

STATE OF U.P.

v.

POOSU AND ANOTHER

April 2, 1976

[A. N. RAY, C.J., M. H. BEG, R. S. SARKARIA, P. N. SHINGHAL AND
JASWANT SINGH]

Constitution of India, Articles 136 r/w 142—Re-arrest and detention of accused during pendency of State appeal against acquittal, whether violative of Articles 14, 19(1)(a) to (g) and 21.

The accused-respondents were acquitted by the High Court of capital offences. This Court granted the State of U.P. special leave to appeal, and under Art. 136 read with Art. 142, issued orders directing the re-arrest and detention of the accused. The orders were challenged by the accused-respondents on the grounds that their acquittal and the findings on which it is based, remain fully in force during the pendency of the State appeal, and that in the absence of a specific statutory provision, the Supreme Court's inherent power under the Cr.P.C., or under Art. 142, cannot be invoked to order the deprivation of the acquitted person's liberty, and that such an order would violate Articles 14, 19(1)(a) to (g) and 21 of the Constitution.

On a reference of this question to the Constitution Bench,

HELD : This Court, while granting special leave to appeal against an order of acquittal on a capital charge, is competent by virtue of Art. 142 read with Art. 136, to exercise the same powers which the High Court has under sec. 427 (re-enacted as Sec. 390 of the new Cr.P.C. of 1973). An order directing the re-arrest and detention of an accused-respondent who has been acquitted by the High Court of a capital offence, neither offends Art. 21 or any other fundamental right guaranteed in Part III of the Constitution, nor deprives the accused-respondent of his liberty in a manner otherwise than in accordance with procedure established by law. [1008D-E, 1009A-B]

State v. Badapalli Adi & Ors. I.L.R. 1955 Cuttack 589, *Empress of India v. Mangu & Ors.* I.L.R. 2 All. 340; *Queen v. Gobin Tiwari* I.L.R. [1876] 1 Cal. 281; *Queen Empress v. Gobardhan* I.L.R. [1887] 9 All. 528; *Banna v. Methuen & Ors.* 2 Bens. 228; *K. M. Nanayati v. State of Maharashtra*, [1962] 1 Supp. S.C.R. 567 and *The State v. Capt. Jagjit Singh* [1962] 3 S.C.R. 622, referred to.

CRIMINAL APPELLATE JURISDICTION : CrI. Mis. Petitions Nos. 1 and 243 of 1975.

(Appeal by special leave from the judgment and order dated the 24-10-1973 of the Allahabad High Court in Criminal Appeal No. 710 of 1973. Referred No. 34 of 1973)

R. K. Garg, S. C. Agarwal, V. J. Francis, for the petitioner in CrI. Mis. 1 and 243 of 1975.

O. P. Rana, for the petitioner/r. 2 in Cr. M.P. No. 546/75.

D. P. Uniyal with *O. P. Rana* for the opposite side in CrI. M. P. Nos. 1 and 243 of 1975.

Pramod Swarup, for respondent No. 2 in Cr. M. P. No. 546 of 1975.

The Judgment of the Court was delivered by

SARKARIA, J. The common question referred to the Constitution Bench in these two cases is : Whether the Supreme Court while granting

A Special Leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-bailable warrant for the arrest and committal to prison of the accused-respondent who had been acquitted by the High Court?

B Mr. R. K. Garg, Counsel for the accused-respondents herein, contends that while the legislature has, in its wisdom, empowered the High Court to cause an accused person to be arrested and committed to prison pending the disposal of the appeal against acquittal, no such power has been conferred on the Supreme Court by the Code or any other statute. According to Counsel, in the absence of a specific statutory provision, the inherent power of the Court to do complete justice under the Code or even under Article 142 of the Constitution cannot be invoked to order deprivation of the liberty of a person who has been found innocent and acquitted by the High Court on all the charges against him because such an order would be violative of Articles 14, 19(1)(a) to (g) and 21 of the Constitution. It is maintained that even after the grant of special leave to appeal under Article 136 against an order of acquittal passed by the High Court, the acquittal and the findings on which it is based, remain fully in force during the pendency of appeal by the State. It is contended that once it is ensured that the accused-respondent will be available to submit himself to the final orders of this Court that may be passed in the appeal under Article 136, the inherent powers of the Court under the Code or under Article 142 exhaust themselves.

C In support of his contentions, Counsel has referred to *State of U.P. v. Mohamed Nooh*⁽¹⁾; and *A. K. Gopalan v. State of Madras*⁽²⁾; *Lala Jairam Das and ors. v. King Emperor*⁽³⁾; *Sheo Swarup and ors. v. The King Emperor*⁽⁴⁾ and *M. G. Agarwal v. State of Maharashtra*⁽⁵⁾; *Prem Chand Garg v. Excise Commissioner, U.P. Allahabad*⁽⁶⁾.

