

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:	06.08.2021
DELIVERED ON:	16.08.2021

THE HON'BLE MR. JUSTICE P.N. PRAKASH

and

THE HON'BLE MS. JUSTICE R.N. MANJULA

Crl.M.P. No.7470 of 2021 in Crl.A. SR.No.5536 of 2020

D. Karthi

Petitioner

vs.

1 Jana @ Janarthanan (A.1)

2 Sundaram @ Sundaravadhanan (A.2)

3 Annadurai (A.3)

4 Godhandabani (A.4)

Kannan (died) (A.5)

Narayanan (died) (A.6)

Gnanavel (died) (A.7)

Sekar (died) (A.9)

5 Sathish @ Murugan (A.10)

6 Murugan (A.11)

7 Ramesh (A.12)

8 Elumalai (A.15)

9 Pandu @ Shanmugam (A.18)

10 Chandrasekaran (A.19)

11 Subramani (A.20)

12 Sakthivel (A.21)

13 Kaliyamoorthy (A.22)

14 Rasu (A.23)

15 The Inspector of Police
Thiruvannainallur Police Station
Cr. No.475 of 2002

Respondents

Petition filed under Section 482 Cr.P.C. seeking to substitute the petitioner in the place of the appellant Devaraj who died on 26.08.2020 and proceed with the case in Crl.A.SR. No.5536 of 2020 and connected Crl.M.P. No.2914 of 2020.

For petitioner Mr. A.G. Rajan

For RR 1 - 10 Mr. V.S. Dixit

For RR 11 - 14 Mr. D. Ashok Kumar

For R15 Mr. R. Muniyapparaj
Government Advocate (Crl. Side)

ORDER

P.N. PRAKASH, J.

This case raises an interesting legal conundrum that requires a judicious answer, towards which end, it is essential to have a look at the following bare minimum facts.

2 It is alleged that on 23.08.2002, A.1 to A.23 and some juvenile accused had fatally attacked one Ezhumalai, in connection with which, they faced a prosecution in S.C. No.8 of 2011 in the Court of the Principal Sessions Judge, Villupuram, for the offences under Sections 147, 148, 323 r/w 149, 324 r/w 149, 326 r/w, 341, 304 and 302 r/w 149 IPC, in which, they were acquitted *vide* judgment and order dated 12.09.2019.

3 Calling into question their acquittal, the State did not prefer an appeal and instead, Devaraj (P.W.1/*de facto* complainant) preferred an appeal invoking the proviso to Section 372 Cr.P.C. in this Court on 06.02.2020.

4 Since there was a delay of 85 days in preferring the appeal, Devaraj (P.W.1) filed an application in Crl.M.P. No.2914 of 2020 in Crl.A. SR.No.5536 of 2020 under Section 5 of the Limitation Act for condonation. Notice was ordered to the respondents/accused and Mr.V.S. Dixit, learned counsel, entered appearance for respondents 1 to 10 and Mr. D. Ashok Kumar, learned counsel, entered appearance for respondents 11 to 14.

5 While that being so, Devaraj (P.W.1) died on 26.08.2020 and consequently, his son Karthi (P.W.5), has filed the instant application for substituting him as the appellant in the place of his father Devaraj (P.W.1) in the appeal.

6 Heard Mr. V. S. Dixit, learned counsel for respondents 1 to 10, Mr.D.Ashok Kumar, learned counsel for respondents 11 to 14 and Mr.R.Muniyapparaj, learned Government Advocate (Crl. Side) appearing for the 15th respondent/State.

7 At the outset, M/s. Dixit and Ashok Kumar, learned counsel for the accused, submitted that in the light of Section 394(2) Cr.P.C., on the demise of

Devaraj (P.W.1), the appeal will stand automatically abated and therefore, the question of substitution of Karthi (P.W.5) in the place of his father Devaraj (P.W.1) as appellant would not arise at all.

8 *Per contra*, Mr. A.G. Rajan, learned counsel for Karthi (P.W.5/petitioner) placed reliance on an unreported judgment of the Karnataka High Court in **K.A.Shivappa Gowda vs. B.L. Jayesha and another**¹ wherein it has been held that the demise of the *de facto* complainant/appellant would not automatically lead to abatement of appeal against acquittal that has been preferred invoking the proviso to Section 372 Cr.P.C.

9 To appreciate the rival contentions, it would be profitable to extract Sections 372 and 394 Cr.P.C.

"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 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.

¹ Crl.A.No.45 of 2015 decided on 30.11.2020

394. Abatement of appeals.

(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 relatives 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."

10 The proviso to Section 372 Cr.P.C. was inserted by Section 29 of Central Act 5 of 2009 effective 31.12.2009, which also inserted clause (wa) in Section 2 in the Code, thereby defining the word "victim".

11 The *raison d'etre* for bringing in these amendments is to empower the victim of a crime, who was otherwise a non entity in an accused-centric criminal justice system to prosecute an offender. Thus, the proviso to Section 372 Cr.P.C. gave a right to the victim of an offence to prefer an appeal against acquittal of an accused, irrespective of whether the State challenges the acquittal under Section 378 Cr.P.C.

