

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.582 of 2015

Arising Out of PS. Case No. -17 Year- 2014 Thana -Munger Muffasil District- Munger

=====

Darbari Yadav @ Bhatto Yadav Son of Late Lakhani Lal Yadav, Resident of
Village - Paria Bariyarpur, P.S. - Bariyarpur, District - Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Kamal Kishore Jha, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 06-09-2018

The appellant had filed this appeal against judgment of conviction and order of sentence dated 16.07.2015 and 20.07.2015 respectively passed by the learned Additional Sessions Judge-V, Munger in Session Trial No. 697 of 2014 by which he has convicted the appellant under Section 25(1-B)(a), 25(1-A), 26(1)(2) and 35 of the Arms Act. He had been sentenced to undergo rigorous imprisonment for seven years under Section 25(1-A) with fine of Rs.5,000/-, rigorous imprisonment for three years with fine of Rs.5,000/- under Section 25(1-B)(a), rigorous imprisonment for seven years with fine of Rs. 5,000/- under Section 26(1)(2) and in default to undergo simple imprisonment for six months. All these sentences were ordered to run concurrently.

2. During the pendency of the appeal, this Court vide order dated 24.11.2015 had suspended the sentences and granted him bail in



exercise of powers under Section 389(1) of the Code of Criminal Procedure (for short 'Cr.P.C').

3. On the submission of the learned counsel for the appellant that the appellant has been killed, vide order dated 29.06.2018, a report was called for from the Superintendent of Police, Munger.

4. In compliance of the order dated 29.06.2018 passed by this court, the Superintendent of Police, Munger vide letter number 135 dated 06.07.2018 submitted his report stating therein that the appellant was killed on 06.04.2018 and in this regard Bariyarpur P.S. Case No. 36 of 2018 has already been registered against five persons on the basis of the information given by one Mala Devi, wife of deceased appellant. The report also contains the postmortem examination report of the appellant.

5. In view of the aforesaid report of the Superintendent of Police, Munger, Mr. Kamal Kishore Jha, learned Advocate on record submitted that the appeal has abated on the death of the appellant.

6. Per contra, learned Additional Public Prosecutor appearing for the State submitted that since the sentences against the appellant were also of fine along with imprisonment, the appeal shall not abate on his death in view of the provisions prescribed under Section 394(2) of the Cr.P.C.

7. In view of the report submitted by the Superintendent of



Police, Munger, there is no dispute to the fact that the appellant has already been killed on 06.04.2018. However, the question arises as to whether the proceeding of this appeal may continue after the death of the appellant.

8. Section 394 of the Cr.P.C. in chapter XXIX deals with abatement of appeals. It reads as under:-

“Section 394:- (1). *Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.*

(2). *Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:*

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relative may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation – In this section, ‘near relative’ means a parent, spouse, lineal descendant, brother or sister. ”

9. From a reading of Section 394 of the Cr.P.C, it would be evident that every appeal, except an appeal against sentence of fine abates on the death of the appellant because sentence under appeal can



no longer be executed. However, sub-section (2) of Section 394 of the Cr.P.C creates an exception to the general rule. The exception is that an appeal against sentence of fine would not abate on the death of the appellant. Under the proviso to sub-section (2) of Section 394 of the Cr.P.C, a right has been given to the near relatives of the accused, who is convicted and sentenced to death or imprisonment and who dies during pendency of the appeal to continue the appeal by making an application to the appellate court within 30 days of the death of the appellant. Under the exception given to the aforesaid proviso, a near relative would mean parent, spouse lineal descendant, brother or sister.

10. Hence, in view of sub-section (2) of Section 394 of the Cr.P.C, an appeal from the sentence of fine would not abate. In such a case near relatives can come on record within 30 days and apply to the appellate court for leave to continue the appeal.

11. Here in the present case, the issue before this Court is not as to what will happen in case a sentence of imprisonment is awarded against the accused and he dies during pendency of the appeal or what will happen in case of an appeal against him sentence of fine is awarded and he dies during pendency of the appeal. The issue is as to what will happen in case of a composite sentence of imprisonment and fine against an accused, who dies during pendency of the appeal. In view of the express provision prescribed under Section 394 of the



Cr.P.C, such an appeal so far as it relates to sentence of fine will not abate with the death of the appellant since fine may affect pecuniary interest of the legal representative on whom estate of the deceased devolves. They are entitled to make an attempt to seek permission of the Court to prosecute the appeal within the statutory period of 30 days of the death of the appellant. If the near relatives do not seek permission of the Court to continue the appeal within 30 days of the death of the appellant, the appeal against imprisonment only shall abate. However, the appeal against sentence of fine would still survive.