D As against this, Mr. Uniyal and Mr. O. P. Rana submit that by virtue of Article 142 read with Article 136 of the Constitution, this Court pending disposal of an appeal against an order of acquittal, is competent to exercise the same powers which are conferred on the High Court by the Code of Criminal Procedure. In support of this contention, Mr. Rana has referred to *State of U.P. v. Deoman Upadaya*⁽⁷⁾; *Abdul Rehman Mahomed Yusuf v. Mahomed Haji Ahmed Agbotwale and anr.*⁽⁸⁾.

We are unable to accept the contentions advanced by Mr. Garg.

E To appreciate the point involved, it will be useful to have a look at the provisions of s. 427 of the Code of Criminal Procedure, 1898 and its historical perspective. This section (which has been re-enacted as s. 390 of the new Code of 1973) provides :

'When an appeal is presented under s. 411A sub-section (2) or section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it

- H**
- | | |
|-------------------------|-----------------------------|
| (1) [1958] S.C.R. 595. | (2) [1950] S.C.R. 88. |
| (3) 72 I.A. 120. | (4) 61 I.A. 398. |
| (5) [1963] 2 S.C.R.405. | (6) 1963 Supp 1, S.C.R. 885 |
| (7) [1961] 1 S.C.R. 14. | (8) [1960] 1 S.C.R. 749. |

or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.”

It may be noted that this provision was for the first time enacted in the Code of 1882. But even before its enactment, the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal, to secure the attendance of the accused-respondent by bailable or non-bailable warrants. As pointed out by Panigrahi C. J. in *State v. Badapalli Adi and ors.*⁽¹⁾ “what was formerly the judicial practice received statutory recognition in the year 1882 when this provision in s.427, Criminal Procedure Code was introduced.” In *Empress of India v. Mangu and ors.*⁽²⁾ (which was decided several years before the addition of this provision in the Code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the rearrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in *Queen v. Gobin Tewari*⁽³⁾. Again in *Queen-Empress v. Gobardhan*⁽⁴⁾, Sir John Edge, Chief Justice without laying down any inflexible rule, emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in *State v. Badapalli Adi and ors.* (supra).

Viewed in this perspective, it is clear that even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused-respondent of or his enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

As far back as 1824, in the English case, *Bana v. Methuen and ors.*⁽⁵⁾ Best J. following an older precedent enunciated the rule that :

“when an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence.”

This is the rationale of s.427. As soon as the High Court on perusing a petition of appeal against an order of acquittal considers that there is sufficient ground for interfering, and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more becomes *sub judice*.

Similar is the position when the Supreme Court, in its discretion, grants special leave to appeal under Article 136 of the Constitution, against an order of acquittal passed by the High Court.

(1) I.L.R. [1955] Cuttack 589.

(2) I.L.R. 2 All 340.

(3) I.L.R. (1876) 1 Cal. 281.

(4) I.L.R. (1887) 9 All. 528.

(5) 2 Bens 228.

- A Article 136 confers on the Supreme Court, the same power which was vested in the Crown to grant special leave to appeal to His Majesty-in-Council (which in practice meant the Judicial Committee of the Privy Council in England) to convicted persons from India. This Article is couched in very specious phraseology. The power under it can be exercised in respect of “any judgment, decree, determination, sentence or order in any cause, matter passed or made by any court or tribunal in the territory of India.” As pointed out by this Court in *K. M. Nanavati v. State of Maharashtra*(¹), “this wide and comprehensive power in respect of any determination of any court or tribunal must carry with it the power to pass orders incidental or ancillary to the exercise of that power.” That is why, Article 142 in equally extensive terms gives this Court power “to make such order as is necessary for doing complete justice in any cause or matter before it and any decree so passed or order so made shall be enforceable throughout the territory of India”. With the same end in view, clause (2) of that Article (subject of course to law, if any, made by Parliament) gives this Court “all and every power to make any order for the purpose of securing the attendance of any person”.

- Thus there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has under s. 427.
- E Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as, “the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, tampering with evidence, larger interest of the public and State”—see *The State v. Capt. Jasjit Singh*(²). In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing before this Court. In the context, it must be remembered that this over-riding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice.

(1) [1962] 1Supp. 567.

(2) [1962] 3 S.C.R. 622.

Nor do we find any merit in the contention that an order directing the re-arrest and detention of an accused-respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right guaranteed in Part III of the Constitution. Such an order is made by this Court in the exercise of its plenary jurisdiction conferred by Articles 136 and 142 of the Constitution. By no stretch of imagination can it be said that such an order deprives the accused-respondent of his liberty in a manner otherwise than in accordance with procedure established by law. A
B

It is not necessary to burden this judgment with a discussion of the rulings cited by Mr. Garg. Suffice it to say that the facts of those cases were entirely different and they have no bearing on the point in issue before us. C

For all the foregoing reasons, we answer the question posed at the commencement of this judgment in the affirmative and dispose of the references accordingly.

M.R.

Reference answered against the accused/respondents.