for the Appellants. T.U. Mehta and A.G. Ratnaparkhi for Respondent No. 1. N.C. Talukdar and R.N. Poddar for Respondent No. 3. N.C. Talukdar and R.N. Poddar for the Petitioner in S.L.P. (Crl.) No. 2498/81.

D. D. Sharma for the State.

The Judgment of the Court was delivered by MISRA, J. The appeal as well as the special leave petition are directed against the judgment of the High Court of Punjab and Haryana at Chandigarh dated 9th July, 1981. Criminal appeal has been filed by the complainant while the special leave petition has been filed by the State of Himachal Pradesh. Vinay Kumar and his mother Chhano Devi were convicted for the murder of Asha, the wife of Vinay Kumar by burning her alive and sentenced to life imprisonment by the learned Sessions Judge, Gurdaspur. On appeal by the accused, the High Court acquitted them by the impugned judgment.

The prosecution case set up at the trial was that the deceased Asha was married with Vinay Kumar in July, 1972. The marriage was an arranged marriage. It did not prove to be a success, the apparent cause for the failure of marriage was that Asha was only a matriculate and not cultured enough to move about in the society with the husband. To make up this deficiency the deceased again resumed her studies and started attending college at Nagrota Bhagwan. While prosecuting her studies she was rebuked and abused and sometimes even thrashed, whenever she visited the house of her-in-laws. She however, kept on suffering in the vain hope that in due course of time things might improve. There was, however, no improvement and she was fed-up with the maltreatment and cruelty meted out to her in the in-laws house. She left the matrimonial home and started living with her parents sometime in the year 1975 or early 1976.

In 1977 Vinay Kumar filed a petition in the court of the District Judge, Kangra at Dharamshala under section 13 of the Hindu Marriage Act for the dissolution of his marriage with the deceased on various grounds including one of desertion. The District Judge in the first instance tried for reconciliation between the spouse and as an interim arrangement Asha returned to her-in-laws house in June 1978 on trial basis, while divorce petition was kept pending and adjourned to July 29, 1978. As the parties did not appear in the Court on the date fixed, it was presumed that they were living happily and the proceedings were, therefore, consigned to the record.

On 5th of August, 1978 at about 11 a.m. Kanwal Nain P.W. 4, Bil Bhandur P.W. 14, employee of the Post office, which was just in front of the house of the accused at a distance of 10/12 feet, and a number of other persons saw smoke coming out of the window of the house of the accused. When Bil Bhandur and others went to the house, they found the outer door locked. There was no other means of ingress to the house. After a short while one Raj brought the key from Chhano Devi accused with which the lock was opened and entry gained into the house. Asha was found burning and after extinguishing the fire, she was removed to the local hospital.

Dr. O. P. Dutta attended her and sent an intimation of the incident to the Incharge local Police Post. He recorded the statement of Asha on the out-patient register 13x. PL. Meanwhile Kesar Singh, Assistant Sub-Inspector, arrived there an d after getting a certificate from Dr. Dutta, he also

recorded her statement Ex. PU. From Civil Hospital, Kangra Asha was removed in a truck to a Civil Hospital in Dharamshala (H.P.) where she breathed her last.

In her statements recorded by Dr. Dutta and Kesar Singh, the deceased disclosed that her clothes caught fire, while she was preparing tea. The police suspected no foul play and did not register any case. The father of the deceased Hanumant Dass, however, made a report on 7th August, 1978 and a case was registered on that basis. The accused were sent up for trial. When the case was pending in the Court of Sessions Judge, Dharamshala in Himachal Pradesh, the complainant moved an application to the Supreme Court for transfer of the case from Himachal Pradesh to some other province. The case was transferred to a Court of competent jurisdiction at Gurdaspur in Punjab. The Sessions Judge, Gurdaspur convicted both the accused under section 302 read with section 34 of the Indian Penal Code and sentenced them to life imprisonment. This conviction was based only on the circumstantial evidence. Accused went up in appeal to the High Court. The High Court in its turn set aside the order of conviction and acquitted the accused of the charge.

