

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 3214 OF 2021

Pankaj Arjunbhai Koli

...Petitioner

Versus

The State of Maharashtra

...Respondent

...

Mr. Nilesh Ojha i/by. Mr. Abhishek Mishra, Mr. Tanveer Nizam, Ms. Deepika Jaiswal, Ms. Poonam Rajbhar & Mr. Mangesh Dongre for Petitioner.

Mrs. S.D. Shinde, APP for State.

...

**CORAM : S. S. SHINDE &
N. J. JAMADAR, JJ.**

DATE : 17th SEPTEMBER, 2021.

P.C.:

1. The Petitioner who is convicted for the offences punishable under Section 376 (1), 376(2)(n) and 506(II) of the Indian Penal Code, 1860 ('Penal Code') has preferred this petition for the following relief:-

(a) this Hon'ble Court may be pleased to direct the Ld. Sessions Judge to pronounce and upload the judgment of conviction dated 18.08.2021 and permit the petitioner/accused to avail the remedy of appeal file of Ld. Additional Sessions (Special Judge POCSO Act), Mumbai, Court Room No. 39, arising out of C.R. No. 128/2015 registered with the J.J. Marg Police Station, Mumbai.

2. The background facts which are necessary for determining the limited controversy raised in this petition can be stated as under:-

The petitioner was sent for trial in a proceedings arising out of C.R. No. 128/2015 registered with J.J. Marg Police Station, Mumbai, for the offences punishable under Section 376(1), 376(2)(n), 506(II), 354 of the Penal Code and Section 4 and 6 of Protection of Children From Sexual Offences Act, 2012. Post conclusion of trial, the learned Sessions Judge by an order dated 18th August, 2021, held the petitioner guilty of offence punishable under Section 376(2)(n) and 506 (II) of the Penal Code. It is the contention of the petitioner that the petitioner has applied for a copy of judgment of conviction. However, the learned Sessions Judge was persuaded to reject the application without assigning any reason. The petitioner was taken in custody. Bail application preferred by the petitioner came to be rejected. Sentence has yet not been pronounced.

The substance of the claim of the petitioner is that the petitioner must have been provided with a copy of judgment whereby the petitioner was held guilty for the offences punishable under Section 376(2)(n) and 506 (II) of the Penal Code as the petitioner has a fundamental right to prefer an appeal against the very order of conviction, as distinct from the judgment of conviction

and sentence.

3. In the light of submissions which were canvassed yesterday to the effect that the judgment of conviction has not yet been pronounced and it was noted in the ordersheet only that the petitioner was held guilty of aforesaid offences, we thought it appropriate to call a report from the learned Sessions Judge to ascertain the true state of affairs.

4. The learned Sessions Judge has submitted a report dated 16th September, 2021 and informed that the entire judgment was already typed and made ready in all respects on 18th August, 2021 itself. The learned Sessions Judge has also adverted to the developments which took place in the intervening period. We do not propose to delve into those details except recording that in the intervening period six applications were filed on behalf of the accused and the matter was required to be adjourned on twelve occasions. Mr. Ojha did not dispute that six applications were filed on behalf of the petitioner.

5. Mr. Ojha, the learned counsel for the petitioner submitted that the constitutional right of the petitioner to have a

copy of the judgment of conviction and challenge the order of conviction is infringed. An endeavor was made to impress upon the Court that there are two distinct parts in the judgment of conviction and sentence. The judgment of conviction precedes the proceedings which are conducted by trial Court to impose the sentence. At the stage of delivery of judgment itself, a right to prefer an appeal thereagainst arises to the accused. The denial of the opportunity to prefer an appeal against the order of conviction causes grave prejudice to the right of the accused, urged Mr. Ojha.

