Narayan Swami vs State Of Maharashtra on 26 October, 1967

Equivalent citations: 1968 AIR 609, 1968 SCR (2) 88, AIR 1968 SUPREME COURT 609, 1967 2 SCWR 816, 1968 2 SCR 88, 1968 MADLJ(CRI) 385, 1968 2 SCJ 179, 1968 ALLCRIR 232, 1968 MAH LJ 172, 1968 MPLJ 90, 1968 SCD 675

Author: C.A. Vaidyialingam

Bench: C.A. Vaidyialingam, Vishishtha Bhargava

PETITIONER:
NARAYAN SWAMI

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT:
26/10/1967

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
BHARGAVA, VISHISHTHA

CITATION:
1968 AIR 609 1968 SCR (2) 88
CITATOR INFO :
E 1970 SC 997 (8)
R 1970 SC1033 (3)
F 1973 SC 278 (3)
R 1973 SC2187 (8)

ACT:
Practice--High Court Criminal appeal raising substantial and important questions-Summary dismissal by High Court --If justified.

HEADNOTE:
During the trial for an offence of dacoity one of the witnesses gave false evidence, and stated, on further examination, that he did so at the instance of the Sub-inspector who investigated the case. The Court gave notice to the Sub-inspector to show cause why a complaint should not be laid against him for offences under ss. 195, 196 and

205 I.P.C. and he appeared and showed cause. After the trial, and at the time of delivering judgment in the dacoity case the Court found that the witness had intentionally given false evidence and that the Sub-inspcctor had intentionally fabricated false evidence, and thereafter filed a complaint against them before the Joint Magistrate. They were committed to the Sessions Court to take their trial for offences under ss. 195, 196 and 34 I.P.C. as first and second accused respectively. The Sessions Judge found them guilty. The Sub-inspector (second accused) appealed to the High Court and contended that : (1) the Sessions Judge had committed a gross illegality in relying as against the second accused, upon the evidence of the first accused as a witness in the earlier dacoity case, and the statement of the first accused under s. 342 Cr. P.C. before the Sessions Judge; and (2) the show cause notice was not sufficient com-pliance with the provisions of s. 479A, Cr. P.C. as the notice should have been given after the judgment in the dacoity case. The High Court dismissed the appeal summarily in one word 'dismissed', without discussing the questions of law and without considering whether there was ,.sufficient other evidence to convict the appellant.

In appeal by the Sub-inspector to this Court,

HELD : The appeal before the High Court, was an arguable one, and it also raised substantial and important questions for consideration by the High Court. The High Court was therefore not justified in dismissing the appeal summarily. [94C]

Mushtak Hussein v. State of Bombay. [1953] S.C.R. 809 Shreekantiah Ramyayya Munipalli v. state of Bombay [1955] 1 S.C.R. 1177 and Chittaranjan Das v. State of West Bengal [1964] 3 S.C.R. 237 followed.

JUDGMENT:

CRIMINAL AAPPELLATE JURISDICTION: Criminal Appeal No.165 of 1967.

Appeal by special leave from the order dated April 27, 1967 of the Bombay High Court, Nagpur Bench in Criminal Appeal No. 74 of 1967.

W. S. Barlingay and A. G. Ranaparkhi, for the appellant. H. R. Khanna and S. P. Nayar, for the respondent.

The Judgment of the Court was delivered by Vaidialingam, J. The appellant, who was the second accused, in Sessions Case No. 9 of 1967, and accused No. 1, were found guilty, under s. 195 and s. 196 read with S. 34, I.P.C. and each of them has been convicted and sentenced to undergo three years' rigorous imprisonment, for these offences and the sentences have been directed to run concurrently. The case of the first accused, is not before us, in these proceedings.