The complainant has filed the present appeal. Shri Kohli appearing for the complainant has strenuously contended that the appeal before the High Court has been allowed in the absence of the State of Himachal Pradesh and without any notice to that State and as such the impugned judgment of the High Court is a nullity and should be set aside on that ground alone. The accused had impleaded only the State of Punjab as a party and the High Court has issued notice to the Advocate-General of Punjab. As a second limb to this argument it has been contended by Shri Kohli that the appeal was filed in the High Court on 15th June, 1981 and while considering the application for bail on 22nd of June, 1981, posted the appeal for hearing on 6th of July, 1981 after service of notice on the Advocate-General of Punjab and the appeal was decided on 9th July, 1981 without even summoning the record. Thus the High Court was in a hot haste to dispose of the appeal even without reasonable opportunity being afforded to the counsel for the State and without impleading the appropriate State as a party to the appeal and without notice to the counsel for the State of Himachal Pradesh.

We may first deal with the criticism of the learned counsel about the undue haste in the disposal of the appeal by the High Court. It appears that Shri M.R. Mahajan, counsel for the appellants while moving the application for bail made a statement before the High Court and it is on his statement that the case was posted for hearing at the earliest possible. This will be apparent from the order dated 22.6.1981 passed by the High Court while disposing of the application for bail. The order insofar as it is material for consideration of the point reads:

> ".. Mr. Mahajan, Advocate states that on the findings of fact recorded by the learned trial Judge, the conviction of the appellants cannot be sustained. Notice for 6.7.81.
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> to the Advocate-General, Punjab. Copy of the grounds of appeal and the judgment rendered by the learned trial Judge be delivered in the office of the A. C. Punjab within two days, The case is likely to be disposed of on that date ... ... "

Therefore, the charge levelled against the High Court that it was in a hot haste to decide the appeal at the earliest possible appears to be uncalled for.

This leads us to the main contention raised by Shri Kohli that the transfer of the case from Dharamshala lying within the territorial jurisdiction of the High Court of Himachal Pradesh to Gurdaspur Lying within the jurisdiction of the Punjab and Haryana High Court, does not change the parties and the parties remain the same even after the transfer of the case from Dharamshala to Gurdaspur. In this view of the legal position, the State of Himachal Pradesh where the offence was committed was a necessary party and should have been impleaded in appeal. In the absence of the State of Himachal Pradesh as a party and in the absence of notice to the counsel for the State of Himachal Pradesh, the High Court was not justified in disposing of the appeal and its judgment is only a nullity.

This contention is based on section 385 of the Code of Criminal Procedure. Insofar as it is material for the purpose of the case it reads :

> "385(1): If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-
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> (i) to the appellant or his pleader;
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> (ii) to such officer as the State Government may appoint in this behalf;
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> (iii) if the appeal is from a judgment of conviction in case instituted upon complaint, to the complainant;
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> (iv) if the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.
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> (2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:
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> Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record. (3) .....

There is no denying the fact that section 385 of the Code is a mandatory provision and the requirement of the section must be satisfied. In the appeal before the High Court, State of Punjab was made a party and notice . Of the appeal was also given to the Advocate-General of Punjab. According to Shri Kohli this does not satisfy the requirement of law.

It would be appropriate at this stage to refer to other relevant provisions of the Code:

> Section 225 provides that-"In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor."

Section 2(4) defines public prosecutor-"Public Prosecutor means any person appointed under section 24, and includes any person acting under the direction of a public prosecutor."

Section 24 deals with "Public Prosecutors in the High Court":

"24. Public Prosecutors:-(I) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

..... Section 378 talks of an appeal in case of acquittal. Insofar as it is material it reads thus:

"378(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court, (or an order of acquittal passed by the Court of Session in revision).

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-sec. (3) to the High Court from the order of acquittal.

.....

Section 432 authorises the appropriate Government to suspend or remit sentences.

"432(1): When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. (2) Whenever an application is made to the appropriate Government for the suspension for remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion (3) . . .. (4)..... (s) (6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property, (7) In this section and in section 433,

the expression "appropriate Government" means-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-

section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

From the various provisions extracted above it is evident that there shall be a Public Prosecutor for conducting any prosecution appeal or other proceeding on behalf of the Central Government or State . Government in the High Court. If notice has been given to the Public Prosecutor viz. the Advocate-General of Punjab the requirement of law to our mind has been fulfilled.