6. In order to lend support to the aforesaid submissions, Mr. Ojha invited our attention to the provisions contained in Section 235 of the Code of Criminal Procedure, 1973 ('the Code') and interpretation put thereon by the Supreme Court in the case of *Santa Singh Vs. The State of Punjab*¹, and the subsequent judgments which followed the proposition in the case of Santa Singh (supra). Mr. Ojha laid special emphasis on the following observations of Supreme Court in Para 2 of the judgment in the case of Santa Singh (supra):

2. The appeal is limited to the question of sentence and the principal argument advanced on behalf of the appellant is that I no not giving an

1 (1976) 4 SCC 190

opportunity to the appellant to be heard in regard to the sentence to be imposed on him after the judgment was pronounced convicting him, the learned Sessions Judge committed a breach of Section 235(2) of the Code of Criminal Procedure, 1973 and that vitiated the sentence of death imposed on the appellant. This argument is a substantial one and it rests on the true interpretation of Section 235(2). This is a new provision and it occurs in Section 235 of the Code of Criminal Procedure, 1973 which reads as follows:

235. (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that state, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the court can proceed to pass the sentence.

7. Laying stress on the observations that “The Court, must, in the first instance deliver a judgment convicting or acquitting the accused. ----- . But if he is convicted, then the court has to hear the accused on the question of sentence, and then pass sentence on him according to law”, Mr. Ojha strenuously urged that the delivery of a judgment of conviction is the requirement law flowing from Section 235 of the Code.

8. Mr. Ojha, placed reliance on the judgment of Hon’ble Supreme Court in the case of Modi Telefibers Ltd. & Others Vs. Sujit Kumar Choudhary and Others², wherein in the context of an order passed by the learned Single Judge of the High Court, holding the appellant therein guilty of contempt of Court, the Supreme Court held that the findings recorded by the learned Single Judge could not have been treated to be an interlocutory order and the appellant could not have been denied the right to challenge the said order by preferring an appeal. Reliance was placed on the observations contained in para 4 and 5 of the said judgment.

4. After hearing the learned counsel for the parties and perusing the impugned order, we find that the Division Bench has committed gross error in overlooking the contents of the order of the learned Single Judge in

2 (2005) 7 SCC 40

which the finding has been recorded that the employer has committed contempt by not paying full dues of the workmen under the award.

5. Such an order of the learned Single Judge could not have been treated to be an interlocutory order and the right of appeal denied to the appellant employer merely because the learned Single Judge had adjourned the contempt proceedings to enable the alleged contemnor to purge the contempt or else for deciding the quantum of punishment.

9. Our attention was also invited to the observations of learned Single Judge of Chattisgarh High Court in the case of **Kiran Singh Vs. State of Chattisgarh and Another**³, wherein, in the context of the allegations that the learned trial Judge had merely recorded in the order sheet that the judgment is written, signed and dated separately, but the enquiry revealed that the said judgments were not forthcoming on the record of the Court, the learned Single Judge held that the order sheets cannot be construed as judgment. Reliance was placed on para 26 to 29 of the said judgment.

26. The Division Bench of Patna High Court in Ramautar Thakur V. State of Bihar, held thus:

18. The Criminal Procedure Code, unlike the Civil Procedure Code does not define 'Judgment' A judgment means the expression of the opinion of the Court arrived at after, a due consideration of the

3 2016 SCC OnLine Chh 2123

evidence and all the arguments. The above meaning of the word 'Judgment', as is to be found in Full Bench decisions of the Madras High Court in Re Chinna Kaliappa Goundan, of the Bombay High Court in Emperor V. Nan-dial Chunt Lal and of the Calcutta High Court in Damu Senapati V. Shridhar Rajwar, was approved by their Lordships Bhagwati and Imam JJ., in the Supreme Court case just mentioned.

Their Lordships mentioned that the observations of the Madras High Court in its Full Bench decision, just referred to, were quoted with approval by Sulaiman, J., in Dr. Hori Ram Singh v. Emperor: AIR 1939 FC 43 (T). in which his Lordships Sulaiman, J., observed that the Criminal Procedure Code did not define a 'judgment', but various sections of the Code suggested what it meant His Lordships then discussed those sections and concluded that 'judgment' in the Code meant a judgment of conviction or acquittal.

19. The question, therefore, for our consideration is, is the order of dismissal for default a 'judgment'?

20. In the case of AIR 1928 Rang 238 (G), it has been held that an order of dismissal for default is not a 'judgment' within the meaning of section 369, Criminal P.C.