12 Both Sections 372 and 394 Cr.P.C. fall under Chapter XXIX, *ibid*. Textually, Section 394(2) Cr.P.C. postulates that every appeal, except an appeal from a sentence of fine, shall finally abate on the demise of the appellant. If Section 394(2) Cr.P.C. is textually interpreted, it will mean that an appeal filed by a victim invoking the proviso to Section 372 Cr.P.C. will abate on his demise.

13 In our considered view, such a textual interpretation would indubitably lead to absurd results, thereby, making the proviso to Section 372 Cr.P.C. otiose. This can be demonstrated by a simple illustration.

14 “X”, an accused, is acquitted by the trial Court of an offence under Section 302 IPC. The State does not appeal against the acquittal invoking Section 378 Cr.P.C. The son of the deceased challenges the acquittal under the proviso to Section 372 Cr.P.C. During the pendency of the appeal, the accused can have the appellant eliminated and escape the consequences of the appellate Court reversing his acquittal in appeal by contending that the appeal stands abated under Section 394(2) Cr.P.C. on the demise of the appellant/victim.

15 We are confident that the legislature would not have intended such absurd consequences while including the proviso to Section 372 Cr.P.C. We are in agreement with the view of the Karnataka High Court in **K.A.Shivappa Gowda** (*supra*). We are perfectly justified in adopting the Hayden's principle of purposive interpretation while interpreting Section 394(2) Cr.P.C. by holding that an appeal filed by a victim under the proviso to Section 372 Cr.P.C. will not stand automatically abated on his demise.

16 This issue can be approached from yet another dimension. Even prior to the passing of Central Act 5 of 2009, a private complainant had a remedy under Section 378(5) Cr.P.C. to file an appeal against acquittal. This remedy is still available. During the pendency of such an appeal in the High Court, if the appellant/complainant dies, the appeal does not abate albeit Section 394(2) Cr.P.C. In our opinion, an appellant under the proviso to Section 372 Cr.P.C. stands on the same footing as that of an appellant under Section 378(5) Cr.P.C. on this aspect.

17 It may be pertinent to extract *ad verbum* the following passage from the judgment of the Supreme Court in **Khedu Mohton and others vs. State of Bihar**², wherein, while dealing with Section 431 of the 1898 Code, which is *in pari materia* with Section 394(2) of the 1973 Code, it has been held that an appeal will not abate on the death of the appellant/complainant.

"7. In view of our above conclusion, it is unnecessary for us to consider the question of law canvassed by Mr. E.C. Aggarwal, learned Counsel for the appellant. But as the same has been argued we shall go into it. The appeal before the High Court was brought after obtaining special leave under Sub-section (3) of Section 417, Cr.P.C. It appears that during the pendency of the appeal, the complainant died. It was contended before the High Court and that contention was repeated before us that the appeal abated in view of the death of the complainant. This contention was rejected by the High Court. In support of that contention, Counsel for the appellant relied on two decisions one of Allahabad High Court in *Nehal Ahmad v. Ramji* AIR1925All 620 and the other of Madras High Court in *Thothan and Anr. v. Murugan and Ors.* A.I.R. 1958 Mad 624. The first decision has no application to the facts of the present case. That was an appeal under Section 476 (B) of the Cr. P.C. It is true that the Madras decision was rendered in an appeal under Section 417(3) of the Cr. P.C. In our opinion, the learned single judge of the Madras High Court erred in thinking that the decision of the Allahabad High Court lent any support to his conclusion that an appeal filed under Section 417(3), Cr. P.C. abates on the death of the complainant. The question of abatement of criminal appeals is dealt with by Section 431 of Criminal Procedure Code. That section reads :

Every appeal under Section 411-A. Sub-section (1) 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 abate on the death of the appellant.

8. From this section it is clear that an appeal under Section 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High

²(AIR 1971 SC 66)

Court to decide the same irrespective of the fact the appellant either does not choose to prosecute it or unable to prosecute it for one reason or the other. The argument that while introducing Sub-section (3) into Section 417, Cr. P.C., the Parliament overlooked the provisions contained in Section 431, does not deserve consideration. The language of Section 431 is plain and unambiguous. Therefore no question of interpretation of that provision arises."

18 In this case, the victim Devaraj (P.W.1) who had filed the appeal invoking the proviso to Section 372 Cr.P.C. had died subsequently. Karthi (P.W.5), who is the son of Devaraj (P.W.1), can step into the shoes of his father to prosecute the case. That apart, Karthi himself was examined as P.W.5 as he was one of the injured witnesses. Though there is no express provision in the Code for substitution, yet, such a power can be exercised by this Court under Section 482 Cr.P.C. to secure the ends of justice.

In view of the discussion aforemade, this substitution petition stands allowed. The Registry is directed to make necessary changes in the cause title and the petitioner is directed to file amended clean copies of the petition for condonation of delay and appeal grounds.

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(P.N.P., J.) (R.N.M., J.)
16.08.2021

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