

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 881 of 2013

Tarun Dutta & Anr.

Vs.

The State of West Bengal

For the Appellants	: None appear
For the Respondent	: Mr. Sandip Chakraborty, Adv.
Hearing concluded on	: 15 th July, 2022
Judgment on	: 22 nd July, 2022

Siddhartha Roy Chowdhury, J:-

1. Challenge in this appeal is to the judgment and order of conviction passed by the learned Additional Sessions Judge, Fast Track, 3rd Court, Basirhat in S.T. Case no. 43 (11) 2012 arising out of S.C. 7(7) 2007 passed on 30th September, 2013 and 1st October, 2013 respectively.
2. Learned Counsel for the State submits that during pendency of appeal convict Tarun Dutta died and Smt. Laxmi Nath served out sentence, therefore the appeal has become infructuous. In support of his contention learned Counsel submits two reports, one from the Superintendent of Correctional Home and other one from local police station. The reports are taken on record.

3. Hon'ble Supreme Court in **K.S. Panduranga Vs. State of Karnataka** reported in **AIR 2003 SC 2164, (2013) 3 SCC 721** held :

"22. From the aforesaid decision, the principles that can be culled out are (i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the Appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court; (v) that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-Appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and (vi) that if the case is decided on merits in the absence of the Appellant, the higher court can remedy the situation.

23. In Bapu Limbaju Kamble (supra), and Man Singh (supra), this Court has not laid down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the Appellant. We have already stated that the pronouncement in A.S. Mohammed Rafi (supra), dealt with a different situation altogether and, in fact, emphasis was on the professional ethics, counsel's duty, a lawyer's obligation to accept the brief and the role of the Bar Associations. The principle laid down in Sham Deo Pandey (supra), relying on Siddanna Apparao Patil (supra), was slightly modified in Bani Singh (supra). The two-Judge Bench in Mohd. Sukur Ali (supra), had not noticed the binding precedent in Bani Singh (supra)."

Therefore, I am not inclined to accept the submission of learned Advocate appearing for the State to dismiss the appeal that too against conviction being infructuous, that would further denude the right of the convict.

4. In view of Section 394 of Cr.P.C. the appeal is abated as against convict Tarun Dutta who died on while serving out sentence as the report reveals. But I am inclined to consider the appeal on merit as filed by Smt. Laxmi Nath the other appellant.
5. Facts of the case in short is that police was informed in writing about unnatural death of Shilpi Nath, daughter of convict Laxmi Nath and PW 1 Naba Kumar Nath, on 24th July, 2006, by Smt. Kanan Das, maternal aunt of the victim and Hasnabad P.S. case no. 103 dated 24th July, 2006 was registered. Police took up investigation which culminated into submission of charge sheet against Tarun Dutta and Smt. Laxmi Nath under Sections 302/201 I.P.C.
6. Learned Trial Court framed charge against the accused persons under Sections 302/201 I.P.C. on 13th November, 2009 and pleading innocence they claimed to be tried.
7. During trial prosecution examined 9 witnesses including the doctor, conducted the post mortem examination and the Investigating Officer, and they did not have any direct knowledge about the incident.
8. Exhibit-4 is the post mortem report where from it is found that doctor opined that asphyxia due to throttling was the cause of death, homicidal in nature. During cross-examination the doctor stated that he did not find any ligature mark on the neck.

9. Rest of the prosecution witnesses including the father and sister of the victim did not have any direct knowledge about the incident. They were examined by the I.O. twice, first on 24th July, 2006 and then after the autopsy report was submitted. All of them to their wisdom thought it was a case of murder as they found mark of external injury like scratches on the neck of the victim. The witnesses also told the learned Trial Court about their notion that mother of the victim Laxmi had illicit relation with Tarun Dutta. They had heard about such illicit relationship.
10. Learned Trial Court could not rely upon the testimony of the autopsy surgeon, as from the evidence it transpired that the door of the room was bolted from within. In absence of any direct evidence this fact that the room was bolted from within, made the charge under Section 302 I.P.C. doubtful. Learned Trial Court could not inspire himself to caper to conclusion that Shilpi was murdered. So learned Trial Court observed :-

