Harnam Singh vs The State Of Himachal Pradesh on 21 November, 1974

Equivalent citations: 1975 AIR 236, 1975 SCR (2) 823, AIR 1975 SUPREME COURT 236, (1975) 3 SCC 343, 1974 SCC(CRI) 951, 1975 MADLJ(CRI) 493, 1975 2 SCR 823, 1975 2 SCJ 226, 1975 ALLCRIC 159, ILR (1974) HIM PRA 1078

Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, P.N. Bhagwati

PETITIONER:
HARNAM SINGH

Vs.

RESPONDENT:
THE STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT21/11/1974

BENCH:
CHANDRACHUD, Y.V.
BENCH:
CHANDRACHUD, Y.V.
BHAGWATI, P.N.

CITATION:
1975 AIR 236 1975 SCR (2) 823
1975 SCC (3) 343

ACT:
Code of Criminal Procedure, 1898, Section 431-"every other appeal", meaning of-Abatement of appeals on death of accused-Provision for continuance of appeal from sentence of fine after death of accused-Composite order of sentence combining substantive imprisonment with fine, if appeal from sentence of fine.
Constitution of India, 1950, Article 136-Criminal Appeal-widow of the deceased appellant, if can be brought on record as legal representative of deceased appellant.

HEADNOTE:
In September 1967, the appellant was working as a Patwari in Halqua Pali. On the 19th of that month one N asked for

copies of the revenue record. The appellant said that the copies will Dot be supplied unless a hush-payment of Rs. 30/- was made. N borrowed Rs. 30/- from a friend and on the 20th he lodged his complaint with the Anti-corruption Department. Sub-Inspector K. obtained permission from a Mandi Magistrate to investigate the offence and laid trap. The raiding party went to the appellant's office where the complainant N is alleged to have given the marked currency notes of Rs. 30/- to the appellant. 'The appellant was prosecuted before the Special Judge who rejected his defence that the sum of Rs. 30/- was not found from his person but was found from a residential room where it was planted by the complainant. The Special Judge convicted the appellant under section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act as also under sec. 161 of the Penal Code, and sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rs. 300/-. The High Court to which he preferred an appeal, confirmed the conviction but reduced the substantive sentence to one year. This appeal was by special leave granted under Article 136 of the Constitution. During the pendency of this appeal the appellant died and his widow was brought on the record as his legal representative.

It was contended that (i) the substantive sentence of imprisonment imposed on the appellant came to an end with his death and therefore the appeal in regard to that sentence stands abated; (ii) So far as the sentence of fine is concerned, since the deceased appellant was not sentenced to pay a fine only out was punished with a composite sentence of imprisonment and fine, the appeal would abate as regards the fine also and (iii) at any rate, even if the sentence of fine could be set aside. the order of conviction and substantive sentence must remain.

Allowing the appeal,

HELD (i) and (ii) Chapter XXXI of the Code of Criminal Procedure, 1898, called "of Appeals" contains provisions governing appeals. Section 431 of the Code inter alia provides that every appeal under section 411 A, sub-sec. (2), or section 417 shall finally, abate on the death of the accused and every other appeal under the Chapter (except an appeal from a sentence of fine) shall finally abate an the death of the appellant. By "every other appeal, is meant an appeal other than one against an order of acquittal that is to say, an appeal against an order of conviction. It is true that an appeal from a composite order of sentence is ordinarily directed against both the substantive imprisonment and the fine. But, such an appeal does not for that reason cease to be an appeal from a sentence of fine. It is something more not less than an appeal from a sentence of fine only and it is significant that the parenthetical clause of section 431 does not contain the word "only". To limit the operation of the exception contained in that clause so as to take away from its purview appeals directed

both against imprisonment and fine is to read into the clause
824
the word "only" which is not there and which by no technique of interpretation may be read there. All that is necessary is that a sentence of fine should have been imposed on the accused and the appeal filed by him should involve the consideration of the validity of that sentence. The deceased appellant's widow who was brought on the record as his legal representative is, therefore, entitled to prosecute the appeal, because the sentence of fine directly affects the property which would devolve on her on the death of her husband. [826C-827F]

(iii) Tee appellate court, while dealing with the validity of the sentence of fine has to determine the primary question whether the conviction itself is sustainable. Once the appellate court reaches the conclusion that the conviction is unsustainable, it must set aside the conviction and the sentence or sentences, following upon the order of conviction; it cannot merely set aside the sentence of fine and permit the conviction and the substantive sentence to remain. If this be the true interpretation of section 431. there is no reason why the same principle ought not to be extended to criminal appeal filed in the Supreme Court under Art. 136 of the Constitution. [828B-F]

Bondada Gajapathy Rao v. State of Andhra Pradesh [1964] 7 S.C.R. 251, distinguished Vidya Devi v. State, A.I.R. 1957 All,. 20 and V. Govindaraja & Ors. v. State of Mysore AIR 1962 Mysore 275 not approved.