21. In this connection the observation of Sulaiman, J., in 'Dr. Hori Ram Singh (T)', above mentioned, which was held by the Supreme Court to be sound, may be reproduced below:

"It will be seen that an order under section 435 can with difficulty be called a 'judgment'. All that a judge does at his preliminary stage is either to send for the records of the lower Court with it a view to examining them under section 439(1), or to refuse to do so it is difficult to see how

the later can possibly be called, a judgment of conviction. When such an order consists of the one word "Dismissed" can it necessarily be taken as a judicial pronouncement that in the opinion of the Judge the respondent was rightly convicted upon the evidence? It seems to me that all that it means is that the Judge sees no adequate ground disclosed in the petition or on the face of the judgment for proceeding further."

22. His Lordship Bhagwati, J. in the Supreme Court case in delivering his own judgment and that of His Lordship Imam, J. observed thus:

"The "order dismissing the appeal or criminal revision summarily or in limine would no doubt be a final order of the High Court not subject to review or revision even by the High Court itself but would not tantamount to a judgment replacing that of the lower Court."

(Emphasis supplied)

27. Thus, by now it is fairly settled that to constitute a judgment rendered by a Criminal Court, it is not the operative part written in the order sheet which would constitute the judgment but it is the discussion on the merits of the prosecution evidence, the arguments of both the sides and the findings based on reasons to conclude the trial in conviction or acquittal, which would constitute a judgment.

28. If the orders in the order sheet passed in the present case would constitute a judgment, then there is nothing to be appealed against because there is no discussion at all of the prosecution case and the reasons for recording of such finding which entitles the accused to be acquitted.

29. In view of the authoritative

pronouncements by the Supreme Court in Jagdev Singh Talwandi (supra) and Yakub Abdul Razak Memon (supra), the order passed in order sheet in favour of each of the petitioner acquitting them of the charges by a two line order would not constitute judgment, therefore, the trial has not come to an end on the basis of such order. Moreover, the trial Judge has mentioned in the order sheet that the judgment is signed and dated in the open Court, however, there is no judgment available in the record of the Court, therefore, the Judge himself had construed that there is a separate document which he has referred as judgment, which is distinct and separate than the order in the order sheet wherein the acquittal is recorded.

10. Lastly, Mr. Ojha, invited our attention to the observations of the Hon'ble Supreme Court in the case of **Balaji Baliram Mupade and Another Vs. State of Maharashtra and Others**⁴, wherein the Supreme Court did not approve the practice of pronouncing the final orders without a reasoned judgment. Emphasis was laid on the observations of the Supreme Court in Para 11 and 12 of the said judgment, which read as under:-

11. We must note with regret that the counsel extended through various judicial pronouncements including the one referred to aforesaid appear to have been ignored, more importantly where oral orders are pronounced. In case of such orders, it is expected that they are either

4 2020 SCC OnLine SC 893

dictated in the Court or at least must follow immediately thereafter, to facilitate any aggrieved party to seek redressal from the higher Court. The delay in delivery of judgments has been observed to be a violation of Article 21 of the Constitution of India in Anil Rai's case (supra) and as stated aforesaid, the problem gets aggravated when the operative portion is made available early and the reasons follow much later.

12.It cannot be countenanced that between the date of the operative portion of the order and the reasons disclosed, there is a hiatus period of nine months! This is much more than what has been observed to be the maximum time period for even pronouncement of reserved judgment as per Anil Rai's case (supra).

11. In opposition to this, Mrs. Shinde, the learned APP would urge that there is no material irregularity in the proceedings of the learned Sessions Judge. Mrs. Shinde, invited our attention to the provisions contained in Section 354 and Section 363 of the Code to buttress the submission that the right of the accused to have a copy of the judgment crystallizes only upon the pronouncement of the sentence. The thrust of submission of Mrs. Shinde was that the sentence forms an integral part of the judgment and till the sentence is pronounced there is no right of appeal against the order holding the accused guilty of the offences charged.