“Now the other possibility that Shilpa has committed suicide.”
11. Learned Trial Court observed that scratches on the neck were self inflicted. Thereafter learned Trial Court made out a case, bereft of any cogent evidence that the victim could not accept the relation of Laxmi, her mother and Tarun, as parents are placed at a very higher pedestal in our society. Since her mother had fallen from grace, the victim decided to commit suicide.
12. Hence invoking the provision of Section 222 Cr.P.C. learned Trial Court recorded an order of conviction under Section 306 of I.P.C.

13. The meaning of “minor offence” has not been defined or explained in the Code of Criminal Procedure. But the thumb rule is both the major and minor offences must be cognate offences and not such as are totally constituted by different elements or in other words minor offence must have some elements of the main offence. Section 306 of the I.P.C. cannot be said to be a minor offence in relation to an offence under Section 302 of the I.P.C. within the meaning of Section 222 of Cr.P.C. Basic element to constitute homicidal death and suicidal death and abetment thereof are chalk and cheese.
14. This Court therefore, is left with no other option but to allow the appeal for the simple reason that having acquitted the appellant of the charge under Section 302/201 I.P.C. learned Trial Court could not have recorded an order of conviction under Section 306 of I.P.C.
15. In this regard we can further rely upon the judgment of Hon’ble Supreme Court pronounced in the case of **Sangaraboina Sreenu vs. State of Andhra Pradesh** reported in **(1997) 5 SCC 348** :

“2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC - which was the only charge framed against him - the High Court could not have convicted him of the offence under Section 306 IPC.

It is true that Section 222 Cr.PC entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr.PC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal

death those of Section 306 IPC are suicidal death and abetment thereof.

3. For the foregoing reason the appeal is allowed and the conviction of the appellant under Section 306 IPC is set aside. The appellant, who is on bail, is discharged from his bail bonds.”

16. To constitute an offence under Section 306 of the I.P.C. there has to have some kind of instigation from the side of accused persons that would drive the victim to commit suicide. There is however, no such evidence available on record.
17. Upon careful perusal of the impugned judgment I have not found any ingredient that would constitute an offence within the meaning of Section 107 of the I.P.C. and as a fall out there cannot be any ingredient of offence within the meaning of Section 306 of the I.P.C.
18. Learned Trial Court dealt with the case with a closed mind without following the basic rule of evidence which says unlike civil trial, in a criminal trial, charges are to be proved beyond reasonable doubt. Learned Trial Court adopted process of elimination and followed the theory of preponderance of probability otherwise he would not have written, “Now the other possibility is that Shilpa has committed suicide.”
19. In my humble opinion the impugned judgment is perverse and should not be allowed to remain in force and should be set aside, which I accordingly do.

20. Consequently the appeal succeeds. Convict Laxmi Nath is acquitted under Sections 235 (1) of the Cr.P.C. Seized alamats if any be destroyed.
21. I have already pointed out convict Tarun Dutta died in the Correctional Home and the other convict Smt. Laxmi Nath served out the sentence but appeal preferred by them against the order of conviction could not be heard, though several attempts were made by the Court, primarily because none appeared for the appellants, including learned Counsel appointed to help the Court as amicus curiae.
22. The convicts were in Correctional Home perhaps without any knowledge of the proceeding, awaiting anxiously for the verdict in the appeal to come and it turned out to be their waiting for Godot. In the process one left the universe and other had to serve out sentence without the appeal being heard.
23. Hon'ble Justice P.N. Bhagwati in ***Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar, Patna*** reported in **AIR 1979 SC 1360** observed that :

"We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but

that the procedure should be 'reasonable, fair and just'. If a person is deprived of his liberty under 'a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21."

24. Hon'ble Apex Court in **State of Andhra Pradesh vs Challa**

Ramkrishna Reddy reported in **(2000) 5 SCC 712** held :

"22. Right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or under trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights."

