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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 19.11.2019

+ **CRL.REV.P. 198/2019**

IN THE MATTER OF:

JYOTI DUBEY Petitioner

Through: Petitioner in person.

Versus

THE STATE & ANR Respondents

Through: Ms. Manjeet Arya, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J (ORAL)

1. The present revision petition has been filed assailing the impugned order dated 26.11.2018 passed by the Addl. Sessions Judge in Criminal Appeal No. 205/2017.
2. A perusal of the record show that the petitioner was convicted vide order dated 02.11.2017 and vide order on sentence dated 03.11.2017, the petitioner was sentenced to pay a fine of ₹3,00,000/- and in default of payment of fine to undergo simple imprisonment for six months. It was further directed that out of fine amount, the amount of ₹1,70,000/- shall be payable to the complainant as compensation.
3. The petitioner preferred a Criminal Appeal No. 205/2017 which was listed for the first time on 22.12.2017. On the said date, the petitioner's sentence was suspended and the case was kept at 2:00 p.m. At 2:15 p.m. the

matter was again kept at 4:00 p.m. At 4:00 p.m. the Addl. Sessions Judge noting the absence of counsel for the petitioner, dismissed the appeal for non-appearance/non-prosecution.

4. The petitioner preferred a Criminal Review Petition No. 70/2018 which came to be dismissed on 26.11.2018.

5. Section 386 Cr.P.C. reads as under:-

386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may:

(b) in an appeal from a conviction,

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same; 142

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal

6. In the case of Bani Singh & Ors. Vs. State of U.P. reported as **(1996) 4 SCC 720**, the question which arose before the Supreme Court was whether the High Court was justified in dismissing the appeal filed by the accused against the order of conviction and sentence for non-prosecution. After considering the relevant provisions under Chapter XXIX of the Cr.P.C., Supreme court reiterated the law declared in the case of Shyam Deo Pandey & Ors vs State of Bihar reported as **(1971) 1 SCC 855** wherein, it was held that once an appeal was admitted, it was the duty of the court to peruse the records of the case before dismissing it. It was also held that once the appeal is not dismissed summarily, it was obligatory for the Appellate Court to send for the records of the case. It was further held that if the appellant or his pleader is not present, the Appellate Court has jurisdiction to proceed with the disposal of the appeal, but that disposal must be after the Appellate Court has considered the appeal on merits. It was further held that the appeal must be considered and disposed of on merits irrespective of the fact whether the appellant or his counsel is present or not. Similarly, in Padam

Singh vs. State of U.P. reported as **(2000) 1 SCC 621**, it was held as under:-

“It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court.”

7. The above principles were reaffirmed and reiterated in subsequent decisions in Rama & Ors vs. State of Rajasthan **(2002) 4 SCC 571**, Iqbal Abdul Samiya Malek vs. State of Gujarat **(2012) 11 SCC 312**, Dharam Pal & Ors. vs. State of Uttar Pradesh **(2008) 17 SCC 337**, Kamlesh Prabhudas Tanna & Anr. vs. State of Guajrat **(2013) 15 SCC 263** and Mohd. Ali @ Guddu vs. State of Uttar Pradesh **(2015) 7 SCC 272**.

8. In Mohd. Sukur Ali vs. State of Assam reported as **(2011) 4 SCC 729**, it was held that in a criminal case if the counsel does not appear the court should appoint an amicus curiae and decide the case after hearing the parties. While laying down the above principles, the Apex Court relied on the following para from the decision of the U.S. Supreme Court in Powell vs. Alabama **287 U.S 45 (1932)** :-

“6. What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”

9. In view of the above enunciation of law, this Court is of the view that the Appellate Court ought not to have dismissed the appeal in default and for non-prosecution. The Appellate Court, in absence of the appellant or his counsel, ought to have appointed an amicus curiae and after hearing the amicus curiae as well as the public prosecutor for the State and after

perusing the records of the case, should have decided the case on merits. The revision petition is allowed and impugned orders dated 22.12.2017 & 26.11.2018 are set aside. Resultantly, the Criminal Appeal 205/2017 is restored to its original number. It is directed that, at the first instance, the matter be fixed on 27.11.2019 for directions by the Appellate Court on which date parties shall appear and thereafter Appellate Court shall proceed with the matter in accordance with law.

10. Certified copy of this order be communicated to the concerned Appellate Court.

MANOJ KUMAR OHRI
(JUDGE)

NOVEMBER 19, 2019

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