

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Criminal Application (APL) No. 744 of 2017

Dr. Omprakash Chitarkha Vs. The State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A.A. Naik, Advocate for the applicant
Mr. S.D. Sirpurkar, APP for the respondent

CORAM : MANISH PITALE, J.

DATED : AUGUST 20, 2021

By this application, the applicant has challenged an order dated 18/09/2017, passed by the Court of Sessions Judge, Gondia, whereby an application at Exh.13 filed by the applicant on the point of maintainability of the appeal was rejected with an observation that the point sought to be raised by the applicant deserved to be decided on merits at the stage of final arguments of the appeal.

2. The background in which the present application has been filed is that the applicant was proceeded against under the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (hereinafter referred to as PCPNDT Act). The Complaint was filed by the authorized officer i.e. the sole respondent herein, before the Court of the Magistrate at Gondia. Pursuant to the said Complaint, proceedings were undertaken, which

culminated in judgment and order dated 16/03/2016, whereby the applicant was acquitted of offences under the provisions of the PCPNDT Act.

3. The respondent filed an appeal under Section 378(1) of the Code of Criminal Procedure (Cr.PC.) before the Sessions Court at Gondia along with an application for condonation of delay. By order dated 23/11/2016, the Sessions Court allowed the application for condonation of delay, thereby condoning delay in filing the appeal and directed the appeal to be registered.

4. Aggrieved by the said order, the applicant filed Criminal Application (APPR) No. 82 of 2019, before this Court. There was delay in filing the Criminal Revision Application before this Court in challenging the said order of the Sessions Court and an application for condonation of delay was also filed along with Revision Application. By order dated 07/08/2017, this Court permitted the applicant to withdraw both the applications and observed that it would be open for the applicant to address the Sessions Court on the question of maintainability of the appeal. Thereafter, the applicant filed the aforesaid application at Exh.13 for considering the point of maintainability of the appeal before the Sessions Court. As noted above, the said application has been rejected by the Sessions Court.

5. At first blush, this Court was of the opinion that since the Sessions Court had erred in holding that the question of maintainability could be decided only at the stage of final hearing of the appeal, the impugned order could be set aside and the matter could be remanded to the Sessions Court on deciding the question of maintainability as a preliminary issue. But, upon hearing the learned counsel for the applicant and the learned APP for the respondent, this Court is of the opinion that the question regarding the maintainability of the appeal before the Sessions Court can be decided by this Court at this stage itself, since the present application invokes inherent powers of this Court under Section 482 of the Cr.P.C. It would be rather circuitous and cumbersome for the said issue to be sent back to the Sessions Court for decision, particularly when there is a judgment of the Hon'ble Supreme Court in the case of **Subhash Chand Vs. State (Delhi Administration) (2013) 2 SCC 17**, directly on the point.

6. Mr. A.A. Naik, learned counsel for the applicant invited attention of this Court to the relevant provision i.e. Section 378 of the Cr.P.C. He emphasized that sub-section 4 of Section 378 of the Cr.P.C. is the only avenue of appeal available to a complainant when the proceeding culminates in an order of acquittal. Under the said provision, the complainant can seek special leave of the High Court

to file an appeal in order to challenge the order of acquittal. Specific reliance is placed on the aforesaid judgment of the Hon'ble Supreme Court in the case of **Subhash Chand Vs. State (Delhi Administration)** (supra). It is pointed out that the Hon'ble Supreme Court has referred to the relevant report of the Law Commission of India, while interpreting Section 378 of the Cr.P.C., pertaining to situations in which appeals can be filed before the Sessions Court and in cases where leave is required to be sought of this Court for filing appeal.

7. Mr. S.D.Sirpurkar, learned APP invited attention of this Court to paragraph 4 of the reply, which gives details of the manner in which the respondent i.e. complainant approached the District Magistrate for a direction to the Public Prosecutor to file an appeal under Section 378(1)(a) of the Cr.P.C. It was submitted that since the offences alleged against the applicant were cognizable and non-bailable offences, under Section 27 of the PCPNDT Act, filing of appeal before the Sessions Court could not be objected to. On this basis, it was submitted that the present application deserved to be dismissed.

8. This Court has considered the rival submissions. A perusal of Section 378 of the Cr.P.C. shows that sub-section (1) thereof specifies the mode and manner in which the appeals can be filed before the Court of Sessions in order to challenge an order

of acquittal passed by a Magistrate in cognizable and non-bailable offences. Sub-section 4 of Section 378 of the Cr.P.C. specifically refers to a case instituted upon a Complaint, culminating into an order of acquittal. A bare perusal of the said provision does show that a special mode and manner in the form of sub-section (4) to Section 378 of the Cr.P.C. is carved out concerning challenge to an order of acquittal passed in a case instituted upon a Complaint. This clearly appears to be distinct from the avenue of appeal before the Sessions Court provided under Section 378(1)(a) and (b) of the Cr.P.C.