The appellant challenged his conviction and sentence, passed against him, before the High Court of Bombay, in Criminal Appeal No. 74 of 1967. A Division Bench of the High Court has, by its order dated April 27, 1967, summarily dismissed the appeal, in one word 'dismissed'. The appellant has come up, to this Court, by special leave. But this Court, by its order dated September 7, 1967, has granted special leave, limited to the question as,to whether the High Court was justified in dismissing the appeal, summarily. That is the only point, that arises for consideration, in this appeal. It is necessary, to set out briefly, the circumstances under which the appellant, who was, a police Sub-Inspector, along with one Dilawar, who was accused No. 1, came to be charged- sheeted and tried, in Sessions Case No. 9 of 1967. In connection with a dacoity, which is alleged to have taken place, on July 18, 1965, when the Bombay-Howrah Mail was stopped, at the outer signal of Nagpur Railway Station, one Ambadas and Deorao, and certain others, were prosecuted before the Additional Sessions Judge, Nagpur, in Sessions Case No. 8 of 1966. In that trial, the prosecution had to prove certain recoveries made, on the basis of three memos, which have been marked, in the present Sessions Trial, as Exhibits 7, 8 and 14. Those memos had been attested by two Panch witnesses, Pochanna and Abdul Gani. Pochanna turned hostile and, therefore, the prosecution tried to establish the recoveries made, under these memos, by the other Panch witness. Abdul Gani. The first accused, in the present Sessions trial, gave evidence, on June 10, 1966, in Sessions Case No. 8 of 1966, that he is Abdul Gani and that he has attested the recovery memos. The appellant, before us, was examined in that trial, on June 11, 1966, and he has stated that the witness, who has spoken to the recovery memos, was Abdul Gani and that he has attested the recovery memos; but, later on, the accused in the dacoity case, appear to have entertained a suspicion that the first accused, in these proceedings, who claim to be Abdul Gani and spoke to having attested the recovery memos, is not the real Abdul Gani, but Dilawar. This suspicion was brought to the notice of the Sessions Judge, trying the dacoity case, on June 14, 1966. The Sessions Judge, Sri Waikar, caused the present first accused, to be L10Sup.CI/68-7 brought before him and further examined him, in Sessions Case No. 8 of 1966. The witness appears to have stated that he was not Abdul Gani, but really Dilwar, and that he had come to the Court, on June 10, 1966, and given evidence, as Abdul Gani, on the compulsion and threat of the present appellant.

On the same day, i.e., June 14, 1966, Mr. Waikar issued a notice to the appellant, to show cause why a complain+ should not be laid against him, for offences under ss. 195, 196, and 205, I.P.C. By the said notice, the appellant was directed to appear before the Court, on June 16, 1966. The appellant appeared and pleaded, on June 16, 1966, that he had not committed any offence and that he bona fide believed that the present 1st accused was Abdul Gani, and that he had never compelled one Dilawar to appear before the Court and give evidence, as Abdul Gani The,- appellant was further examined, in the dacoity case, on Juno 17, 1966, and he was also cross-examined, by the accused, in the dacoity case, on June 22, 1966, the teamed Sessions Judge, Nagpur, ac- quitted all the accused, in the dacoity case. In the said judgment, the learned Sessions Judge has stated that the present accused No. 1, intentionally gave false evidence, and the appellant intentionally fabricated false evidence with the intent to procure conviction of the accused, in the dacoity case, and that it was highly expedient, in the interest of justice and in the interest of eradication of the evil of perjury and the fabrication of false evidence, that both of them should be prosecuted. Thereupon, the learned Sessions Judge filed the complaint, against the appellant and Dilawar, on July 8, 19669 in the, Court of the Joint Magistrate, First Class, IV Court, Nagpur. The Joint Magistrate, by his order dated

January 27, 1967, held that a prima facie case, against both the accused, under ss. 195 and 196 read with s. 34, I.P.C., has been made out; and, accordingly, after framing charges, he committed them to the Sessions Court, to face trial. The learned Sessions Judge, Nagpur, by his judgment, dated March 31, 1967, has found each of the accused, guilty under S. 195 and s. 196 read with s. 34, I.P.C., and sentenced them, as mentioned earlier.

In view of the, fact that special leave has been limited to the question, as to, whether the, High Court was justified, in dismissing the appeal, summarily, and, as we are satisfied, after hearing arguments, on behalf of the appellant, and the State, that the appeal will have to be remanded, for fresh consideration, by the High Court, we do not propose to deal with the matter very elaborately. We will only advert to some of the material circumstances, that have been placed, before us, by the learned counsel, for the appellant, to hold that this was certainly not a case in which the, High Court was justified in dismissing the appeal, summarily.

