Supreme Court of India
State Of U.P. vs Kapil Deo Shukla on 30 March, 1972
Equivalent citations: AIR 1973 SC 494, 1972 CriLJ 1214, (1972) 3 SCC 504
Author: J Shelat
Bench: H Khanna, J Shelat
JUDGMENT J.M. Shelat, J.

1. These two appeals, founded on special leave obtained from this Court, are directed against two orders passed by the High Court of Allahabad, dated March 16. 1967 and July 24, 1967 respectively. The first order was passed in Criminal Miscellaneous application No. 3334 of 1966 under Section 561-A of the CrPC for quashing the Criminal case against the respondent pending before the Third Temporary Additional Sessions Judge. Allahabad on charges under Sections 408 and 477A of the Penal Code, A learned Single Judge of the High Court allowed that application and quashed the said proceedings as the State had failed to file any counter-affidavit against the statements made by the respondent in the said application. The second order was passed in an application filed by the State for recalling the said order. The same learned Judge dismissed that application observing that the State had had five months' time to file a reply to the respondent's said application, that the State had even then failed to file its reply, that he had, therefore, in the absence of such a reply, allowed the application and that In those circumstances he found no reason to recall his said first order.

2. The relevant facts necessary to understand the circumstances in which the two impugned orders were passed are as follows:

3. In 1946. the respondent was an employee in the then Imperial Bank of India at Allahabad. A first information report was lodged against him on August 9. 1946 whereupon the police commenced their investigation. On the completion of the investigation committal proceedings started before the City Magistrate. Those proceedings ended in 1949. the committing Magistrate ordering that the respondent should be tried by the Sessions Court at 'Allahabad under Sections 408 and 477-A of the Penal Code. The respondent accordingly was tried by the Sessions Judge with the aid of jury in 1950 and was acquitted. On an appeal filed by the State, the High Court, by its judgment dated August 12, 1953. set aside the order of acquittal and convicted the respondent under Sections 408 and 477A of the Penal Code and imposed the sentence of four years rigorous imprisonment and a fine of Rs. 10,000 out of which Rs. 7,000 were directed to be paid to the Imperial Bank as compensation.

4. The respondent. thereupon filed an appeal in this Court against the said order of conviction and sentence. In the appeal, he took up mainly two grounds; (1) that the memorandum of appeal filed by the State in the High Court was not a valid memorandum under Section 419 of the CPC inasmuch as no grounds against his acquittal were therein set out except a general plea that the acquittal was against the weight of evidence and contrary to law. and (2) that although the entire trial turned on the question as to who was the author of the documents alleged to have been forged and the said documents were all in the English language, it was found as a fact that out of the five jurors, three only had sufficient knowledge of that language, while the fourth knew very little of it and could not read the documents produced in the case, and the fifth also had no sufficient knowledge of English as he could understand letters written in English with some difficulty but could not read English

newspapers. By a judgment dated October 14, 1957 (reported in Kapil Deo Shukla v. State of U.P. 1968 SCR 640 - AIR 1958 SC 1211 this Court held that the trial before the Sessions Judge was coram non judice on account of the incompetence of the jury to decide the question as to the authorship of the forged documents, that it therefore was a "mistrial." and allowed the appeal setting aside the High Court's order of conviction and sentence. In doing so this Court observed at page 647 of the report as follows: It is unfortunate that a prosecution which has been pending so long In respect of an offence which Is said to have been committed about eleven years ago should end like this. But it will be open to the State Government, If It is so advised, to take steps for a retrial...