9. Debate on this aspect of the matter appears to have been put to rest by the Hon'ble Supreme Court in the aforesaid judgment in the case of **Subhash Chand Vs. State (Delhi Administration)** (supra). In the said judgment, the Hon'ble Supreme Court has made copious references to the 154th Report of the Law Commission of India, pertaining to amendment of Section 378 of the Cr.P.C. The observations of the Law Commission of India have been adverted to and the Hon'ble Supreme Court has expressly stated its agreement with certain conclusions rendered by the Law Commission of India in the said report. Relevant paragraphs of the said judgment read as follows :

“15. Though, the Law Commission's 154th report indicated that [Section 378](#) was being amended to provide that an appeal against an order of acquittal passed by a

Magistrate in respect of a cognizable and non-bailable offence filed on a police report would lie to the Court of Session, the words “police report” were not included in the amended [Section 378](#). In this connection, it is necessary to refer to the relevant extract from the Law Commission’s 221st Report of April, 2009. After noting amendment made to Section 378 the Law Commission stated as under:

“2.9 All appeals against orders of acquittal passed by Magistrates were being filed in High Court prior to amendment of [Section 378](#) by Act 25 of 2005. Now, with effect from 23-06-2006, appeals against orders of acquittal passed by Magistrates in respect of cognizable and non-bailable offences in cases filed on police report are being filed in the Sessions Court, vide clause (a) of sub-section (1) of the said section. But, appeal against order of acquittal passed in any case instituted upon complaint continues to be filed in the High Court, if special leave is granted by it on an application made to it by the complainant, vide sub-section (4) of the said section.

2.10. [Section 378](#) needs change with a view to enable filing of appeals in complaint cases also in the Sessions Court, of course, subject to the grant of special leave by it.”

These two extracts of the Law Commission’s Report make it clear that though the words ‘police report’ are not mentioned in [Section 378\(1\)](#) (a), the Law Commission noted that the effect of the amendment was that all appeals against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence in cases filed on police report are being filed in the Sessions Court. The Law Commission lamented that there is no provision enabling filing of appeal in complaint cases in the Sessions Court

subject to the grant of special leave by it. Thus, the Law Commission acknowledged that there is no provision in [the Code](#) under which appeals in complaint cases could be filed in the Sessions Court. We agree with this opinion for reasons which we shall now state.

16.

17. At the outset, it must be noted that as per [Section 378\(3\)](#) appeals against orders of acquittal which have to be filed in the High Court under [Section 378\(1\)\(b\)](#) and [378\(2\)\(b\)](#) of the Code cannot be entertained except with the leave of the High Court. [Section 378\(1\)\(a\)](#) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the Court of Session. Sub-Section (1)(b) of [Section 378](#) provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-Section(2) of [Section 378](#) refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the [Delhi Special Police Establishment Act, 1946](#) or by any other agency empowered to make investigation into an offence under any [Central Act](#) other than [the Code](#). This provision is similar to sub-section(1) except that here the words 'State Government' are substituted by the words 'Central Government'.

18. If we analyse [Section 378\(1\)\(a\) & \(b\)](#), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed

by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by [Section 378\(1\)\(b\)](#). Such appeals, that is, appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. [Section 378\(1\)\(b\)](#) uses the words “in any case” but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

19. Sub-Section (4) of [Section 378](#) makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of “special leave” as against sub-section (3) relating to other appeals which speaks of “leave”. Thus, complainant’s appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for “special leave” by the complainant. It grants six months’ period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-Section (6) is important. It states that if in any case the complainant’s application for “special leave” under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if “special leave” is not granted

to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

20. Since the words ‘police report’ are dropped from [Section 378\(1\)](#) (a) despite the Law Commission’s recommendation, it is not necessary to dwell on it. A “police report” is defined under [Section 2\(r\)](#) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of [Section 173](#) of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. [Section 2\(d\)](#) defines a “complaint” to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under [the Code](#), that some person, whether known or unknown has committed an offence, but does not include a police report. The Explanation to [Section 2\(d\)](#) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under [Section 154](#) of the Code may culminate into a complaint case (cases under the Drugs & [Cosmetics Act](#), 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of the Metropolitan Magistrate as specified in [Section 20](#) of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence

involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under [Section 378\(4\)](#) for special leave to appeal against it in the High Court. [Section 378\(4\)](#) places no restriction on the complainant. So far as the State is concerned, as per [Section 378\(1\)\(b\)](#), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under [Section 378\(1\)\(a\)](#) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of [Section 378](#) of the Code.

21.

22.

23. In view of the above, we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. In the instant case the complaint alleging offences punishable under [Section 16\(1\) & \(1A\)](#) read with Section 7 of the PFA Act and the Rules is filed by complainant Shri Jaiswal, Local Health Authority through Delhi Administration. The appellant was acquitted by the Metropolitan Magistrate, Patiala House Courts, New Delhi. The

complainant can challenge the order of acquittal by filing an application for special leave to appeal in the Delhi High Court and not in the Sessions Court. Therefore, the impugned order holding that this case is not governed by [Section 378\(4\)](#) of the Code is quashed and set aside. In the circumstances the appeal is allowed.”

10. The observations of the Hon’ble Supreme Court have been quoted above in detail for the reason that the entire gamut of the controversy has been analyzed in the above quoted portion and categorical findings are rendered by the Hon’ble Supreme Court. The observations made, particularly in paragraph 20 are relevant for the present case. There is no manner of doubt that the law has been settled by the Hon’ble Supreme Court in the aforesaid judgment by holding that in cases, like the present case, when an order of acquittal is sought to be challenged by the complainant, the only avenue available is to approach this Court under sub-section 4 of Section 378 of Cr.P.C., by filing an application for grant of special leave to challenge the order of acquittal. Such an order of acquittal cannot be made subject matter of challenge in an appeal before the Sessions Court.

11. Thus, it becomes evident that the appeal pending before the Sessions Court was still-born and the Sessions Court committed a grave error by passing the impugned order in rejecting the application raising the point of maintainability, deferring the discussion and findings on the said

point to the stage of final hearing of the appeal. Since the appeal itself is clearly not maintainable, there is no question of the Sessions Court deferring the issue to the stage of final hearing of the appeal.

12. In view of the above, the application is allowed. The impugned order is set aside and it is held that the appeal filed by the respondent before the Sessions Court in the present case is not maintainable.

JUDGE

MP Deshpande