12. Be it noted that Section 394 of the Cr.P.C corresponds to Section 431 of the Code of Criminal Procedure, 1898 (old Code). Section 431 of the old Code reads as under:-

"431. Every appeal under section 411A, sub- section (2), or section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."

13. In *Harnam Singh Vs. The State of Himachal Pradesh [AIR 1975 SC 236]*, the appellant was convicted by the Special Judge under section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act as also under section 161 of-the Penal Code and was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.300. The High Court confirmed the conviction but reduced the



substantive sentence to one year. Appeal to special leave was granted under Article 136 of the Constitution of India. The Supreme Court observed as under :-

“7. The appeal before us was filed by special leave granted under Article 136 of the Constitution and is neither under section 411A(2) nor under section 417 nor under any other provision of Chapter XXXI of the Code. Plainly therefore, section 431 has no application, and the question whether the appeal abated on the death of the appellant is not governed strictly by the terms of that section. But, in the interests of uniformity, there is no valid reason for applying to appeals under Article 136 a set of rules different from those which government appeals under the Code in the matter of abatement. It is therefore necessary to find the true meaning and scope of the provision contained in section 431.

8. Chapter XXXI of the Code of 1898, called "of Appeals" contains provisions governing appeals. The Chapter opens with section 404 which provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force and ends with section 431 which deals with abatement of appeals. Section 411A(2) provides for appeals to the High Court from orders of acquittal passed by the High Court in the exercise of its original criminal jurisdiction. Section 417 deals with appeals to the High Court from original or appellate orders of acquittal passed by Courts other



than a High Court. By section 431, appeals against acquittal filed under section 411 A (2) of section 417 finally abate on the death of the accused. Dead persons are beyond the processes of human tribunal and recognizing this, the first limb of section 431 provides that appeals against acquittals finally abate on the death of the accused. Where a respondent who has been acquitted by the lower court dies, there is no one to answer the charge of criminality, no one to defend the appeal and no one to receive the sentence. It is of the essence of criminal trials that excepting cases like the release of offenders on probation, the sentence must follow upon a conviction. Section 258(2), section 306(2) and section 309(2) of the Code provide, to the extent material, that where the Magistrate or the Sessions Judge finds the accused guilty and convicts him he shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on the accused according to law.

9. Every other appeal under Chapter XXXI, except an appeal from a sentence of fine, finally abates on the death of the appellant. By "every other appeal" is meant an appeal other than one against an order of acquittal, that is to say, an appeal against an order of conviction. Every-appeal against conviction therefore abates on the death of the accused except an appeal from a sentence of fine. An appeal from a sentence of fine is excepted from the all pervasive rule of abatement of criminal appeals for the reason that the fine constitutes a liability on the estate of the



deceased and the legal representatives on whom the estate devolves are entitled to ward off that liability. By section 70 of the Penal Code the fine can be levied at any time within six years after the passing of the sentence and if the offender has been sentenced for a longer period than six years, then at any time previous to the expiration of that period;

"and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts".

The fact that the offender has served the sentence in default of payment of fine is not a complete answer to the right of the Government to realize the fine because under the proviso to section 386(1) (b) of the Code the court can, for, special reasons to be recorded in writing, issue a warrant for realizing the fine even if the offender has undergone the whole of the imprisonment in default of payment of fine. The sentence of fine thus remains outstanding though the right to recover the fine is circumscribed by a sort of a period of limitation prescribed by section 70, Penal Code.