It appears that by the time this judgment was delivered the jury system In the State of U. P. had been done away with. In the light of that circumstance this Court further observed:

We do not express any opinion on the question whether it is a fit case for a de novo trial by a competent jury or by a Court of Session without a jury, if the present state of law permits it The matter will go back to the High Court for such directions as may be necessary if the High Court is moved by the Government in this behalf-

5. In April 1958, the High Court, on an application by the State Government under Section 561A of the CrPC, ordered the retrial of the respondent and directed a non bailable warrant of arrest to issue against him. Thereupon, the Sessions Judge, Allahabad made a reference to the High Court for directions as to whether the respondent should be tried by him along with a jury. On September 17. 1959, the High Court directed that the trial must take place according to the law then prevailing, and that therefore, "the accused shall be tried by the Sessions Judge without the help of the Jury." "It is immaterial that when the accused was placed on trial there was a law for his trial with the aid of jury? that law has been repealed and cannot now be given effect to.

6. In 1962, however, another Division Bench of the very same High Court in Ram Swarup v. State. took a different view and held that a trial Is said to commence from the date when a charge Is framed against an accused, that Clause. (d) of Section 116 and the rest of that section meant that the provisions of Ch. XXII, as amended by the Criminal Procedure Code (Amendment) Act. XXVI of 1955, would not apply to or affect any trial before a court of session, either by jury or with the aid of assessors, which was pending at the date of the commencement of the Amendment Act and that therefore, such a trial, if proceeded with without the jury or the assessors, as the case may be, would be null and void. Thus, contrary to what was said in the said order, dated September 17, 1959 the High Court held that though a trial by jury might be a procedural matter, the right to be so tried was so substantial that its infringement would vitiate the entire trial. In view of the meaning given to the word 'trial' and the interpretation given to Section 116 in Ram Swarup's case the High Court had ordered the retrial of the respondents, a contention was possible that he could not validly be tried by the Sessions Judge alone without a jury.

7. After the retrial commenced before the Sessions Judge, the respondent filed two applications. One was that in view of the decision in Ram Swarup's case should be tried with the aid of a jury. The second was that under Section 173(4) of the Code at Criminal Procedure copies of the police papers and other documents on which the prosecution sought to rely should be furnished to him. The

Sessions Judge dismissed by his order dated May 14. 1962. both these applications, the first on the ground that he was directed by the High Court to proceed with the trial without the jury, and the second on the ground that:

statements Under Section 161, Criminal P. C. are not traceable. So copies cannot be granted. But copies of other papers on which the prosecution wants to rely be furnished to the accused before the commencement of the trial.

According to the affidavit in support of the said Criminal Miscellaneous Application No. 3334 of 1966. upon which the orders impugned in this appeal were made and in which the State Government had not filed any counter-affidavit, even copies of documents sought to be relied upon by the prosecution were not furnished till the date of that application, although an order to do so was made as early as May 14. 1962 by the Trial Judge.

8. Against the order passed by the Sessions Judge ordering that the trial should proceed without a jury the respondent went to the High Court in revision. The revision application was heard by a Division Bench consisting of the learned Chief Justice and Jagdish Sahai, J. Though both the learned judges agreed that the revision application should be dismissed as the High Court's said order dated September 17, 1959 had become final, and therefore, there was nothing illegal in the order passed by the Sessions Judge since he had simply followed the direction contained in that order, Jagdish Sahai. J., did not subscribe to the view expressed by the learned Chief Justice that the decision in Ram Swarup's case AIR 1962 All 58 could be distinguished on the ground that a retrial ordered on the ground that the original trial was a nullity was a fresh trial which could be said to have commenced after the Amendment Act. XXVI of 1955 had come into operation. Jagdish Sahai, J., on the contrary, held that the trial began from the date when the charges were framed against the respondent by the committal Court, that that trial had remained the same as the commitment proceedings had not been quashed, and that consequently, the respondent had acquired a right to be tried with the aid of the jury, which right was not taken away either by the order of a retrial or by Section 116 of the Amendment Act, and finally, that the decision in Ram Swarup's case AIR 1962 All 58 could not be distinguished. Against the order of dismissal of his (revision application the respondent however, did not file any further proceedings and thereby undoubtedly allowed that order to become final.