Shri Kohli, however, contends that occurrence in the instant case took place within the territorial limits of Himachal Pradesh. That State, therefore, will continue to be a necessary party in the appeal irrespective of the fact that the appeal was filed in the Punjab High Court.

Section 432(7) extracted above defines "appropriate Government". "Appropriate Government" means-(a) in cases where the sentence is for an offence against, or the order referred to in subsection (6) is passed under any law relating to a matter to which the executive power of the Union extends, the Central Government; (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

According to this section the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence was committed. A somewhat similar question came up for consideration in the State of Madhya Pradesh v. Ratan Singh & Ors.,(1) where the respondent was convicted and sentenced to imprisonment for life by a court in the State of Madhya Pradesh. At his request he was transferred o a Jail in the State H of Punjab, to which State he belonged. He applied to the Government of Punjab that under the Punjab Jail Manual he is entitled to be released since he had completed more than 20 years of imprisonment. The application was sent to the Government of Madhya Pradesh, which rejected it. In a Writ petition filed by him the High Court of Punjab and Haryana held that the State of Punjab was the appropriate authority to release him and directed the State of Punjab to consider the matter. This Court in appeal observed "a perusal of this provision clearly reveals that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of sec. 401 of the Code of Criminal Procedure. Thus since the prisoner in The instant case, was tried, convicted and sentenced in the State of Madhya Pradesh, the State of Madhya Pradesh would be the appropriate Government. to exercise the discretion for remission of the sentence under sec. 401(1) of the Code of Criminal Procedure.... ." That was a case based on section 401 of the old Criminal Procedure Code, but the Code of Criminal Procedure, 1973 has put the matter completely beyond any controversy and

reiterated the provisions of section 402(3) in sub-section (7) of section 432, Lastly it was contended that the appeal was disposed of by the High Court even without summoning the record. There is no warrant for this assumption. No specific allegation has been made in the special leave petition that the record was not summoned. We have perused the Judgment of the High Court and the tenor of the judgment indicates that the record must have been there before the court. There is copious reference to the materials on the record which could be possible only when the record was there before the court. Besides, . the counsel for the appellant made a statement before the court that on the finding of fact recorded by the High Court he was entitled to an acquittal and in this view of the matter even if the record had not been summoned (for which there is no basis) that would not be fatal, Proviso to sub section (2) of section 385 itself provides "...the court may dispose of the appeal without sending for the record." in a certain situation. The rigour of subsection (2) of sec. 385, which provides that "the Appellate Court shall then send for the record of the case..." has been taken away by the proviso in a certain situation. If the appellant himself says that the appeal can be allowed on the findings recorded by the Sessions Judge, the non-summoning of the record, if it was at all so, would not to our mind be fatal. The complainant was present with his counsel, the State Advocate-General was also present. If there had been any grievance about the record, they would have raised an objection. Their non-objection on this point is also an indicator that the record was there or in any case, the summoning of the record was not thought to be necessary by the parties. B Assuming for the sake of argument, that there were certain irregularities it the procedure the judgment of the High Court could not be set aside unless it was shown by the appellant that there has been failure of justice, as will be evident from section 465 of the Criminal Procedure Code which reads:

> "465. Finding or sentence when reversible by reason of __ error, omission or irregularity-
>
> (l) Subject to the provisions herein before contained . no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

We have perused the judgment of the High Court which was placed before us in full. It shows that each and every aspect of the matter has been thoroughly discussed and the High Court has also referred to the error committed by the Sessions Judge in the approach of the case and also in making unwarranted assumptions.

on merits we fully agree with the appraisal of the evidence made by the High Court. It is not necessary to repeat the same over again. There is no eye witness. The fate of the case hinges upon the circumstantial evidence. The High Court has dealt with the two dying declarations, one recorded by the Doctor and the other by the Assistant Sub-Inspector. The High Court also took into consideration the oral dying declaration on which the prosecution strongly relied. But even that declaration does not implicate the accused. The reason given by the High Court for acquittal in our opinion is cogent and plausible.

For the foregoing discussion, the criminal appeal and the special leave petition must fail and they are accordingly dismissed.

S.R. Appeal & Petition dismissed