

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.11.2019

+ **W.P.(CRL) 2576/2018 & CRL.M.A. 31082/2018**

ASHOK MALHOTRA

..... Petitioner

versus

STATE (GOVT OF NCT DELHI) & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Sanobar Ali, Advocate.

For the Respondent: Mr Rajesh Mahajan, ASC with Mr Jyoti Babbar, Advocates for state.

SI Rahul, P.S. Shahdara.

Mr Manjeet Singh and Mr S. Gupta,
Advocates for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 04.06.2018 (hereafter 'the impugned order') passed by the learned District and Sessions Judge, Shahdara District, Karkardooma Courts, Delhi in Criminal Appeal No. 1230/2016.

2. Respondent no.2 (the complainant) had stated that the petitioner, who is the elder brother of the complainant's husband (*jeth*) lived on the first floor of the property bearing House No. 1/6896, East Rohtash Nagar, Shahdara, Delhi - 110031. She had stated that the petitioner desired to live on the ground floor of the said property and wanted the

complainant and her family to leave the said property. She alleged that in the aforesaid context, on 02.07.2006 at about 11:45 a.m., the petitioner had hurled abuses at her and had hit the complainant on her face (below her left eye) with a GI Pipe (iron pipe). She had stated that this was informed to the police and the complainant and her husband were taken by the police to GTB Hospital for a medical examination. An FIR (bearing FIR No. 295/2006 under Section 325 of the IPC) regarding the said incident was registered with PS Shahdara and a case was sent to trial.

3. The Trial Court, by an order dated 28.09.2010, framed a charge against the petitioner for the commission of an offence under Section 323 of the IPC.

4. On 03.03.2015, the petitioner submitted before the Trial Court that the disputes between him and the complainant (who is the wife of his younger brother) had continued for a number of years. In addition, other litigation regarding property in question had also ensued between the parties. He submitted that he was finding it difficult to appear in court repeatedly and had attempted to compromise the matters with the complainant but she had refused the same. He stated that in the circumstances, he desired to plead guilty for the offence for which he was charged, that is, an offence under Section 323 of the IPC.

5. In view of the aforesaid statement on 03.03.2015, the Trial Court convicted the accused for the offence under Section 323 of the IPC. Considering the facts of the case, the Trial Court also imposed the

punishment of admonishing the petitioner. It also clarified that the conviction would not attract any disqualification as per the Probation of Offenders Act, 1958.

6. Aggrieved by the same, the complainant (respondent no.2) preferred an appeal (Appeal under Section 378 of the CrPC) before the learned Additional Sessions Judge. It was contended on behalf of respondent that the injuries suffered by her were grievous in nature and therefore, the petitioner ought to have been convicted of an offence under Section 325 of the IPC. The Appellate Court (learned ASJ) accepted the aforesaid contention and by an order dated 14.01.2016, allowed the appeal and remanded the matter to the learned Chief Metropolitan Magistrate. The Appellate Court also directed the parties to appear before the said Court on 28.01.2016.

7. The learned Metropolitan Magistrate considered the matter afresh and convicted the petitioner of the offence under Section 325 of the IPC on the ground that he had already pleaded guilty on 03.03.2015. Considering the facts obtaining in the case, the Trial Court observed that ends of justice would be served if the petitioner is admonished for the offence under Section 325 of the IPC and be additionally burdened to pay compensation to the complainant. Accordingly, the learned CMM, by an order dated 15.09.2016, admonished the petitioner and directed him to pay compensation of ₹80,000/- to the complainant. The Court further directed that if the petitioner failed to pay the compensation as directed, he would be liable to serve simple imprisonment for a period

of one year. The matter was relisted on 14.10.2016 for payment of compensation.

8. On 14.10.2016, the petitioner's wife brought the compensation amount of ₹80,000/- and tendered the same. The complainant (respondent no.2) declined to receive the said amount and the Trial Court recorded her statement to the said effect. The Trial Court admonished the petitioner for the offence under Section 325 of the IPC and also clarified that no disqualification would be attracted in terms of the provisions of the Probation of Offenders Act, 1958. The Trial Court further clarified that the conviction would not have any adverse effect on the petitioner's service. Aggrieved by the aforesaid orders (order dated 15.09.2016 and 14.10.2016) respondent no.2 preferred an appeal (CA No. 1230/2016) before the Learned ASJ. The memorandum of appeal has been handed over to this Court.

9. A perusal of the appeal indicates that respondent no.2 is, essentially, aggrieved by the sentence awarded to the petitioner. According to respondent no.2, the said sentence is inadequate. Respondent no.2 also claims that the petitioner was not entitled to exemption from disqualification under the Probation of Offenders Act, 1958.

10. The Trial Court passed an order dated 31.01.2017 directing that the appeal preferred by respondent no.2 be treated as one under Section 372 of the CrPC. The appellate court disposed of the appeal by an order

dated 04.06.2018 and the same is impugned by way of the present petition.