On behalf of the appellant, learned counsel, Dr. Barlingay. raised two contentions: (i) that the learned Sessions Judge, in convicting the appellant, has relied, mainly, on the evidence, given by Dilawar, on June 14, 1966, in Sessions Trial No. 8 of 1966, and on the statements, made by Dilawar, as first accused, when he was examined, under s. 342, Cr.P.C., in the present Sessions Trial; and (ii) that the provisions of s. 479A, Cr.P.C., have not been complied with, when Mr. Waikar filed the complaint, as against the appellant, on July 8, 1966.

Mr. H. R. Khanna, learned counsel, appearing for the State of Maharashtra, on the other hand, submitted that the learned Sessions Judge has considered the question of non- compliance with the provisions of s. 479A, Cr.P.C., and he has rejected the appellant's contention, in that regard. Counsel also pointed out that, apart from the evidence of Dilawar, in Sessions Case No. 8 of 1966, and his answers, given as co-accused, in the present Sessions Case, there is, on record, other evidence, which have also been taken into account, by the learned Sessions Judge, for convicting the appellant. When the High Court dismissed the appeal, though summarily, it must be presumed that the High Court has agreed with the views, expressed by the learned Sessions Judge, in the present judgment. Therefore, we understood counsel to urge that the High Court was perfectly justified, in dismissing the appeal, summarily.

There is no controversy, that the appellant, who has been convicted, on trial, by the Sessions Judge, had a right of appeal, to the High Court, under s. 410, Cr-P.C. The appellant was also entitled, under s. 418 Cr.P.C., to agitate, in his appeal, before the High Court, findings of fact, recorded against him, as also questions of law, available to him. No doubt, under S. 421 Cr.P.C., the Appellate Court may dismiss an appeal, summarily, if, on a perusal of the petition of appeal, and a copy of the judg- ment appealed from, it considers that there is no sufficient ground for interference. This section, has come up for consideration, before this Court, in Mushtak Hussein v. The State of Bombay(1). This Court has held, therein, that in a case, which, prima facie, raises no arguable issue, a summary dismissal of the appeal, may be justified, but, in arguable cases, a summary rejection order must give some indication of the views of the High Court, on the point,, raised. Again, in a case, where the High Court summarily dismissed an appeal, in one word 'dismissed', this Court, in Shreekantiah Ramayya Munipalli V. The State of Bombay(1) (1) [1953] S.C. R. 8 19.

(2) [1955] 1 S. C. R. 1177.

again reiterated the views expressed in the earlier decision, referred to above, and stated that summary rejection of appeals, which raise issues of substance and importance, was not justified. After adverting to the two decisions, noted above, this Court, again in Chittaranjan Das v. State of West, Bengal(1), laid down that there ,can be no doubt, whatever, that in dealing with criminal appeals, brought before them, the High Courts should not summarily reject them, if they raise arguable and substantial points. Bearing these principles in view, the question naturally arises as to whether the appeal filed, by the appellant, before the High Court of Bombay, raised any arguable point, or whether the questioned raised were substantial and important.

In support of the first contention, Dr. Barlingay drew our

-attention to the discussion, contained in the judgment of the learned Sessions Judge, wherein he has placed strong reliance, upon the evidence, given by Dilawar, in Sessions Case No. 8 of 1966. He has also. drawn our attention, to the reliance, placed by the learned Sessions Judge, upon the answers given by Dilawar, -as co-accused, when he was examined, under S. 342 Cr.P.C. The evidence given by Dilawar, in the dacoity case, counsel points out, is inadmissible, in these proceedings. The answers giver. by him, as co-accused, when examined, under S. 342 Cr.P.C., cannot be taken into account, as against the appellant, whatever the position may be, so far as Dilawar himself, is concerned. There is no other evidence, counsel points out, on record, which has been taken into account, by the learned Sessions Judge. In any ;event, counsel urged, after eliminating the evidence, given by Dilawar in the dacoity case, and the answers given by him, in this trial, the High Court had to consider whether there was any other evidence, on record, which would justify the Sessions Court finding the appellant guilty. By the dismissal of the appeal, sum- marily, counsel points out, the High Court has omitted to consider the serious illegality, contained in the judgment of the Sessions Judge, in relying upon the evidence and statement of Dilawar.

