

VRJ

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

WRIT PETITION NO.1079 OF 2023

Suresh Chhotelal Sharma ... Petitioner
V/s.
The State of Maharashtra & Anr. ... Respondents

Mr. Aditya Rai with Mr. Nitin Rai & Mr. Mayur Sosa
i/by Mr. Ramdhandra Rane for the petitioner.

Mr. Yashpal Thakur with Mr. Mukund Pandya for the
respondent No.2.

Ms. M.R. Tidke, APP for the respondent No.1/State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 31, 2023

P.C.:

1. Challenge in this petition is to the order dated 9th March 2023, passed by the learned 56th Sessions Court Judge in Criminal Appeal No.619 of 2017.

2. The petitioner is an accused who has been convicted in a proceeding under section 138 of the Negotiable Instruments Act, 1881. In an appeal preferred by him, the Appellate Court by the impugned order has directed the appellant to remain present at the time of delivery of judgment. Exception to the order has been taken mainly on the ground that the Appellate Court has no power to insist for presence of the accused. Apart from the said ground, it

is the submission of the appellant that the Appellate Court should assign reasons before passing such order. To consider the said submission, it is necessary to consider provisions of section 387 of the Code of Criminal Procedure, 1973. Section 387 reads as under:

“387.Judgments of subordinate Appellate Court. — The rules contained in Chapter XXVII as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Session or Chief Judicial Magistrate:

Provided that unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.”

3. Proviso to the said section is relevant for adjudicating the issue involved. Proviso is clear which mandates the Appellate Court to direct presence of accused if the Appellate Court thinks it proper that presence of the accused is necessary. What is required under proviso to section 387 is the specific direction of the Appellate Court. In the facts of the case, Roznama is clear which mandates the appellant to remain present. Sustenance to the submission is trite to be made based on unreported judgment of this Court in Criminal Writ Petition No.1455 of 2008. Attention is invited to paragraph 4 of the judgment wherein the learned Single Judge has taken a view that proviso to sub-section 387 requires presence of accused at the time of pronouncement of judgment only when the Appellate Court specifically directs the accused to remain present. Except the observation recorded above, no other proposition of law is laid down in this judgment.

4. The other judgment relied upon to support the contention is

in Criminal Writ Petition No.1455 of 2008 dated 12th June 2014. The Division Bench of this Court has agreed with the Single Judge of this Court that proviso confers discretion to the Appellate Court whether it thinks fit and proper for accused to be brought in Court to hear the judgment to be delivered. Except the proposition of law as extracted above, no other legal proposition has been laid down.

5. The next judgment relied is of the learned Single Judge of this Court reported in AIR 2 OnLine Bombay 3489, wherein the Single Judge was concerned with issuance of non-bailable warrant by the appellate Court in a proceedings under section 498A. In the said judgment also the Single Judge of this Court has recorded the view of earlier benches holding that presence of appellant in an appeal against the conviction is not must unless otherwise directed by the Appellate Court. In the facts of the said case, non-bailable warrant of the accused was cancelled, it does not constitute a ratio. As has been settled by various judgments of the Apex Court following land mark judgment in the case of **Quinn v. Leatham**, 1901 AC 495 (HL) which laid down ratio to mean what the case actually decides and not what logical follows from it.

6. The judgment relied upon delivered by the Andhra Pradesh High Court is only persuasive value and not binding on this Court.

7. In the facts of the case, the Appellate Court thought it fit in its wisdom to direct presence of the appellant. The extraordinary constitutional jurisdiction of this Court is invoked to challenge exercise of such discretion. It is well settled that unless the exercise of discretion is either perverse, arbitrary or capricious, the writ

Court shall not interfere with the such exercise of power. Therefore, in my opinion, there is no reason to interfere with the impugned order.

8. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)