11. The Appellate Court held that the learned CMM ought to have altered the charge and conducted the trial after altering the charge to Section 325 of the IPC. The Court also noted that the petitioner had pleaded guilty to an offence under Section 323 of the IPC and not to an offence under Section 325 of the IPC. Consequently, the appeal was allowed and the orders passed by the learned CMM on 15.09.2016 and 14.10.2016 in relation to FIR No. 295/2006 were set aside. The matter was remanded to the learned CMM for proceeding with the case in accordance with law after altering the charge, as directed by the earlier order dated 14.10.2016.

12. The principal question to be addressed in the present petition is whether an appeal under Section 372 of the CrPC was maintainable at the instance of respondent no.2 (the victim). It is contended on behalf of the petitioner that respondent no.2 had preferred an appeal under Section 372 of the CrPC for enhancing the punishment imposed on the petitioner as, according to her, the same is wholly inadequate. He submitted that respondent no.2 had made no grievance regarding inadequacy of compensation directed to be paid. On the contrary, she had recorded her statement declining to accept the compensation.

13. Mr Rajesh Mahajan, learned ASC, has supported the contention advanced by the petitioner. He submitted that the proviso to Section 372 of the CrPC does not entitle the victim to file an appeal on account of

inadequacy of sentence. He submitted that an appeal on the said ground could only be filed by the State. He referred to the decision of the Supreme Court in ***National Commission for Women v. State of Delhi & Anr.: (2010) 12 SCC 599*** in support of his contention. He also pointed out the decision of the coordinate Bench of this Court in ***Shikha Beniwal v. State & Anr.: Crl. A. 1320/2012, decided on 18.02.2015***, wherein an observation had been made that an appeal filed by the complainant victim for enhancement of sentence is akin to the State's appeal for enhancement of sentence under Section 377 of the CrPC. He also submitted that the said Bench had, in a subsequent decision in ***Shakeel Ahmed v. State of NCT of Delhi & Ors.: Crl. A. 528/2012, decided on 25.05.2015***, accepted the view that the scope of an appeal preferred by a victim under Section 372 of the CrPC was limited.

14. Mr Manjeet Singh, learned counsel appearing for respondent no. 2, countered the aforesaid submissions. He referred to the decision of the Supreme Court in ***Mallikarjun Kodagali (dead) represented thr. Legal Representatives v. State of Karnataka & Ors.: Crl. Appeal No. 1281-82/2018, decided on 12.10.2018***. He submitted that M.B. Lokur, J. speaking for himself and S. Abdul Nazeer, J., had emphasized the rationale for providing the victim a right to appeal. He submitted that given such right, the victim would also have a right to challenge the inadequacy of sentence awarded. He further submitted that *de hors* the provisions of Section 372 of the CrPC, a victim would always have the right to challenge an order passed by the Trial Court imposing an inadequate sentence convicting the accused. He stated that in the present

case, simply because the State had not filed an appeal, the victim could not be rendered remediless.

15. He also referred to the decision of the Division Bench of this Court in ***Mahesh Rai v. The State Government of NCT of Delhi: Crl. A. No. 1075/2017, decided on 13.05.2019***. He submitted that in that case, the father of the deceased victim had also filed an appeal (Crl. A. 31/2018) seeking enhancement of the sentence awarded and the same was allowed. He submitted that this also indicated that an appeal seeking enhancement of sentence awarded to the accused was maintainable.

Reasons and Conclusion

16. The issue as to the rights available to victims has been much debated in recent times. This was also one of the subjects dealt with in the 154th Report of the Law Commission of India submitted in the year 1990. In March, 2003 the Committee on Reforms of Criminal Justice System, referred to as the ‘Justice Malimath Committee’, had recommended that a victim should also have a right to prefer an appeal. The recommendation made by the said Committee reads as under:-

“The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.”

17. Subsequently, Section 372 of the CrPC was amended with effect from 31.12.2009. The said Section, as amended, reads as under:-

“372. No appeal to lie unless otherwise provided.

– No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.”

18. A plain reading of the proviso to Section 372 of the CrPC indicates that the victim also has a right to prefer an appeal against an order passed by the Court in the following circumstances – (a) acquitting the accused; or (b) convicting the accused for a lesser offence; or (c) imposing inadequate compensation.

19. The proviso to Section 372 of the CrPC does not contemplate an appeal against an order of a Court imposing an inadequate sentence/punishment. It is well settled that there is no inherent right of an appeal and the said right is a statutory right and is available only if it is conferred by a statute. In several decisions, an appeal has been described as a creature of a statute. (See: **Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh: (2014) 9 SCC 102**). In **National Commission for Women** (*supra*), the Supreme Court had observed that “an appeal is a creature of a statute and cannot lie under any inherent

power”. In view of the above, the contention that respondent no. 2 has an inherent right to appeal against an order of a court imposing inadequate punishment on the accused, is unmerited.

20. The proviso to Section 372 of the CrPC provides a limited right to the victim to file an appeal. The plain language of the said proviso indicates that it does not contemplate an appeal against an inadequate sentence.