9. On July 15, 1964. the respondent filed before the High Court a Miscellaneous Application No 1882 of 1964 under Section 561A of the Code for quashing the proceedings before the Additional Sessions Judge on the grounds inter alia that copies of the police papers and other documents on which the prosecution proposed to rely were not made available to him although the retrial had been fixed for July 15, 1964, that as much as eighteen years had elapsed since the prosecution against him began, that in the meantime many of the witnesses had either gone away to England or had retired, and therefore, would not now be available, and that even the complainant Ganguli himself had become invalid and would not, therefore, be able to appear before the Court. The High Court dismissed the said application on January 21, 1965, observing that there was no valid ground to sustain it.

10. Having thus failed in the High Court, the respondent made an application, dated February 12, 1965, to the State Government for the withdrawal of the case against him. By its order dated April 2, 1965. the Government Informed the respondent that it would consider the withdrawal of the case provided that he was prepared to deposit the amount said to have been embezzled by him. The respondent approached the Government once again on May 4. 1965 requesting the Government to agree to his paying a sum of Rs. 1,000. By its office memorandum dated November 16, 1965. the Government directed, in partial modification of its earlier order, that it would consider the withdrawal of the case provided the respondent paid Rs. 4,000 "out of the embezzled amount". In accordance with the said memorandum, the respondent deposited on January 29, 1966 a cheque for Rs. 4.000 with the District Magistrate. Allahabad and the Government had the said cheque cashed and credited to its account the cash proceeds of that cheque. It appears that after the Government realised the said cheque it changed its mind and by its order dated August 2, 1966 informed the Trial Court of its final decision that the case should be proceeded with.

11. On October 17. 1966, the respondent filed a fresh application before the High Court under Section 561A, being Criminal Miscellaneous Application No. 3334 of 1966 for quashing the trial before the Sessions Court urging that proceeding with the trial would amount in the circumstances of the case to an abuse of the process of the Court In that application the respondent pointed out that he had already remained in jail for about nine months as an under-trial prisoner, that twenty years had already elapsed since the alleged commission of the offence by him. that admittedly copies of statements of witnesses proposed to be examined by the prosecution recorded under Section 161 of the Code and copies of other documents proposed to be relied upon by the prosecution were not furnished to him, the first on the ground that they were not traceable, and the second in spite of the court's order under Section 173 of the Code, thus stultifying preparation by him of his defence and cross-examining adequately those witnesses. He also pointed out that in consequence of the lapse of nearly twenty years it would be well-nigh impossible for witnesses to remember his handwriting and identify as his handwriting certain marked writings sought to be proved as his, and finally, that for twenty years, which was the best part of his life, he had remained under the anxiety and suspense of a criminal trial against him. The application came up for hearing on March 16, 1967. that is, nearly five months after it had been filed. Yet, in spite of its having been served on the Government, the Government failed to file any reply thereto contesting the facts and allegations made therein. There being thus no affidavit in reply contesting the assertions made in the application, the High Court allowed it and quashed the proceedings before the Additional Sessions Judge. As stated in the order rejecting the State's application for a certificate for appeal to this Court, the High Court was of the view that it would be an abuse of the process of the court if the trial protracted for about eighteen years were to be allowed to go on, particularly in view of the fact that documents on which the prosecution sought to rely on were already mutilated and copies thereof and of statements under Section 161 of the Code were not, in the former case, and could not be. In the latter case, furnished to the respondent, stultifying thereby his right to cross-examine witnesses who might be examined by the prosecution. As aforesaid, an application by the Government for recalling the said order was also dismissed by the High Court.

12. The question for consideration is whether in these circumstances of a somewhat extraordinary nature, and specially the lapse of nearly twenty years since the trial against the respondent began,

we should interfere with the High Court's said orders, in an appeal under Article 136 of the Constitution