The contention of the learned counsel, that a gross illegality has been committed, by the learned Sessions Judge in relying upon the evidence, given by Dilawar, in the dacoity case, and using the answers given by him, as a accused, against the appellant, in our opinion, is well- founded. In paragraph 5 of its judgment, the Session's Court has referred to the fact that Dilawar, accused No. 1, admits all the facts alleged, by the prosecution, and that he has explained that he gave evidence as Abdul Gani at the instance of the appellant. In considering, again, the question as to whether the appellant knew accused No. 1 as Dilawar or Abdul Gani, the learned Sessions Judge, in (1) [1964] 3 S.C.R. 237.

paragraph 20, refers to the statement of Dilawar, wherein he. refers to the circumstances, under which the appellant compelled him to come to, the Court and pose himself as Abdul Gani. The learned Sessions Judge also refers, in paragraph 21 of his judgment, that Dilawar has made a very clean breast of the whole matter, when he, was examined by Mr. Waikar, on June 14, 1966, in the dacoity case. The learned Sessions Judge also refers to the fact that Dilawar has given a consistent version throughout, inculpating the appellant, both in his evidence in Sessions Case No,. 8 of 1966, as well as in his statement given, in the present Sessions Trial. We are not referring to the various

other points, adverted to, by the learned Sessions Judge. We have adverted to the above circumstances, only for the purpose of holding that the learned Sessions Judge, in coming to the conclusion that the appellant is guilty, has placed considerable reliance on the evidence of Dilawar, given in the dacoity case and to his statements, made: under S. 342 Cr.P.C., as co-accused, in the present trial. The legal position is quite clear, viz., that the evidence,, given by Dilawar, in the dacoity case, cannot be used as evidence against the appellant, who, had no opportunity to cross-examining Dilawar, in the said case; and the statements of Dilawar, as co-accused, made under S. 342 Cr.P.C., in the present trial, cannot be used against the appellant. We are not certainly inclined to accept the contention of the learned counsel, for the State, that these very serious illegalities, committed by the learned Sessions Judge, must be considered to have been, approved, by the learned Judges of the High Court, when they dismissed the appeal, summarily. In fact, we are inclined to think, that, by dismissing the appeal summarily, the learned Judges of the High Court have omitted to note these serious illegalities, contained in the judgment of the learned Sessions Judge. As to whether there is other evidence, on record, which would justify the conclusion that the appellant has been rightly convicted, is not a, matter on which it is necessary for us to embark upon, in this,, appeal. That is essentially for the High Court, as a Court of appeal, to investigate, and come to a conclusion, one way or the other.

The second contention, urged by the learned counsel, for the appellant, is also, in our opinion, a very substantial one. According to the learned counsel, after the judgment was delivered, in the dacoity case, on June 22, 1966, and before the complaint was filed, by Mr. Waikar, on July 8, 1966, against the appellant, the appellant was not given an opportunity of being heard, as required under S. 479A, Cr. P.C. This contention has been raised,, even before the Committing Magistrate, as a perusal of the order of that Magistrate, will show. This objection, was again taken. before the. learned Sessions Judge. The learned Sessions Judge has taken the view that the show cause notice, issued. by Mr. Waikar, to the appellant, on June 14, 1966, is a sufficient compliance with the provisions of that section. The learned Sessions Judge is also of the view that, under s. 479A, Cr.P.C., it does not matter whether a notice is given before the finding is recorded in the judgment, or whether the notice is given, after the findings are recorded in the judgment. The question, as to whether the appellant has been given an opportunity, of being heard, under s. 479A, is again, not only in our opinion, an arguable point, but also a substantial and important one.

The discussion, contained above, will clearly show that the appeal, filed by the appellant, before the High Court of Bombay was an arguable one, and it also raised substantial and important questions, for consideration at the hands of the High Court. We are therefore satisfied that the High Court was not justified, in dismissing the appeal, filed by the appellant, summarily.

In view of this conclusion, the order of the High Court, dated April 27, 1967, dismissing Crl. Appeal No. 74 of 1967, is set aside, and the said appeal is remanded to the High Court, for fresh disposal, in the light of the observations, contained in this judgment. This appeal is allowed, accordingly.

V.P.S. Appeal allowed and remanded.