It is impossible to uphold the judgment of the High Court on merits. The High Court held that. in spite of the fact that two witnesses had turned hostile and had no regard for truth, their evidence "firmly corroborated the evidence of the aforesaid partisan witnesses". It is extremely difficult to appreciate how the evidence of the hostile witnesses could corroborate the evidence of the partisan witnesses that the accused accepted the bribe. What the High Court had to find was whether on the evidence it war, established that the accused had accepted the bribe from the complainant. There are a number of circumstances which would render it unsafe to accept the prosecution evidence. Having taken the view that the state of affairs disclosed by the manner of investigation was not commendable and that there was "sufficient misbehaviour" on the part of the prosecution agency, the learned Judge should have approached the evidence with greater caution. His failure to do so has resulted in, gross injustice, for, the evidence on which the conviction is based is wholly unworthy of acceptance. [829G; 830D; 831D-E].

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 68 of 1971.

Appeal by Special leave from the Judgment & Order dated the 18th December 1969/7th January, 1970 of the Delhi High Court (Himachal Bench) in Crl. A. No. 20 of 1969.

S. B. Wad, for the appellant.

Vikram Chand Mahajan and R. N. Sachthey, for the respondent. The Judgment of the Court was delivered by CHANDRACHUD, J.-This appeal by special leave is directed against a judgment dated January 7, 1970 of the Delhi High Court (Himachal Bench, Simla). This appellant Harnam Singh died during the pendency of the appeal, this Court by an order dated February 26, 1972 allowed his widow to be substituted in his place as his legal representative. There is nothing new in the story of bribe taking which form the theme of this appeal, except perhaps the way the High Court bear the story and drew a moral. In September, 1967 Harnam Singh was working as a Patwari in Halqa Pali. On the 19th of that mont Nitya Nand asked for copies of the revenue record. Harnam Singh said that the copies will not be, supplied unless a hush-payment of Rs. 30 was made. Nitya Nand borrowed Rs. 30 from a friend Chet Ram and on the 20th he lodged his complaint with the Anti-Corruption-Department. Sub Inspector Kewal Ram obtained permission from a Mandi Magistrate to investigate the offence and laid the trap. The raiding party went to Harnam Singh's office where Nitya Nand is alleged to have given the marked currency notes of Rs. 30 to Harnam Singh.

The Special Judge Mandi, Kulu and Lahaul Spiti Districts, rejected the defence of Harnam Singh that the sum of Rs. 30 was not found from his person but was found from a residential room where it was planted by the complainant Nitya Nand. The learned Judge convicted Harnam Singh under section 5)1)(d) read with section 5(2) of the Prevention of Corruption Act as also under section 161 of-the Penal Code, and sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rs. 300. The High Court of Delhi confirmed the, conviction but reduced the substantive sentence to one year.

Learned counsel for the State of Himachal Pradesh, who are respondents to the appeal, has raised a preliminary objection to the right of the appellant's widow to prosecute the appeal. He contends that the substantive sentence of imprisonment imposed on the appellant Harnam Singh came to an end with his death and therefore the appeal in regard to that sentence stands abated. As regards the sentence of fine, it is contended that since the deceased appellant was not sentenced to pay a fine only but was punished with a composite sentence of imprisonment and fine, the appeal would abate as regards the sentence of fine also. According to the learned counsel this Court may, at the highest, set aside the sentence of fine if it finds that the appellant need not have been asked to pay a fine. But the order of conviction and the substantive sentence must remain and the legality or propriety of that order cannot any longer be questioned in view of the death of the appellant. On the other hand, Mr. Wad who has usefully assisted us as an amicus curiae contends that section 431 of the Code of Criminal Procedure, 1898 which deals with Abatement of "Appeals" has no application to appeals

filed in the Supreme Court; that such appeals ought in the matter of abatement be governed by principles of justice and equity; that even on the assumption that section 431 applies, the appellant having been sentenced to pay a fine, the appeal cannot abate: and that if the sentence of fine cannot be sustained on the ground that the conviction itself is bad, the order of conviction must also go.

These contentions require an examination of section 431 of the Code which reads thus "431. Every appeal under section 411A, sub- section (2), or section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."

