

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 379 OF 2015
IN
CRIMINAL APPEAL NO. 426 OF 2012

Ramkesh Rampyare Kewat. ... Applicant.
Versus
The State of Maharashtra. ... Respondent.

WITH
CRIMINAL APPLICATION NO. 378 OF 2015
IN
CRIMINAL APPEAL NO. 449 OF 2012

Raju Shyamlal Nishad. ... Applicant.
Versus
The State of Maharashtra. ... Respondent.

Mr. Kartik Garg, Advocate appointed for Applicants.

Mrs. A.A. Mane, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : DECEMBER 21, 2015

P.C.:

1 Heard the learned APP and the learned Counsel appointed for
the applicants.

2 The applicants herein are appellants in Criminal Appeal No. 426 of 2012 and Criminal Appeal No. 449 of 2012 respectively. It is the contention of the applicants that they were arrested by Saki Naka Police Station (Mumbai) on 14/4/2010 in C.R. No. 175 of 2010 registered at Saki Naka Police Station for offence punishable under section 376 read with Section 34 of the Indian Penal Code. That the case was committed to the Court of Sessions and was registered as Sessions Case No. 489 of 2010. The learned Sessions Court vide Judgment and Order dated 10/2/2012 was pleased to convict the accused for offence with which they were charged and they are sentenced to suffer R.I. for 10 years and fine of Rs. 5,000/- i.d. R.I. for 3 months. Being aggrieved by the said Judgment and Order, the applicants have filed Criminal Appeal Nos. 426/12 and 449/12 respectively.

3 The applicants have addressed letters to this Court praying for withdrawal of the appeals. The reasons assigned for withdrawal of the appeals are as follows :

- (i) They were initially in Arthur Road Prison at Mumbai and had been shifted to Kolhapur Central Prison.
- (ii) They hail from Sidharth Nagar, Utter Pradesh.
- (iii) They do not have any relatives or friend or family in Maharashtra and therefore, they cannot meet relatives and friends and for last 5 years they have not met any family members.
- (iv) That they wish to meet their family members and friends and therefore, had prayed that they be transferred to Uttar Pradesh Jail in order to enable them to meet their dear ones.
- (v) Last but not the least reason for withdrawal of the appeal is that the applicants feel that there would be very slim chance of disposal in the near future and therefore, they have prayed for withdrawal of the appeals.

4 The last reason for seeking withdrawal of the appeals is to pave the way for the process of shifting the applicants to the prison at Uttar Pradesh.

6 Upon considering the contents of the applications, which were filed through jail, this Court had requested the learned Advocate Mr. Kartik Garg to espouse the cause of the accused and to make submissions as to whether such a prayer can be granted after the admission of the appeal.

7 The learned Counsel appointed for the applicants has put in the best of efforts. The learned Counsel appointed for the applicants has placed on record the extracts of the Maharashtra Prisoner Manuals and more particularly, Chapter 35 of the said Act which pertains to removal of prisoners, Section II : Non-Statutory Rules. Section 10 of the said Chapter contemplates as follows :

“10. (a) Transfer of prisoners under Reciprocal arrangements.- Transfer under reciprocal arrangements is the transfer of a prisoner convicted in a State which is not his home

State, to his home State. This State has entered into reciprocal arrangements with the following States.

Madras Punjab, Bihar, Assam, Orissa, Uttar Pradesh, Andhra Pradesh, Mysore, Rajasthan, West Bengal, Delhi, Kerala, Madhya Pradesh and Gujarat.”

Sub-clause (ii) of Section 10 contemplates as follows :

“(ii) Notwithstanding the unwillingness of a prisoner to be transferred to his home State, he shall be transferred to that State if there are adequate reasons, e.g. his being out of mind, or obstreperous or his aged parents request his transfer. Such cases should be referred to Government for issuing orders under the Transfer of Prisoners Act.”

Sub-Section (iii) of Section 10 contemplates as follows :

“No prisoner shall be transferred under reciprocal arrangements till his appeal period is over, **and if he has filed an appeal till the appeal is decided.**”

8 It is abundantly clear that the appeal has been admitted by the High Court. Records and proceedings have been called for. The paper book is ready. Matter is ready for final hearing. The Statute

contemplates that admission of the appeal would not be idle formality and that it has to be taken to its logical end and therefore, the Maharashtra Prisoner Manual contemplates that the prisoner shall not be transferred under reciprocal arrangements till his appeal is decided. The Statute does not contemplate withdrawal of an appeal.

9 To substantiate the submission, the learned Counsel for the applicants has categorically submitted that an appeal cannot be withdrawn. The learned Counsel was appointed to assist the court and not only to espouse the cause of the applicants and therefore, he has placed on record various judgments to fortify his legal submissions that an appeal cannot be withdrawn.

10 The learned Counsel has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Bani Singh v/s. State of Uttar Pradesh, (1996) 2 BLJR 148**, wherein the Hon'ble Apex Court was considering the issue of call for records and proceedings as well as summary dismissal of the appeal. In that case, the High Court had

dismissed the appeal for want of prosecution without going into the merits of the case. It was an issue which was referred to a three judges bench of the Hon'ble Apex Court. There were 2 judgments of 2 judges bench which had taken conflicting views. In the case of **Shyam Deo Pandey & ors. v/s. State of Bihar**[AIR 1971 SC 1606], the Hon'ble Division Bench of the Apex Court had observed that -

“once the appeal was admitted, it was the duty of the Court to peruse the record of the case before dismissing it. The Court considered this to be a mandatory requirement and since, in its view, the record of a case is not confined only to the judgment under appeal, it held that the order of High Court was not in conformity with the requirement of the provisions and ordered it to be set aside.”

