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CRL.R.C.(MD).No.592 of .



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2022

Pronounced on : 18.07.2022

CORAM

THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

CRL.R.C.(MD).No.592 of 2022

and

CRL.M.P.(MD).Nos.7263 and 7265 of 2022

Vinoth @ Vinoth Kumar

: Petitioner/Appellant/A2

Vs.

The State represented by
The Inspector of Police,
Kollemcode Police Station,
Kanyakumari District.
Crime No.347 of 1999.

: Respondent/Respondent/Complainant

PRAYER: Criminal Revision Case has been filed under Section 397 and 401 of Cr.P.C, to call for the records and set aside the Judgment passed in C.A.No.171 of 2004, dated 17.06.2022 on the file of the Additional District and Sessions Judge, Kuzhithurai confirming the Judgment passed in C.C.No.75 of 2000, dated 03.08.2004 on the file of the learned Judicial Magistrate No.II, Kuzhithurai.

For Petitioner : Mr.S.Sivakumar

For Respondent : Mr.S.Manikandan
Government Advocate (Crl. side)

ORDER



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The Criminal Revision Petition is directed against the judgment passed in C.A.No.171 of 2004, dated 17.06.2022 on the file of the learned Additional District and Sessions Judge, Kuzhithurai, dismissing the appeal for default.

2.The revision petitioner is the sole appellant in C.A.No.171 of 2004 and is the second accused in C.C.No.75 of 2000 on the file of the learned Judicial Magistrate No.II, Kuzhithurai.

3.The respondent police has registered a case in Crime No.347 of 1999 for the offence under Sections 4(1)(aaa) and 11 of TNP Act r/w Rule 6 of Tamil Nadu Rectified Spirit Rule, 1959 and after completing the investigation, filed the final report before the learned Judicial Magistrate No.II, Kuzhithurai and the same was taken on file in C.C.No.75 of 2000.

4.The learned Judicial Magistrate, after full-fledged trial, has passed a judgment, dated 03.08.2004, acquitting the first accused under Section 248(1) of Cr.P.C. and convicting the second accused for the offence under Section 4(1)(aaa) of TNP Act and sentenced him to undergo two years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months Simple Imprisonment. Aggrieved by the said Judgment of conviction and



sentence, the petitioner/second accused has preferred an appeal in C.A.No.171 of 2004 and the learned Additional District and Sessions Judge, Kuzhithurai, has passed the impugned order, dated 17.06.2022 dismissing the appeal for default. For better appreciation, it is necessary to refer the order of the Appellate Court, which reads as follows:-

“This Criminal Appeal is directed as against the Judgment and sentence passed by the learned Judicial Magistrate No.II, Kuzhithurai, dated 03.08.2004 in C.C.No.75 of 2000 thereby convicting the appellant/2nd accused for the offence under Section 4(1)(aaa) of the TNP Act.

Appellant and his counsel called absent. No representation till 04.00 p.m. Appeal dismissed for default, the Judicial Magistrate No. 2,Kuzhithurai is directed to execute the sentence through concern police.”

Challenging the said dismissal of the appeal, the present Criminal Revision came to be filed.

5.The learned counsel for the petitioner would submit that the petitioner could not appear before the learned Additional District and Sessions Judge, Kuzhithurai, due to illness and the same was conveyed to his counsel, but the petitioner's counsel could not appear before the concerned Court, that the Appellate Court has failed to consider that the Mahazar witness had turned hostile, that mere acceptance of the signature of the Mahazar witness will not prove the prosecution case and that the above case itself was cooked up



maliciously. The learned counsel would further submit that the Appellate Court cannot dismiss the appeal for default or for non-prosecution and the same has to be proceeded and disposed of on merits.