21. In ***National Commission for Women*** (*supra*), the Supreme Court had observed as under:-

“8. Chapter XXIX of the Code of Criminal Procedure deals with “Appeal(s)”. Section 372 specifically provides that no appeal shall lie from a judgment or order of a criminal court except as provided by the Code or by any other law which authorizes an appeal. The proviso inserted by Section 372 (Act 5 of 2009) with effect from 31-12-2009, gives a limited right to the victim to file an appeal in the High Court against any order of a criminal court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence.”

(emphasis applied)

22. The decision of the Division Bench of this Court in ***Mahesh Rai*** (*supra*) is of little assistance to respondent no. 2. In that case, the accused had preferred an appeal against a judgment convicting him

under Sections 452 and 302 of the IPC and also against the order of sentence. The State had also preferred an appeal seeking enhancement of the sentence. All the three appeals were heard together. A plain reading of the decision indicates that no issue had been raised or considered regarding the maintainability of the appeal preferred by the father of the deceased victim.

23. In **Shikha Beniwal** (*supra*), the coordinate Bench of this Court had referred to the decision of the Supreme Court in **Jagmohan Bhola v. Dilbagh Rai Bhola & Ors.: 2011 (2) JCC 777** and following the said decision, had observed that an appeal filed by the complainant victim was for enhancement of sentence was akin to a State's appeal for enhancement of sentence under Section 377 of the CrPC. A plain reading of the decision in **Jagmohan Bhola** (*supra*) indicates that the observations made by the Court in that decision were in the context of whether a leave to appeal was necessary for preferring an appeal under Section 372 of the CrPC. The Division Bench of this Court was not called upon to consider the question whether an appeal by a victim is maintainable for enhancement of the punishment imposed.

24. It is also relevant to note that the view expressed by the coordinate Bench of this Court in **Shikha Beniwal** (*supra*) was not followed by the bench in a later decision in **Shakeel Ahmed** (*supra*).

25. Before concluding, it is also relevant to refer to the decision of the Full Bench of the Gujarat High Court in **Bhavuben Dineshbhai Makwana v. State of Gujarat & Others: (2013) 3 MWN (Cri) 268 (FB)**.

In that case, the Full Bench had, *inter alia*, framed the following questions for consideration: -

“(i). Whether an appeal filed by the victim, invoking his right under proviso to section 372 of Cr.P.C, challenging acquittal, or conviction for a lesser offence, or awarding inadequate compensation, is not maintainable, on the ground that the State has filed an appeal against the same order and for the same purpose?

(ii). Whether an appeal filed by the State should not be entertained, on the ground that the appeal preferred by the victim invoking his right under proviso to section 372 of Cr.P.C., against the same order, is admitted by the Court?

(iii). If the victim prefers an appeal before this Court, challenging the acquittal, invoking his right under proviso to section 372 of Cr.P.C., whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State?”

26. After analyzing the provisions of the Act and after considering the earlier issues, the Court had held as under:-

“18. We further find that in taking the above view, the Division Bench in the above matter failed to take into consideration the fact that the scope of appeal at the instance of the victim is different from that of an appeal filed by the State. It appears that the victim (as defined in Section 2(wa) of the Code) shall have a right to prefer an appeal in the following 3 types of cases:

(i) Acquittal of the accused

(ii) Convicting of the accused for a lesser offence

(iii) Imposing inadequate compensation

18.1 In other words, the victim has no right to prefer an Appeal against 'inadequacy of sentence', a right which is available only to the State. The State, however, does not have any right to file any Appeal against "inadequacy of Compensation", a right, which is available only to a victim.

19. The term 'inadequacy of sentence' has a special connotation and a distinct statutory demarcation if the provisions of Section 375(d) and Section 377 of the Code are compared. Scheme of Section 377, which provides for right of Appeal to the State/Prosecution, is entirely different from the right of Appeal conferred upon a victim under the Proviso to Section 372 of the Code. Under the scheme of Section 377 not only the State/Prosecution can file an Appeal based upon inadequacy of sentence, but even the Accused can plead for his acquittal or for reduction of the sentence as contemplated under Section 377(3) of the Code.

20. As against this, if the scheme of Proviso to Section 372 of the Code is compared, only a victim has an absolute right to file an Appeal challenging imposition of inadequate Compensation in addition to the right of Appeal against acquittal and also challenging the conviction based on lesser offence. There is, however, no provision in the entire Code empowering the State Prosecution to file an Appeal against an order imposing inadequate Compensation.

21. In light of different types of right of Appeal provided to the victim and to the State/Prosecution, it will not be proper to hold that the right of either of them is dependent upon the other. To put it differently, only victim can file an Appeal against an order of imposing 'inadequate Compensation' in addition to his right of Appeal against acquittal and

convicting the Accused for a lesser offence and therefore, to club his right and make it dependent upon the exercise of right of Appeal at the instance of the State would be not only be unworkable, but would run contrary to the scheme and lead to absurdity.”

27. In view of the above the appeal (Criminal Appeal 1230/2016) preferred by respondent no.2 was not maintainable. Accordingly, the present petition is allowed and the impugned order is set aside as The pending application is also disposed of.

28. The parties are left to bear their own costs.

NOVEMBER 01, 2019
RK/pkv

VIBHU BAKHRU, J