12. We have given our careful consideration to the submissions canvassed across the bar. We have also perused the material on record including the copies of ordersheets, which are annexed to the petition. We have carefully perused the judgments cited across the bar by Mr. Ojha.

13. The moot question, which is sought to be urged on behalf of the petitioner, is whether the accused has a right to have the copy of the judgment the moment the judgment of conviction is pronounced and a further right to assail the judgment of conviction *eo instanti*. The edifice of the challenge is sought to be built around the provisions contained in Section 235 of the Code. Section 235 of the Code reads as under:-

235. Judgment of acquittal or conviction.- (1) *After hearing arguments and point of law (if any), the Judge shall give a judgment in the case.*

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

14. In our view the reliance sought to be placed on the aforesaid provisions does not advance the cause of the petitioner. On a proper construction of the said provision, especially sub

section (2) of Section 235 of the Code, it becomes abundantly clear that an important and, in a sense, inviolable right of the accused to be heard on the point of sentence is secured thereby. The said provision, in our view, cannot be construed in such a fashion as to provide right to the accused to prefer an appeal against the order of conviction only. The observations of the Supreme Court in the case of Santa Singh (supra) especially the portion extracted above that 'the Court must, in the first instance, deliver the judgment convicting or acquitting the accused', do not imply that there is a distinct judgment of conviction followed by the judgment of sentence.

15. The aforesaid position becomes abundantly clear, if we consider the relevant provisions in the Code. Section 353 of the Code prescribes the manner in which the judgment shall be pronounced. Section 354 of the Code deals with the language and contents of the judgment. The relevant part of Section 354 reads as under:-

354. Language and contents of judgment.-(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,-

(a) -----

b) -----

c) shall specify the offence (if any) of which, and the section of the Indian

Penal Code (45 of 1860) of other law under which, the accused is convicted and the punishment to which he is sentenced;

(d) -----

Section 372 of the Code declares that there is no right of appeal unless expressly provided by the Code or any other law.

Section 372 of the Code reads as under:

372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of Criminal Court except as provided for by this Code or by any other law for the time being in force:

¹ *[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].*

16. Section 374 of the Code provides for appeal from conviction. Sub Section (2) and (3) of Section 374 are material, which read as under:-

374. Appeals from convictions.

(1) -----

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any

other Court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial], may appeal to the High Court.

(3) Save as otherwise provided in sub-section (2), any person, -

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or

(b) sentenced under section 325, or

(c) in respect of whom an order has been made or a sentence has been passed under section 360 by any Magistrate, may appeal to the Court of Session.

17. Section 386 of the Code describes the power of appellate Court. Clause (b) of Section 386 of the Code is relevant for determining the controversy at hand. It 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-

(a) xxxx

(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 contempt 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;

18. A bare perusal of aforesaid provisions would indicate that the clause 'c' of Sub Section (1) of Section 354 indicates that the Court should specify the offence of which and Section of the particular enactment under which the accused is convicted and the punishment to which he is sentenced. The legislature has taken care to provide that the conviction and sentence or consequential orders form an integral part of the judgment whereby a person is convicted. A judgment cannot be said to be complete unless the punishment to which the accused is sentenced is set out therein. This position is further clarified by Sub Section (2) and (3) of Section 374 of the Code. The forum before which the appeal may lie is made dependent upon the quantum of sentence imposed by the trial Court. Thus, what is appealable under Section 374 is a complete

judgment of conviction and not a mere finding of holding an accused guilty of a particular offence. Section 386 of the Code, extracted above, indicates that in a appeal from conviction the appellate Court may (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 (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. The aforesaid text of Section 386 makes it crystal clear that the finding and sentence form an inseparable part of judgment of conviction.