6.At this juncture, it is necessary to refer the Judgment of the Hon'ble Supreme Court in **Kisha Singh Vs. State of U.P.** reported in (1996) 9 SCC 372, and the Hon'ble Apex Court has held as follows:-

“...7.It will be seen that the very opening words of the Section require the Appellate Court to examine the petition of appeal and copy of the impugned judgment in considering whether there is any sufficient ground for interfering with the same. Sub-section (2) provides that the Court may call for the records of the case even at the preliminary stage. It is, thus clear, that the duty of the appellate court to examine the petition of appeal and the judgment under challenge and to consider the merits of the case before dismissing the appeal summarily is not dependent on the appellant or his counsel appearing before the Court to press the appeal. As soon as a petition of appeal is presented under Section 382 or 383 it becomes the duty of the appellate court to consider the same on merits, even in the absence of the appellant and his counsel before dismissing the same summarily.....Here, the appellant's advocate was not present to argue the appeal when the case was called out and in the restoration application filed subsequently, attempt was made to explain the default, which, of course, did not succeed. The question is, whether in the circumstances, the High Court could have dismissed the appeal for default, and if not, whether the prayer for restoration should have been allowed. As is manifest from the



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provisions of Criminal Procedure Code, referred to above, the High Court should have either examined the appellant's petition of appeal and the judgment under challenge, itself or appointed a counsel to assist the Court, but could not have proceeded to dismissed the same on the ground that the Advocate for the appellant was not present. The position of a criminal appeal is not the same as in a civil appeal governed by the Civil Procedure Code. comparison of the provisions of Section 384 with those of Order 41, Rules 11 and 17 of the Civil Procedure Code clearly brings out the difference. Rule 17, Order 41 of Civil Procedure Code in express terms provides that an appeal may be dismissed on the ground of absence of the appellate when the appeal is called out, and Rule 19 provides for its restoration on the appellant offering sufficient cause for his non-appearance. In the case of a criminal appeal the corresponding provisions are not to be found in the Code of Criminal Procedure. On the other hand the Code in express terms requires the matter to be considered on merits. Thus a criminal appeal cannot be dismissed for non-prosecution, and this is the reason as to why the Criminal Procedure does not contain any special provision like Order 41, Rule 19. The law was correctly laid down in *Shyam Deo Pandey & Ors. v State of Bihar*, [1971] Suppl. SCR 133 a case governed by the old Criminal Procedure Code. The position in this regard remains the same under the new Code...”

7.In ***K.Muruganandam and Others Vs. State and Others*** reported in 2022

(2) ***Crimes 122 (SC)***, the Hon'ble Apex Court has held as follows:-

“....8.It is well settled that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the



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hearing of the case only after appointing an amicus curiae, but cannot dismiss the appeal merely because of non-representation or default of the advocate for the accused (see Kabira vs. State of Uttar Pradesh 1981 (Supp.) SCC 76 and Mohd. Sukur Ali Vs. State of Assam MANU/SC/0155/2011: (2011) 4 SCC 729).”

8.Considering the above, it is clear that the position of law is well settled and that the criminal appeal cannot be dismissed for default or for non-prosecution.

9.In the case on hand, as already pointed out, the learned Additional District and Sessions Judge, has passed the impugned order, dismissing the appeal for default. Hence, this Court has no hesitation to hold that the impugned order is not good in law and the same is liable to be set aside.

10.In the result, the Criminal Revision Case is allowed and the impugned order, dated 17.06.2022 passed in C.A.No.171 of 2004, is set aside and the appeal is remitted back to the learned Additional District and Sessions Judge, Kuzhithurai for disposal of the same on merits and in accordance with law. The learned Additional District and Sessions Judge is further directed to dispose of the criminal appeal in C.A.No.171 of 2004 within a period of one month from the date of receipt of a copy of this order and the petitioner/A2 is directed to extend his co-operation in disposing the appeal within the time stipulated by this



Court. Consequently, connected miscellaneous petitions are closed.

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Index : Yes/No

Internet : Yes/No

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To

1.The Additional District and Sessions Judge, Kuzhithurai.

2.The Judicial Magistrate No.II, Kuzhithurai.

3.The Inspector of Police,
Kollemcode Police Station,
Kanyakumari District.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

5.The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR, J.

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Pre-delivery order made in

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