The appeal before us was filed by special leave granted under Article 136 of the Constitution and is neither under section 411A(2) nor under section 417 nor under any other provision of Chapter XXXI of the Code. Plainly therefore, section 431 has no application, and the question whether the appeal abated on the death of the appellant is not governed strictly by the terms of that section. But, in the in- terests of uniformity, there is no valid reason for applying to appeals under Article 136 a set of rules different from those which government appeals under the Code in the matter of abatement. It is therefore necessary to find the true meaning and scope of the provision contained in section 431. Chapter XXXI of the Code of 1898, called "of Appeals" con- tains provisions governing appeals. The Chapter opens with section 404 which provides that no appeal shall he 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 and ends with section 431 which. deals with abatement of appeals. Section 411A(2) provides for appeals to the High Court from orders of acquittal passed by the High Court in the exercise of its original criminal jurisdiction. Section 417 deals with appeals to the High Court from original or appellate orders of acquittal passed by Courts other than a High Court. By section 43 1, appeals against acquittal filed under section 41 1 A (2) of section 417 finally abate on the death of the accused. Dead persons are beyond the processes of human tribunal and recognising this, the first limb of section 431 provides that appeals against acquittals finally abate on the death of the accused. Where a respondent who has been acquitted by the lower court dies, there is no one to answer the charge of criminality, no one to defend the appeal and no one to receive the sentence. It is of the essence of criminal trials that excepting cases like the release of offenders on probation, the sentence must follow upon a conviction. Section 258(2), section 306(2) and section 309(2) of the Code provide, to the extent material, that where the Magistrate or the Sessions Judge finds the accused guilty and convicts him he shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on the accused according to law. Every other appeal under Chapter XXXI, except an appeal from a sentence of fine, finally abates on the death of the appellant. By "every other appeal" is meant an appeal other than one against an order of acquittal, that is to say, an appeal against an order of conviction. Every-appeal against conviction therefore abates on the death of the accused except an appeal from a sentence. of fine. An appeal from a sentence of fine is excepted from the all prevasive rule of abatement of criminal appeals for the reason that the fine constitutes a liability on the estate of the deceased and the legal representatives on whom the estate devolves are entitled to ward off that liability. By section 70 of the Penal Code the fine can be levied at any time within six years after the passing of the sentence and if the offender has been sentenced for a longer period than six years, then at any time previous to the expiration of that period; "and the death of the offender does not discharge from the liability any property which would, after his death,

be legally liable for his debts". The fact that the offender has served the sentence in default of payment of fine is not a complete answer to the right of the Government to realise the fine because under the proviso to section 386(1) (b) of the Code the court can, for, special reasons to be recorded in writing, issue a warrant for realising the fine even if the offender has undergone the whole of the imprisonment in default of payment of fine. The sentence of fine thus remains outstanding though the right to recover the fine is circumscribed by a sort of a period of limitation prescribed by section 70, Penal Code.

The narrow question which then requires to be considered is whether an appeal from a composite order of sentence combining the substantive imprisonment with fine is for the purposes of section not an appeal from a sentence of fine. It is true that an appeal from a composite order of sentence is ordinarily directed against both the, substantive imprisonment and the fine. But, such an appeal does not for that reason cease to be an appeal from a sentence of fine. It is something more not less than an appeal from a sentence of fine only and it is significant that the parenthetical clause of section 431 does not contain the word "only". To limit the operation of the exception contained in that clause so as to take away from its purview. appeals directed both against imprisonment and fine is to read into the clause the word "only" which is not there and which, by no technique of interpretation may be read there. The plain meaning of section 431 is that every criminal appeal abates on the death of the accused "except an appeal from a sentence of fine". The section for its application requires that the appeal must be directed to the sentence of fine and that it must, be directed to that sentence only. If by the judgment under appeal a sentence of fine is imposed either singularly or in conjunction with a sentence of imprisonment, the appeal against conviction would be an appeal from a sentence of fine within the meaning of section

431. All that is necessary is that a sentence of fine should have been imposed on the accused and the appeal filed by him should involve the consideration of the validity of that sentence.

It is difficult to discern any principle behind the contrary view. The reason of the rule contained in the exception is that a sentence of fine operates directly against the estate of the deceased and therefore the legal representatives are entitled to clear the estate from the liability Whether or not the sentence of fine is combined with any other sentence can make no difference to the application of the principle. The appeal filed by the accused Harnam Singh in this Court was thus an appeal from a sentence of fine, involving as it did the consideration as regards the legality or propriety of that sentence. The deceased appellant widow who has been brought on the record as his legal representative is accordingly entitled to prosecute the appeal. Counsel for the State Government thought it anomalous that whereas after the death of an appellant the court would have no power to deal with an appeal against an order by which a substantive sentence only is imposed, the court should have the power to set aside the conviction and the sentence of imprisonment even after the death of an appellant merely because a sentence of fine is also imposed on him. The answer to this difficulty is that by section 431 an express exception is carved out in favour of appeals from a sentence of fine. Such appeals are saved from the general rule contained in section 431 that all criminal appeals abate on the death of the accused. In an appeal from a judgment imposing a sentence of fine either by itself or long with a sentence of imprisonment, the legality or propriety of the sentence of fine necessarily involves an examination of the validity of the order of conviction.