Whereas, in the case of **Ram Naresh Yadav & ors. v/s. State of Bihar** [AIR 1987, (SC) page 1500], the Hon'ble Division Bench has taken a view that the order dismissing the appeal in default deserves to be quashed and set aside and the matter was remanded to the appellate court for hearing the learned counsel appointed by the Court. The Hon'ble Apex Court in view of the provisions of sections

384 and 385 of the Code of Criminal Procedure, 1973 had observed that -

“Therefore, the plain language of [Sections 385-386](#) does not contemplate dismissal of the appeal for non-prosecution simplicitor. 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.”

This Court is therefore of the opinion that an admission of the appeal should taken to its logical end and every appeal admitted has to be heard and decided on the merits of the case and that there is no provision for withdrawing the appeal.

11 The learned Counsel has drawn attention of this Court also to the observations made by the Hon'ble Single Judge of this Court, wherein this Court was considering an appeal against acquittal. In

the case of **Prema Ramanand Hattangadi v/s. State of Maharashtra and anr., reported in 2013(1) BCR (Cri) 338**, this Court had observed in paragraph-8 as follows

“8. After careful perusal of the record, there appears all substance in the submissions canvassed by the learned counsel for Respondent No.2. He has rightly submitted that criminal appeal either against the order of acquittal or order of conviction once admitted, cannot be dismissed for default. The same is apparent as the decision of the Apex Court in the case of (Madan Lal Kapoor V. Rajiv Thapar) 1 MANU/SC/7884/2007: (2007) 7 SCC 623 reveals such position wherein after relying upon and reiterating the law pronounced in the earlier decisions of Apex Court in case of (Bani Singh V. State of U.P.) 2, MANU/SC/0615/1996: (1996) 4 SCC 720 and in case of (Parasuram Patel V. State of Orissa),: (1994) 4 SCC the Apex Court was pleased to observe in paragraphs 4 to 7 as under:

“4. The matter relates to administration of criminal justice. As held by this Court, a criminal matter cannot be dismissed for default and it must be decided on merits. Only on that ground the appeal deserves to be allowed.

5. Thus in Bani Singh v. State of U.P., a three-Judge Bench of this Court held that a criminal appeal should not be dismissed in default but should be decided on merits. If despite notice neither the appellant nor his counsel is present, the court should decide the appeal on merits. If the appellant is in jail the court

can appoint a lawyer at State expense to assist it. This would equally apply to the respondent.

6. In *Bani Singh v. State of U.P.* the Supreme Court overruled its earlier decision in (*Ram Naresh Yadav v. State of Bihar*) 4, MANU/SC/0691/1986: A.I.R. 1987 S.C. 1500 in which it was held that a criminal appeal can be dismissed for default.

7. In *Parasuram Patel v. State of Orissa* the Supreme Court held that a criminal appeal cannot be dismissed for default.”

12 The learned Counsel for the applicant has also placed reliance upon the Judgment of the Hon'ble Single Judge of Calcutta High Court in the case of **Sudhindra Nath Dutt v/s. State, AIR 1957 CAL 677**. The Hon'ble Judge of Calcutta High Court observed thus :

“5. After the present appeal had been admitted and when the preparation of the paper book had made some progress, the appellant sent an application or rather a letter from jail by which he represented that he was not desirous of prosecuting the appeal further and, therefore, the appeal might be struck out. He was informed in reply that inasmuch as he had a solicitor on record, no personal representation by him could be entertained and that if he desired to make any prayer to the Court, he should do so by means of an application filed through the Solicitor in the ordinary way. An application was thereafter filed and a learned Advocate of this Court was briefed by the appellant to appear in support of the application. The State also

was given notice and appeared at the hearing. The prayer in that application was that the appellant might be permitted to withdraw the appeal or it might be struck out, as he did not desire to proceed with the appeal any further. We rejected that application because, in our view, after a criminal appeal had been filed, it became the duty of the appellate court to hear and determine the appeal on its merits and the appeal could neither be allowed to be withdrawn, or be struck out on the ground that the appellant did not desire to proceed with it.”

13 In the case of **Emperor vs. Ghulam Mohammad s/o. Dost Mohammad Khan** reported in AIR 1942 Lah. 296, the Bench has held as follows :

“the Legislature have never contemplated any withdrawal of an appeal once lodged whether by the accused or by the Crown and that once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound, once the appeal is admitted to proceed under Section 421 or under Sections 422 and 423 to decide the appeal on the merits. And hence, the Court has refused to grant permission to withdraw the appeal.”

14 Taking into consideration reasons assigned for the withdrawal of the appeals and the observations made by various High Courts including the observations of the Hon'ble Apex Court in the case of **Bani Singh (supra)**, this Court is of the opinion that the applications filed by the applicants seeking withdrawal of the appeals deserves to be rejected. The applicants have not assigned any specific justification, reason for withdrawal of the appeals. The applicants could have instead prayed for expeditious hearing of the appeal. The provisions of Maharashtra Prisoner Manual also need to be taken into consideration as far as reciprocal arrangement in respect of transfer of convicts is concerned as has been observed by this Court. Hence, the applications deserves to be rejected. The applications are rejected.

15 The learned Counsel appointed for the applicants has put in the best of efforts and order cannot be concluded without recording proper appreciation of the efforts taken by the learned Counsel.

Hence, his professional fees are quantified at Rs. 5,000/- to be paid within 3 months.

16 Office to communicate this order to the applicants who are lodged in the jail at Kolhapur Central Prison.

17 Both the applications are disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)