10. The narrow question which then requires to be considered is whether an appeal from a composite order of sentence combining the substantive imprisonment with fine is for the purposes of section 431 not an appeal from a sentence of fine. It is true that an appeal from a composite order of sentence is ordinarily directed against both the, substantive imprisonment and the fine. But, such an appeal does



not for that reason cease to be an appeal from a sentence of fine. It is something more not less than an appeal from a sentence of fine only and it is significant that the parenthetical clause of section 431 does not contain the word "only". To limit the operation of the exception contained in that clause so as to take away from its purview appeals directed both against imprisonment and fine is to read into the clause the word "only" which is not there and which, by no technique of interpretation may be read there. The plain meaning of section 431 is that every criminal appeal abates on the death of the accused "except an appeal from a sentence of fine". The section for its application requires that the appeal must be directed to the sentence of fine and not that it must be directed to that sentence only. If by the judgment under appeal a sentence of fine is imposed either singularly or in conjunction with a sentence of imprisonment, the appeal against conviction would be an appeal from a sentence of fine within the meaning of section 431. All that is necessary is that a sentence of fine should have been imposed on the accused and the appeal filed by him should involve the consideration of the validity of that sentence.

11. It is difficult to discern any principle behind the contrary view. The reason of the rule contained in the exception is that a sentence of fine operates directly against the estate of the deceased and therefore the legal representatives are entitled to clear the estate from the liability whether or not the



sentence of fine is combined with any other sentence can make no difference to the application of that principle.

12. The appeal filed by the accused Hamam Singh in this Court was thus an appeal from a sentence of fine, involving as it did the consideration as regards the legality or propriety of that sentence. The deceased appellant's widow who has been brought on the record as his legal representative is accordingly entitled to prosecute the appeal.

13. Counsel for the State Government thought it anomalous that whereas after the death of an appellant the court would have no power to deal with an appeal against an order by which a substantive sentence only is imposed, the court should have the power to set aside the conviction and the sentence of imprisonment even after the death of an appellant merely because a sentence of fine is also imposed on him. The answer to this difficulty is that by section 431 an express exception is carved out in favour of appeals from a sentence of fine. Such appeals are saved from the general rule contained in section 431 that all criminal appeals abate on the death of the accused. In an appeal from a judgment imposing a sentence of fine either by itself or along with a sentence of imprisonment, the legality or propriety of the sentence of fine necessarily involves an examination of the validity of the order of conviction. The sentence follows upon the conviction and the validity of the two is interconnected. The appellate court, while dealing



with the validity of the sentence of fine, has to determine the primary question whether the conviction itself is sustainable. If it holds that the conviction is unsustainable, it must set aside the conviction and the sentence or sentences following upon the order of conviction; it cannot merely set aside the sentence of fine and permit the conviction and the substantive sentence to remain. The sentence of the fine becomes illegal if the conviction is wrong. If the conviction is wrong, no sentence at all can be imposed on the accused. Therefore, once the appellate court reaches the conclusion that the conviction is unwarranted, that finding must be given its full effect by setting aside the conviction and all such sentences as are founded on the order of conviction. We find it impossible to agree with the submission of the State Government that even after finding that the conviction is illegal, the court must only set aside the sentence of fine permitting the illegal conviction and the substantive sentence founded upon it to remain. That would be truly unjust and anomalous.

14. If this be the true interpretation of section 431, there is no reason why the same principle ought not to be extended to criminal appeals filed in this Court under Article 136 of the Constitution. Accordingly the widow of the deceased appellant who has been brought on the record of the appeal as his legal representative is entitled to continue the appeal as the sentence of fine directly affects the property which would devolve on her on the death of her



husband.”

14. It would be relevant to note here that in Section 431 of the old Code, the proviso to Section 394(2) of the Cr.P.C was not there. By this new proviso the legislature has given a right to the near relatives of the deceased, who is convicted and sentenced and who dies during pendency of the appeal to continue the appeal by making an application to the appellate court within 30 days of the death of the appellant. Even in absence of the proviso to Section 394(2) of the Cr.P.C, the Supreme Court permitted the wife of the deceased appellant to continue the proceeding.

15. Thus, there is no dispute as far as question of law is concerned that in case the accused is convicted and sentenced to pay fine along with imprisonment, the appeal would not abate. However, since the legal representatives or near relatives of the appellant have not turned up and sought leave to continue the appeal, the appeal is consigned.

(Ashwani Kumar Singh, J)

Md.S./-Sanjeev
Pradeep/

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	18.09.2018
Transmission Date	18.09.2018