19. A useful reference, in this context, can be made to the a 3 judge bench decision of the Supreme Court in the case of **Rama Narang Vs. Ramesh Narang**⁵. Para No. 13 and 15 are instructive. They read as under:-

13. Chapter XXVII deals with judgment. Section 35 sets out the contents of judgment. It says that every judgment referred to in Section 353 shall, inter alia, specify the offence (if any) of which and the Section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is

5 (1995) 2 SCC 513

sentenced. Thus a judgment is not complete unless the punishment to which the accused person is sentenced is set out therein. Section 356 refers to the making of an order for notifying address of previously convicted offender. Section 357 refers to an order in regard to the payment of compensation. Section 359 provides for an order in regard to the payment of costs in non-cognizable cases and Section 360 refers to release on probation of good conduct. It will thus be seen from the above provisions that after the court records a conviction, the accused has to be heard on the question of sentence and it is only after the sentence is awarded that the judgment becomes complete and can be appealed against under Section 374 of the Code.

14. -----

15. Under the provisions of the Code to which we have already referred there are two stages in a criminal trial before a Sessions Court, the stage upto the recording of a conviction and the stage post conviction upto the imposition of sentence. A judgment becomes complete after both these stages are covered.

[emphasis supplied]

20. The aforesaid pronouncement settles the controversy sought to be raised on behalf of the petitioner.

21. This leads us to the grievance of the petitioner that the copy of the judgment of conviction ought to have been made

available to the petitioner immediately after the order of conviction was pronounced.

22. The provisions contained in Section 353 of the Code provide an answer to the controversy sought to be raised on behalf of the petitioner. Sub Section (1) of Section 353 provides three modes of pronouncement of judgment: (a) by delivering the whole of the judgment; or (b) by reading out the whole of the judgment; or (c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

23. Section 353 (4) of the Code reads as under:-

353. Judgment.-

(1) -----

(2)-----

(3)-----

(4) Where the judgment is pronounced in the manner specified in clause (c) of sub-section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

24. Evidently, Sub Section (4) of Section 353 enjoins the Court to immediately make available for the perusal of the parties or the pleader free of cost the whole judgment or copy thereof where the judgment is pronounced in the manner specified in clause (c) to sub section (1). If this provision is compared and contrasted with Section 363 of the Code which provides for furnishing a copy of the judgment to the accused, the position becomes clear. Sub Section (1) of Section 363 envisages that the copy of the judgment shall immediately after the pronouncement of judgment be given to the accused free of cost, when the accused is sentenced to imprisonment. Had it been the intention of the legislature that a copy of the judgment be made available to the accused the moment the judgment of conviction, meaning thereby holding the accused guilty of a particular offence, is pronounced, the legislature would not have used in Sub Section (4) of Section 353 of the Code the expression that 'the copy thereof shall be made available for the perusal of the parties or their pleaders free of costs.'

25. In view of the aforesaid provisions contained in the Code, we are afraid to accede to the submission on behalf of the petitioner that there is either a constitutional or statutory right to prefer an appeal against the order holding the person guilty of offence. The

provisions contained in Section 235 of the Code cannot be stretched to hold that there is an independent right to assail the findings recorded by the learned Sessions Judge, apart from right to prefer an appeal against the order of conviction and sentence.

26. Reliance sought to be placed on the judgment of Hon'ble Supreme Court in the case of *Modi Telefibers Ltd. & Ors.(surpa)*, does not seem to be well founded, as the said decision was rendered in the peculiar facts of the case where the Division Bench had held that the order holding the person guilty of contempt was an interlocutory order.

27. The matter can be looked at from a slightly different perspective. If we accept the submission on behalf of the petitioner that in every matter, where the accused is held guilty of a particular offence, he has a right to prefer an appeal against the said finding of holding him guilty, then there is a clear and present risk of destroying the integrity of trial. It would entail a two stage consideration by the appellate Court. First, after the accused is held guilty of the offence. Second, consequent to imposition of sentence on the accused. Such proposition cannot be countenanced, especially in the absence of a statutory prescription.

28. For the foregoing reasons we do not find any merit in the petition. The petition, therefore, deserves to be dismissed.

29. The petition thus stands dismissed.

30. The learned Sessions Judge shall proceed to pass an appropriate sentence in accordance with law.

31. All concerned to act on an authenticated copy of this order.

32. Registry to send an authenticated copy of this order to the Court of learned Sessions Judge.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)