13. It is a well-settled rule, on the soundness of which there can be no doubt, that a contract to withdraw a prosecution or to give no evidence against an accused charged with an offence of a public nature is one founded on an unlawful consideration, and therefore, void. But the agreement by the Government not to proceed with the case if the respondent deposited Rs. 4.000 and the fact of the Govt. appropriating that amount and not returning it although it changed its mind were neither relied on by the respondent nor were made the ground by the High Court for passing the impugned orders. On the other hand, it is fairly clear from the impugned orders as also the order refusing the certificate that what weighed with the High Court were the failure of the prosecution to supply copies of Section 161 statements and other documents under Section 173 of the Code, the fact of the trial having protracted for one reason or the other for twenty years or more, the fact that the . respondent, since the order of retrial, had remained in jail as an under trial prisoner for about nine months, and lastly, the possibility of witnesses' memory failing owing to such a long lapse of time to identify the writings in. question being those, of the respondent. It is an admitted fact that the complainant, Ganguli, had been an invalid and it appears doubtful if after such a long time even he would be in a position to attend the court and even if he were to be able to do so. would be in a position to remember and depose about the facts which took place in 1946 upon the basis of which he had then lodged the complaint. Coupled with that difficulty, there is the fact that the other witnesses retired long ago and some of them are now in England, a fact which rendered their availability as witnesses somewhat doubtful. Assuming that they were to be available and were to claim that they still remembered the facts of the case there was yet another difficulty which must have been present in the mind of the High Court. That was that statements recorded during investigation in 1946 were not traceable and the copies thereof admittedly could not be furnished to the respondent. That meant that a statutory right, unquestionably the most valuable to an accused, was denied to the respondent, a right, the exercise of which alone could have given to him an effective opportunity to test the veracity of the evidence led by the prosecution. The denial of such a right gains considerable significance in view of the long lapse of time due to which the respondent would, if furnished with copies of the witnesses' police statements, have probably been in a position to establish that in some cases at least the witnesses' memory of the alleged events which took place as early as 1946 had failed, or in any event, was not such as could be relied upon for the success of the prosecution case.

14. In a recent case of proceedings for alleged perjury this Court held that lapse of a long time, in that case of ten years, was a proper ground for holding that launching of a prosecution was inexpedient (Chajoo Ram v. Radhey Shyam . Similarly. In Machander v. State of Hyderabad where an order of conviction under Section 302 was set side by this Court for failure to examine the appellant under Section 342 of the Code, a remand was declined on the ground that the accused had been arrested in 1950 and had been on his trial one way or the other for over four and a half years. In that connection the Court observed at page 529 of the report as follows:

We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial Judges omit to do their duty. Justice Is not one-sided. It has many facets and we have

to draw a nice balance between conflicting rights and duties. While It is incumbent on us to see that the guilty do not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go.

See also Union of India v. Lt. Col. G. It Apte page 1537. These observations and the refusal to order remand on the ground of the trial having protracted for four and a half years apply with equal and perhaps with greater force In the present case since the respondent has been kept in suspense of a trial for twenty years and more. The situation Is far worsened by the other circumstances present here, namely, the Inducement given by the Government to the respondent to pay Rs. 4,000 on an assurance that It would consider not to proceed with the trial, the Government failing to return that amount although it changed Its mind, the Impossibility of furnishing to the respondent copies of police statements of witnesses the prosecution intends to examine, depriving the respondent of his right to effectively cross-examine them, the failure to furnish copies of other documents on which also the prosecution intends to rely In spite of the court's order to that effect, and lastly, the uncertainty of the memory of witnesses, assuming that they are still available, on the question of proving the handwriting on the documents alleged to have been forged by the respondent These circumstances, in our view, are likely to prevent the trial being altogether fair.

15, It is a matter of some regret that on such a view, the respondent against whom serious charges of a public nature stand, should not be proceeded with. But as against that there is equally the fact that long lapse of time and the impossibility of supplying him copies of police statements and other relevant documents is likely to end in the trial not being fair and just In these circumstances, we have come to the conclusion that it is neither expedient nor in the larger interest of justice that the trial with all the afore said possible deficiencies should be allowed to proceed. In any event, this is, in our view, not a case where this Court should interfere with the orders of the High Court in an appeal under Article 136 of the Constitution.

16. The appeal, therefore, must fail and is dismissed.