Dhananjay Rai @ Guddu Rai vs The State Of Bihar on 14 July, 2022

Author: Abhay S. Oka

Bench: M.M. Sundresh, Abhay S. Oka

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.803 of 2017

Dhananjay Rai @ Guddu Rai ….Appellant

Versus

State of Bihar ….Respondent

JUDGMENT

Abhay S. Oka, J.

1. The short issue involved in this appeal is whether an appeal against conviction filed by an accused under Sub-Section (2) of Section 374 of the Code of Criminal Procedure, 1973 (for short,' Cr. P.C.') can be dismissed on the ground that the accused is absconding.

2. The appellant was convicted for the offences punishable under Sections 302 and 120B of the Indian Penal Code (IPC) and Section 27(1) of the Arms Act, 1959. The maximum substantive sentence is of life imprisonment. Against the aforesaid judgment and order dated 04th September 2009 of conviction passed by the learned Additional Sessions Judge, Buxar in Sessions Trial No.338 of 2006, an appeal was preferred by the appellant before the High Court of Patna. On 29th October 2009, a Division Bench of the High Court admitted the appeal for hearing. When the application for suspension of sentence filed by the appellant came up before a Division Bench of the High Court, it was brought to the notice of the Court that the appellant was absconding. Thereafter, a non-bailable warrant was issued against the appellant. As the appellant was absconding, the Director General of Police announced a reward to the informant who could report the whereabouts of the appellant.

3. By the impugned judgment and order dated 25th August 2015, a Division Bench of the High Court of Patna dismissed the appeal without adverting to the merits of the appeal on the ground that the appellant was absconding.

4. The Division Bench held that though the remedy of an appeal is a valuable right, the appellant forfeited his right to prefer an appeal the moment he escaped from the custody and flagrantly abused the process of law. The learned Judges held that such deliberate act on the part of the appellant amounts to defiance of the criminal administration of justice. The Division Bench referred to a decision of this Court in the case of Shyam Deo Pandey & Ors. v. State of Bihar1. The Division Bench referred to another decision of this Court in the case of Surya Baksh Singh v. State of Uttar Pradesh2 as well as a decision of the same High Court in the case of Daya Shankar Singh & Anr. v. State of Bihar3. After adverting to another decision of this Court in the case of K.S. Panduranga v. State of Karnataka4, the (1971) 1 SCC 855 (2013) 2 SCALE 492 = (2014) 14 SCC 222 2004 SCC Online Pat 1189 (2013) 3 SCC 721 Division Bench held that the circumstances of the case before it were exceptional and, therefore, the Court was required to deviate from the settled principle of law that once the appellate court has refused to dismiss the appeal summarily, the same must be heard on merits.

5. After having heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent-State, for the reasons which are recording, we have no option but to set aside the impugned judgment and remand the appeal for fresh consideration of the High Court.

6. In the impugned judgment, the Division Bench of the Patna High Court has itself recorded that it is deviating from the settled position of law. Such an approach cannot be countenanced. The well settled law can be found in the decision of this Court of a Bench consisting of three Hon'ble Judges in the case of Bani Singh & Ors. v. State of U.P.5. The issue before this Court in the said case was whether the High Court was justified in dismissing an appeal against conviction for non-prosecution. This Court noted the conflict in the views expressed by two co-ordinate Benches of this Court in the case of Shyam Deo1 and Ram Naresh Yadav v. State of Bihar6. Paragraphs 13 to 15 of the said decision are relevant, which read thus :

> "13. What then is the area of conflict between the two decisions of this Court? In Shyam Deo case [(1971) 1 SCC 855 : 1971 SCC (Cri) 353 : AIR 1971 SC 1606] , this Court ruled that once the appellate (1996) 4 SCC 720 AIR 1987 SC 1500 court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for non-appearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the appellate court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record. In Ram Naresh Yadav case [AIR 1987 SC 1500 : 1987 Cri LJ 1856] , the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo case [(1971) 1 SCC 855 : 1971 SCC (Cri) 353 : AIR 1971 SC 1606] but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for non-prosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.

14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo case [(1971) 1 SCC 855 : 1971 SCC (Cri) 353 : AIR 1971 SC 1606] appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case [AIR 1987 SC 1500 : 1987 Cri LJ 1856] that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

15. Secondly, the law expects the appellate court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the appellate court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the appellate court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav case [AIR 1987 SC 1500 : 1987 Cri LJ 1856] did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the appellate court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent."

(emphasis added)

7. We may note here that the High Court relied upon its earlier decision in the case of Daya Shankar Singh3 which was based on Rule 8 of Chapter XII of the Patna High Court Rules which predicates that no appeal against conviction shall be heard for admission unless the accused has surrendered to the order of the Court below convicting him to a sentence of imprisonment except in a case where the appellant has been released on bail by the trial court after convicting him. In the case in hand, the appeal was already admitted on 29th October 2009. Therefore, the said rule, which applies to the pre-admission stage, was not applicable in this case.

8. The anguish expressed by the Division Bench about the brazen action of the appellant of absconding and defeating the administration of justice can be well understood. However, that is no ground to dismiss an appeal against conviction, which was already admitted for final hearing, for non-prosecution without adverting to merits. Therefore, the impugned judgment will have to be set aside and the appeal will have to be remanded to the High Court for consideration on merits.

9. We may note that subsequently, the appellant was taken into custody and in fact an application for bail made in this appeal was heard and rejected on 14th May 2018.

10. Since the appeal before the High Court is of the year 2009, the same will have to be heard expeditiously. If the appeal could not be heard within a reasonable time, in that event, the appellant will have to be granted a liberty to apply for suspension of sentence.

11. Accordingly, the impugned judgment and order dated 25th August 2015 is hereby set aside. Criminal Appeal (D.B.) No.936 of 2009 is remanded to the High Court of Judicature at Patna for hearing in accordance with the law.

12. Considering the fact that the appeal against conviction under Section 302 of IPC is of the year 2009, necessary priority deserves to be given to the disposal of the appeal. We, therefore, request the High Court to ensure that appeal is disposed of as expeditiously as possible, preferably within a period of six months from today.

13. In the event, that the appeal is not heard within a period of six months from today, it will be open to the appellant to apply for suspension of the sentence before the High Court.

14. Appeal is partly allowed in the above terms.

.....J. [ABHAY S. OKA] .....J. [M.M. SUNDRESH] New Delhi July 14, 2022.