The sentence follows upon the conviction and the validity of the two is inter- connected. The appellate court, while dealing with the validity of the sentence of fine, has to determine the primary question whether the conviction itself is sustainable. If it holds that the conviction is un-sustainable, it must set aside the conviction and the sentence or sentences following upon the order of conviction; it cannot merely set aside the sentence of fine and permit the conviction and the substantive sentence to remain. The sentence of the fine becomes illegal if the conviction is wrong. If the conviction is wrong, no sentence at all can be imposed on the accused. Therefore, once the appellate court reaches the conclusion that the conviction is unwarranted, that finding must be given its full effect by setting aside the conviction and all such sentences as are founded on the order of conviction. We find it impossible to agree with the submission of the State Government that even after finding that the conviction is illegal, the court must only set aside the sentence of fine permitting the illegal conviction and the substantive sentence founded upon it to remain. That would be truly unjust and anomalous.

If this be the true interpretation of section 431, there is no reason why the same principle ought not to be extended to criminal appeals filed in this Court under Article 136 of the Constitution. Accordingly the widow of the deceased appellant who has been brought on the record of the appeal as his legal representative is entitled to continue the appeal as the sentence' of fine directly affects the property which would devolve on her on the death of her husband.

In Gondada Gajapathy Rao v. State of Andhra Pradesh(), the appellant was convicted by the High Court under section 302, Penal Code and was sentenced to imprisonment for life. He filed an appeal in this Court by special leave but died during the pendency of the appeal. His sons and daughter applied for substitution as his legal representatives contending that the conviction of their father had resulted in his removal from Government service and if the conviction were set aside the estate will be able to claim the arrears of salary from the date of conviction till the date (if his death. This Court declined to permit the legal representatives to continue the appeal on the ground that the claim on the strength of which they sought permission to continue the appeal was too remote. This decision is, distinguishable (1) [1964] 7 S.C.R. 251.

as the appeal was not from a sentence of fine and as the interest of the legal representatives was held to be contingent and not direct. Even if the conviction were set aside, the legal representatives would not have automatically got the arrears of salary due to their father. In the, view we have taken the decisions of the Allahabad High Court in Vidya Devi vs.' State(1) and of the Mysore High Court in V. Govindrajalu & Ors. VS. State of Mysore(2) must be held to be wrong in so far as the point of abatement is concerned. The Allahabad High Court took the view that an appeal from a composite order of sentence would abate as regards the sentence of imprisonment but may be continued by the legal representatives as regards the sentence of fine. This bisection of the appeal, as pointed out by us, is not justified by the language of section 431 and would lead to unjust and anomalous results. The Mysore decision assumed without any discussion that an appeal from a composite order of sentence abates partially. The High Court having held that the conviction of accused No. 3 in that case, who had died during the pendency of the appeal, was justified the question did not arise in sharp focus whether if the conviction was bad the order of conviction and the sentence of imprisonment could be allowed to remain. An amendment to section 431 was suggested in the Bill

introduced in the Parliament by a private Member, Shri K. V. Raghunatha Reddy. The main object of the amendment was to provide a machinery whereby the children or the members of the family of a convicted person who dies during the appeal could challenge the conviction and get rid of the odium attaching to the family as a result of the conviction. The Law Commission of India by its Forty-First Report (Sep- tember, 1969, Vol. 1, pp. 279 to 281) found the proposed amendment " eminently sound" and recommended that the amendment be made with certain modifications. Accordingly section 394 of the Code of Criminal Procedure, 1973 has made a provision that "where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply 'to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate", 'near relative means a parent,, spouse, lineal descendant, brother or sister.

Turning to the merits of the case we find it impossible to uphold the judgment of the High Court. The main witnesses examined by the prosecution in support of its case the complainant Nitya Nand the Investigating Officer, Kewal Ram, the Head Constable Jai Ram and the two Panchas Sital Prasad and Lok Bandhu. At the outset of its judgment of two and a half pages the High Court observes "I am firm in my finding that PW-1 the complainant, Shri Kewal Ram, the Investigating Officer, and Jai Ram, the Head-Constable, are partisan witnesses. The state of affairs disclosed by the manner of the investigation in this case is not very commendable.,, (1) A.I.R. 1957 All. 20.

