

(1991) 03 BOM CK 0087

Bombay High Court

Case No: Criminal Appeal No. 620 of 1983

Dattu Santuppa Patil

APPELLANT

Vs

Nagoji Kallappa Patil and others

RESPONDENT

Date of Decision: March 25, 1991

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 385
- Penal Code, 1860 (IPC) - Section 34, 379, 447

Citation: (1991) 3 BomCR 607 : (1991) CriLJ 1975

Hon'ble Judges: M.F. Saldanha, J

Bench: Single Bench

Advocate: Miss Ujjawala Shirke and Ajit P. Shah, for the Appellant; G.N. Salunkhe and M.R. Suryavanshi, Assistant Public Prosecutor, for the Respondent

Judgement

1. This is an appeal by the heir of the original complainant and is directed against an order of acquittal passed by the Additional Sessions Judge, Kolhapur in Criminal Appeal No. 143 of 1982. The present appellant was the complainant in Criminal Case No. 11 of 1980 which was for a charge against the present respondents Nos. 1 to 10 for offences under sections 379, 447 read with S. 34, I.P.C. The learned trial Magistrate convicted the accused and sentenced them to suffer simple imprisonment for one day till the rising of the court and to pay a fine of Rs. 25/- each in default simple imprisonment for seven days. Against this conviction, the accused filed Criminal Appeal No. 143 of 1982 which came to be allowed by the learned Additional Sessions Judge on 16th July, 1983. As a result, the conviction of the present respondents Nos. 1 to 10 was set aside.

2. The principal ground on which the present appeal has been preferred by the original complainant who is the appellant (now represented by his heir) is that at the time when the appeal was heard by the learned Additional Sessions Judge, Kolhapur, that the requisite notice in respect of the same had not been served on

the original complainant. It is pointed out that there cannot be any dispute with regard to this aspect of the record because the complainant was not even made a party to the appeal in question which was principally why no such notice came to be served.

3. Miss Shirke, learned Advocate appearing on behalf of the appellant has relied on the provisions of Section 385(1)(111) Of the Criminal Procedure Code and contended that after the new Code i.e., the Code of 1973 was promulgated, that the provisions of Section 385 are mandatory and that consequently, non-compliance with the provisions of that Section would vitiate any order passed in the appeal. It is the contention of Miss Shirke that the 41st Law Commission, while recommending certain changes with regard to the new Code of Criminal Procedure, did consider it obligatory to include the provision in Section 385 that notice would have to be served on the original complainant. Undoubtedly, this is a salutary provision because the original complainant is the party who is aggrieved and who has set the law in motion and is certainly one of the necessary parties in any appeal proceedings. Miss Shirke has relied on the decision reported in [Abdul Kareem Vs. Iswarappa and Others](#), and a decision of this Court* reported in [Abdul Kareem Vs. Iswarappa and Others](#), . In all these decisions, the Courts have uniformly expressed the view that the provisions of Section 385(1)(iii) are mandatory and that, consequently, if the appeal comes to be disposed of without hearing the original complainant, then the order in question will have to be set aside and the matter remanded for a fresh hearing.

4. As against this position, Mr. Salunke, learned Advocate appearing on behalf of respondents Nos. 1 to 10 has vehemently submitted that this Court should peruse the order of the appellate Court from which it will be evident that both on facts and in law, the complainant has failed to make out any criminal offence whatsoever and that the conviction recorded by the learned trial Magistrate was wholly erroneous. He has advanced a submission of considerable importance viz., that in essence, this Court will have to examine as to whether injustice has occurred as a result of the procedure followed by the appeal Court. According to Mr. Salunke, this Court is fully empowered to hear the parties and there is no need whatsoever for a remand insofar as this Court is quite competent, if on hearing the parties and if it is satisfied that no offence whatsoever is made out, in disposing of the appeal at this stage itself and that a remand under these circumstances is uncalled for. Mr. Salunke supports his argument by submitting that if at this late point of time, merely on a ground of technical breach or on a ground of procedure, if the present appellant succeeds in having the matter remanded, that the rehearing of the whole case will result in injustice to his clients rather than to the complainant who is complaining of injustice. He points out that respondents Nos. 1 to 10 were members of a public body and were made accused wrongfully and that, consequently, any reversal of the acquittal order would be unjust to them.

5. Though the submission made by Mr. Salunke appears to be quite attractive, unfortunately, it cannot be accepted because it would have the effect of justifying breach of a mandatory provision. The provisions of Section 385 of the Code of Criminal Procedure are based on the essential principle that a party to a judicial proceeding must be given a hearing. This, in turn, stems from the rule of audi alteram partem and the result of acceptance of the submission advanced by Mr. Salunke would be that even if the present appellant was not heard before the appeal Court, if this Court were to grant him a hearing at this stage, that it would in other words, amount to condonation of the wrong procedure adopted by the Sessions Court.

6. Mr. Salunke has placed reliance on a decision of the Punjab High Court, reported in [Gurbax Singh and Another Vs. The State of Punjab and Others](#), . Mr. Salunke submits, that even in this decision, the Punjab High Court has basically dealt with the proposition as to whether or not the breach of procedure that is complained of has resulted in any injustice. According to him, if he is in a position to demonstrate that no injustice has occurred to the other side insofar as the result would have been very much the same, that the present appellant cannot pray for a remand. The only answer to this submission is that one cannot anticipate as to what the submissions or arguments would have been before the appeal Court had the party who is absent been in fact represented and under these circumstances, the question as to whether injustice has occurred or not would be purely within the realm of conjecture.

7. In this view of the matter, it would not be possible to accept the submissions of Mr. Salunke, and the only course open is to remand this matter to the appeal Court for a re-hearing.

8. In the result, the appeal is allowed. The order of the learned Additional Sessions Judge, dated 16th July, 1983 in Criminal Appeal No. 143 of 1982 is set aside. The proceedings are remanded to the learned Additional Sessions Judge, Kolhapur with a direction that since this is an extremely old matter, the appeal be heard and disposed of, for ably within an outer limit of six months. It is clarified, that this Court has remanded the proceedings without considering the merits of the matter and it shall be open to both the parties to advance their submissions on merits after which, the learned Sessions Judge shall hear and dispose of the appeal according to law. Appeal allowed accordingly.

9. Appeal allowed.