



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.06.2023
PRONOUNCED ON : 16.06.2023

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

Crl.R.C. (MD) No.568 of 2023
and
Crl.M.P. (MD) No.8110 of 2023

Archunan : Petitioner/Accused
Vs.

The State represented by
The Inspector of Police,
Thirukattupalli,
Thanjavur District. : Respondent /Complainant

PRAYER : Criminal Revision Case has been filed under Section 397 (1) r/w 401 Cr.P.C., to call for the records relating to the Order dated 13.05.2022 in Crl.A.No.75 of 2021, on the file of I Additional District and Sessions Judge (PCR), Thanjavur, confirming the judgment of conviction and sentence, dated 29.09.2021 in C.C.No.56 of 2020, on the file of the Judicial Magistrate, Thiruvaiyar and set aside the same.

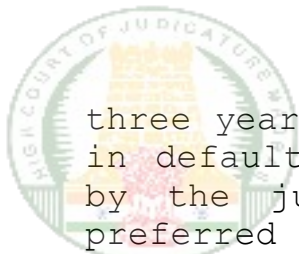
For Petitioner : Mr.A.Sivasubramanian

For Respondent : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor

ORDER

This Criminal Revision is directed against the order passed in Crl.A.No.75 of 2021, dated 13.05.2022 on the file of I Additional District and Sessions Court (PCR), Thanjavur in dismissing the Criminal Appeal for default.

2. The revision petitioner is the sole accused in C.C.No.56 of 2020, on the file of the Court of Judicial Magistrate, Thiruvaiyar and he was charged for the offence under Section 392 I.P.C. The learned Judicial Magistrate, after trial, has passed a judgment in C.C.No.56 of 2020 on 29.09.2021 convicting the petitioner for the offence under Section 392 I.P.C. and sentenced him to undergo



three years Rigorous Imprisonment and to pay a fine of Rs. /- in default to undergo six months Simple Imprisonment. Aggrieved by the judgment of conviction and sentence, the accused has preferred an appeal in Crl.A.No.75 of 2021, on the file of the Principal Sessions Court, Thanjavur and the same was made over to I Additional District and Sessions Court (PCR), Thanjavur. The appeal was admitted and notice was ordered. When the appeal was posted on 13.05.2021 for final hearing, the appellate Court by recording that the appellant as well as his Counsel were not present, dismissed the appeal for default and the exact order passed by the learned Sessions Judge is reproduced hereunder:

"The appellant is continuously absent. Notice was sent to the learned counsel for the appellant and served to him. The counsel has not appeared. Hence, this appeal is dismissed for default."

3. Aggrieved by the dismissal of the appeal, the appellant/accused has preferred the present revision. It is further evident from the records that subsequent to the dismissal of the appeal, NBW was issued against the revision petitioner/accused and he was arrested by executing the warrant on 27.03.2023 and on production before the Judicial Magistrate, Thiruvaiyaru, he was sent to prison to undergo the remaining period of sentence and is in prison till now.

4. The case of the prosecution is that the revision petitioner had snatched three sovereigns of Thali chain from the defacto complainant at around 02.00a.m., on 14.08.2020.

5. The learned Counsel for the petitioner would mainly contend that the appellate Court dismissed the appeal for default, as the appellant and his Counsel were not present, that the Court under section 384 Cr.P.C., should have considered the appeal on merits and that the Hon'ble Apex Court has already settled the position that the dismissal of the criminal appeal for non-prosecution is illegal.

6. No doubt, the Court can dismissal the appeal summarily under section 384 Cr.P.C., but once the appeal is admitted, the Court has to dispose of the appeal only on merits. At this juncture, it is necessary to refer the three Judges Bench judgment of the Hon'ble Supreme Court in **Bani Singh & Others vs State Of U.P** reported in **1996 SCC (4) 720**, wherein the Hon'ble Apex Court, after taking note of the contradictory views, has settled the position that the criminal appeal cannot be dismissed for non-prosecution and the relevant passage is extracted hereunder:

"We have carefully considered the view expressed in the *Saini* and two decisions of this Court and, we may state that

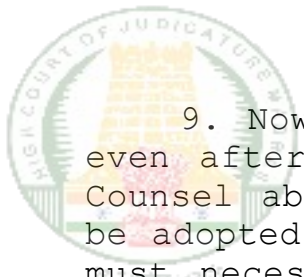


the view taken in Shyam Deo's case appears to be except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simplicitor. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfy itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution."