(2) A.I.R. 1962 Mysore 275.

The Panchas Sital Prasad and Lok Bandhu turned hostile and their evidence could not be pressed in aid by the. prosecution. The High Court, however, held that in spite of the fact that these two witnesses had turned hostile and had no regard for truth, their evidence "firmly corroborated the evidence of the aforestated partisan witnesses". We find it extremely difficult to appreciate how the evidence of these hostile witnesses could corroborate the evidence of the partisan witnesses that the accused accepted the bribe. The corroboration which the High Court seems to have been impressed with is, as is stated by the High Court itself, that when the preliminary Panchnama wig prepared the Panchas were present, that the three marked currency notes were supplied by the complainant Nitya Nand and that the number of those notes were noted in the preliminary Panchnama. What the High Court had to find was whether on the evidence it was established that the accused had accepted the bribe from the complainant. Unfortunately' the High Court has not discussed the various aspects of the evidence which, in our opinion, is wholly unsatisfactory.

There are a large number of circumstances which would render it unsafe to accept the prosecution evidence. The Investigating Officer, Kewal Ram, took an almost unholy interest in the case. The complaint which Nitya Nand is alleged to have made to the Anti Corruption Department was written by Kewal Ram in his own hand. Kewal Ram then obtained permission from the Magistrate to investigate the case by misleading the, Magistrate. Under section 5 A of the Prevention of Corruption Act the particular offence could not have been investigated by a police officer below the rank of, a Deputy Superintendent of Police without an order of the Magistrate of the First Class. In his application for permission to investigate the offence Kewal Ram stated that there was no

gazetted police officer in the unit and therefore he may be allowed to undertake the investigation. The evidence shows that the immediate superior of Kewal Ram, Inspector Amar Singh, was at the relevant time in charge of the Anti-Corruption unit functioning at Mandi. Kewal Ram obtained the permission to investigate the offence without disclosing this fact to the Magistrate. The two Panchnamas neither mention the time when they were made nor the place where they were made. The usual precaution of applying anthracene powder to the marked notes was not taken. The Panchas and the Police officers took their position at a spot from which they could neither see nor hear what was happening in the office of the accused. The two Panchas, who ultimately turned hostile, were previously known to the complainant Nitya Nand. Head Constable Jai Ram procured an affidavit of the Panch Sital Prasad in an unsuccessful attempt to bind him to the Statements contained in the Panchnama. Above all there is a serious discrepancy in the evidence as to whether the marked notes were found in a jacket worn by the accused or the pocket of his shirt.

The accused examined himself as a witness in support of his own case but the High Court has not even referred to his evidence.

Considering the broad probabilities of the case the evidence of the accused ought to be preferred to that of the witnesses. examined by the prosecution. Nitya Nand planted the amount in a part of the residential house of the accused and made a pretence of having given it to the accused. In the concluding portion of its judgment the High Court observes :

> "I, however, find that there has been sufficient mis- behaviour on the part of the prosecution agency in this case. I cannot understand how an affidavit was obtained from PW-1. No doubt the witness resiled while he was in the witness-box from the statement made to the police and explained how the affidavit had been obtained from him but then the fact remains that Shri Jai Ram who was having no authority whatsoever took Shri Sital Parshad before a Magistrate and obtained an affidavit. That circumstance by itself would not have been a mitigating circumstance but Harnam Singh is losing the service for ever and will provide a sound example to those working in his situation that they, can suffer in the same way. His losing of service is a mitigating circumstance."

Having taken the view that the state of affairs disclosed by the manner of investigation was not commendable and that there was sufficient misbehaviour on the part of the prosecution agency, the learned Judge should have approached the evidence with greater caution. His failure to do so has resulted in gross injustice for, we find that the evidence on which the conviction is based is wholly unworthy of acceptance.

Learned counsel appearing for the, appellant argued that the violation of section 5A of the Prevention of Corruption Act has caused prejudice to the accused and has resulted in miscarriage of justice. Were it necessary we would have upheld this contention because the order giving permission to Kewal Ram to investigate the offence gives no reasons and the illegality committed has resulted in a miscarriage of justice. Kewal Ram misled the Magistrate into granting the permission and he had himself more than a personal interest in the case which he sought permission to investigate. It is,

however, unnecessary to pursue this point as it is impossible to uphold the conviction on merits. In, the result we allow the appeal and set aside the order of conviction, the substantive sentence as also the sentence of fine. Fine, if paid, shall be refunded to the widow of the deceased appellant, who has prosecuted the appeal.

V.M.K.. Appeal allowed.