25. Access to justice is human right and in certain situations it may also

be considered to be a fundamental right as held by Hon'ble Supreme

Court in **Tamilnad Mercantile Bank Shareholders Welfare Assn.**

(2) vs. S.C. Sekar reported in **(2009) 2 SCC 784** :

"46. We will, however, proceed on the assumption that no appeal was maintainable. An aggrieved person cannot be left without a remedy. Access to justice is a human right. In

certain situations it may also be considered to be a fundamental right.”

26. In this particular case, despite efforts from the end of the Court the appeal could not be heard and there is no denial to the fact that fundamental right of the convicts in this appeal got denuded. We may not cry over spilled milk but we should try to find out some effective means to avert such situation in future.
27. Hon’ble Supreme Court in Writ Petition (Criminal) 312 of 1994, Supreme Court Legal Services Committee vs. Union of India & Ors. on 18th August, 1998, gave certain directions whereby the Superintendent of Correctional Home has been saddled with the responsibility to read out the judgment and explain the same to the convict in the language as understood by him.
28. The convict shall have to be informed by the Superintendent of Correctional Home about the availability of Legal Services and convict shall have to be asked as to whether he is desirous of exercising his constitutional right to have the service available under the State Legal Services Act. The Superintendent of the Correctional Home is to provide further at the cost of the State Exchequer vakalatnama and other related papers so required to prefer appeal before the High Court.
29. Now let us peep into the provision of Section 11 (2) (a) of the West Bengal Correctional Services Act, that says :

“11. (1) The State Government may, for each of the central correctional home, district correctional home and special correctional home, appoint such number of Chief Welfare Officers and Welfare Officers as it may consider necessary.

The Chief Welfare Officer shall have the rank and status of the Superintendent of a district correctional home and the Welfare Officer shall have the rank and status of the Chief Controller of Correctional Services. The qualifications and the terms and conditions of services of the Chief Welfare Officers and the Welfare Officers shall be such as may be prescribed.

(2) It shall be the duty of the Welfare Officer-

- a) To look after the correctional services and to see that the prisoners are not deprived of the amenities and privileges under this Act or under any other law for the time being in force;*
- b) xxxxxx*
- c) xxxxxx*
- d) xxxxxx*
- e) xxxxxx”*

30. The statute when enjoins upon the welfare officer the duty to secure the ‘amenities’ and ‘privileges’ of the person in incarceration, which pertains to right to life, the Correctional Home Services authority in general and welfare officer in particular shall have the obligation to ensure the rights of convicts to have access to justice in all possible manner, it is one of the facets of right to life.

31. In view of the statutory mandate the Welfare Officer is directed to keep information regarding the appeal preferred by the convict/convicts with all required particulars such as number, Court in seisin of the appeal etc. and to monitor the same. While doing so, in appropriate cases the welfare officer is to bring the status of the lis to the notice of the Chairman/Chairperson or Secretary, D.L.S.A. of the District or Chairman of the S.D.L.S.C. of the Sub-Division as the

case may be, while visiting Correctional Home, who shall take up the matter with the Member Secretary of the S.L.S.A., West Bengal and Secretary, High Court Legal Services Committee, if the appeal is pending before the Hon'ble High Court at Calcutta, who in turn may take the call to ensure the protection of right of the convict and/or appellant to have access to justice.

32. The Court cannot afford to have the crying shame where an appeal preferred by convict, could not be heard till the convict walks out of the Correctional Home, serving out the terms of sentence.
33. Inspector General of Correctional Services is required to sensitize the welfare officers of the Correctional Homes regarding their obligation to help out the convicts by monitoring the legal proceeding before the Court of law, which would add value to the endeavour to protect such right of the convicts to have access to justice.
34. Inspector General, Correctional Services West Bengal, Member Secretary, S.L.S.A., West Bengal and Secretary, Calcutta High Court Legal Services Committee may be informed accordingly by sending copy of the judgment.
35. Department is directed to send a copy of this judgment to Smt. Laxmi Nath at her last known address free of cost by speed post.

(Siddhartha Roy Chowdhury, J.)