7. The learned Counsel for the petitioner has relied on the subsequent decision of the Hon'ble Supreme Court in **Dhananjay Rai @ Guddu Rai Vs. State of Bihar** (Crl.A.No.803 of 2017), wherein after considering the earlier decisions including **Bani Singh's case** above referred, it has been held as follows:

"8. The anguish expressed by the Division Bench about the brazen action of the appellant of absconding and defeating the administration of justice can be well understood. However, that is no ground to dismiss an appeal against conviction, which was already admitted for final hearing, for non-prosecution without adverting to merits. Therefore, the impugned judgment will have to be set aside and the appeal will have to be remanded to the High Court for consideration on merits."

8. The above decisions are squarely applicable to the case on hand. Hence, this Court has no hesitation to hold that the impugned order dismissing the criminal appeal for default is illegal and the same is liable to be set aside.



9. Now turning to the other aspect of the case, that even after the restoration of the appeal, the appellant and his Counsel absent themselves again, then what will be the course to be adopted by the Sessions Court. There is a view that the Court must necessarily appoint the amicus or legal aid Counsel at the State expenses to argue on behalf of the absenting appellant. The Hon'ble Apex Court, taking note of the existence of the contradictory views in this aspect also, has held as follows:

"Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the Appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add 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. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.



Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted.

In view of the position in law explained above, we are of the view that the High Court erred in dismissing the appeal for non-prosecution simpliciter without examining the merits. We, therefore, set aside the impugned order and remit the appeal to the High Court for disposal on merits in the light of this judgment. The appeal will stand allowed accordingly."

10. It is necessary to refer the judgment of the Hon'ble Supreme Court in **K.S.Panduranga vs State of Karnataka** (Crl.A.No.373 of 2013), wherein considering the earlier decisions of the Hon'ble Supreme Court, has culled the principles and the relevant passage is extracted hereunder:.

"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 decided on merits in the absence of the appellant, the higher court can remedy the situation."

11. Considering the above, it is very much clear that it is for the concerned Court to decide as to whether the amicus or legal aid Counsel has to be appointed or to consider the appeal by itself and dispose of the same on merits. As pointed out by the Hon'ble Supreme Court, in case if the accused is in jail and is not in a position to engage the Counsel, then the Court is duty bound to engage the amicus or legal aid Counsel to argue the appeal and in cases, if the Court is of the opinion that the complexcity of the issue or the matter involved, the legal assistance is very much necessary for the accused, then the Court can appoint the amicus or legal aid Counsel and as such, the same would depend upon the facts and circumstances of the case.

12. In view of the above, the appeal Court is to be directed to restore the appeal on its file and hear the appeal and dispose of the same within a period of one month from the date of receipt of a copy of this order, as the revision petitioner/accused is in jail.

13. In the result, the Criminal Revision Case is allowed and the order passed by the learned I Additional District and Sessions Judge (PCR), Thanjavur, in Crl.A.No.75 of 2021, dated 13.05.2022, is set aside and the matter is remitted back to the appellate Court for fresh disposal in accordance with law, within a period of one month from the date of receipt of a copy of this order, by taking note of the legal position above referred. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS III)

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/07/2023

Sub Assistant Registrar(CS)

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To

1. The Judge,
I Additional District and Sessions Court (PCR), Thanjavur.



2 The Judicial Magistrate, Thiruvaiyaru.

3. The Inspector of Police,
Thirukattuppalli,
Thanjavur District.

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

+1 CC to M/s.A.SIVASUBRAMANIAN, Advocate (SR-28663[F] dated
16/06/2023)

Crl.R.C.(MD)No.568 of 2023
16.06.2023

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