

A

STATE (DELHI ADMINISTRATION)

v.

DHARAMPAL

OCBTOBER 19, 2001

B

[K.T. THOMAS AND S.N. VARIAVA, JJ.]

Criminal Trial :

C

Omission to bring to the notice of the accused an inculpatory material—Effect of—Does not ipso-facto vitiate the proceeding—Accused must show that failure of justice was occasioned by such omission—If an inculpatory material not put to the accused, the Appellate Court can always make good that lapse by calling upon explanation on the circumstances established against him.

D

Code of Criminal Procedure, 1973 :

E

Section 378—Applicability of—Period of limitation to appeal by State Government—Continues to be governed by Section 114(a) of Limitation Act—Sub-section (5) of Section 378 Cr.P.C. has no application to an appeal by the State Government—Limitation Act, 1963.

F

G

H

Food Inspector purchased a sample of 'lal mirch kutti' from the respondent. The sample was found to be non confirming to the prescribed standards. A complaint was filed under Section 20 of the Prevention of Food Adulteration Act. The respondent got the sample analysed from Central Food Laboratory (CFL) under Section 13(2) of the Act. As per report submitted by CFL, the sample was found to contain adulterating material, starches and colouring material. Metropolitan Magistrate, after trial, convicted and sentenced him to rigorous imprisonment and fine. On appeal, the Sessions Judge acquitted him on the ground that while recording statement of the accused/respondent under section 313 Cr.P.C., the contents of the certificate of the Director, CFL was not read out. On this ground many other accused had also been acquitted. Against the judgments, appellants filed appeals which were dismissed by the High Court on the ground that non-putting of the contents of the certificate to the accused was a vital omission; conviction could not, therefore, be maintained and

that all the appeal were barred by limitation as not filed within a period of 60 days as proved under sub-section (5) of Section 378 Cr.P.C.

Allowing the appeals, the Court

HELD : 1. An omission to bring the attention of the accused to an inculpatory material does not *ipso facto* vitiate the proceedings, the accused must show that failure of justice was occasioned by such omission. Further, the Appellate Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused. In such cases it is enough if the attention of the accused is brought to the report/certificate. It is not necessary that contents of the report be also put to the accused. [453-E-G]

Shivaji Sahabrao Bobade v. State of Maharashtra, [1973] 2 SCC 793 and *Basavaraj R. Paul v. State of Karnataka*, [2000] 8 SCC 740, relied on.

2.1. Section 378 makes a distinction between an appeal filed by the State Government or the Central Government, who only need to obtain leave and an appeal by a complainant who needs to obtain special leave. The limitation provided in sub-section (5) is only in respect of application filed under sub-section (4) i.e. application for special leave to appeal by the complainant. This period of limitation does not apply to appeals by the State Government under sub-section (1) or the Central Government under sub-section (2). Appeals by the State Government or the Central Government continue to be governed by Article 114(a) of the Limitation Act. These appeals must be filed within 90 days from the date of the order appealed from. If there is a delay in filing an appeal by State Government/Central Government, it would be open for them to file an application for condonation of delay under Section 5 of the Limitation Act. The reference to sub-section (5) of sub-section (1) of Section 378 is clearly an inadvertent mistake and sub-section (5) applies only to application for special leave by a complainant and has no application to an appeal by the State Government or to an application for leave under sub-section (3). What the legislature clearly intended was to continue to provide that an appeal by the State Government would not be maintainable if special leave to appeal had

A been refused to the complainant. Sub-section (1) of Section 378 is subject to provisions of sub-section (6) and not sub-section (5) as inadvertently provided therein. Thus in Section 378(1) the figure (6) will have to be read in place of figure (5). [457-H; 458-A-B-D; 459-A]

B 2.2. In the instant case the delay already having been condoned, there was no question of the High Court subsequently entertaining and upholding an argument on delay. This does not seem to have been brought to the notice of the High Court. [460-A]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1076 of 2001.

From the Judgment and Order dated 28.1.2000 of the Delhi High Court in Crl. A. No. 91 of 1996.

WITH

D Crl. A. No. 1077 and 1078 of 2001.

E B.A. Mohanty, U.R. Lalit, Rajeev Sharma, Ms. Anita Verma, Ms. Mamta Tripathi, Ms. Usha Mann, D.S. Mahra, Randhir Singh Jain, D.B. Vohra, S.K. Sabharwal, M. Qamaruddin, Ms. M. Qamaruddin and Ambar Qamaruddin for the appearing parties.

The Judgment of the Court was delivered by

S.N. VARIAVA, J. Leave granted.

F Heard parties.

G These appeals are against the Judgment of the Delhi High Court dated 20th November, 2000. By this Judgment a number of appeals, filed by the appellants herein, have been dismissed. All these appeals are against the said common Judgment. They are based on almost similar facts and raise common question of law. They are, therefore, being disposed of by this common Judgment.

H It must be mentioned that against the Judgment dated 20th November, 2000 other SLPs had also been filed before this Court. Those were dismissed leaving the questions of law open.

In this Judgment the facts in Criminal Appeal No. 1076 of 2001 [arising out of SLP (Cri.) No. 1617 of 2001] are being set out. The facts of the other Appeals need not be set out as they are more or less similar.

On 29th August, 1988 the Food Inspector purchased a sample of Lal Mirch Kutti from M/s Vashno Panjabi Dhaba, H-1, Chander Nagar, Delhi. The Respondent was the person who had sold Lal Mirch to the Food Inspector. The sample purchased was divided into three equal parts and put into bottles which were sealed. One sample was sent to the Public Analyst, who, by his report dated 6th August, 1988 found the same to be non-confirming to the prescribed standards. On 4th May, 1989 after obtaining sanction from the competent authority, under Section 20 of the Prevention of Food Adulteration Act (hereinafter called the Act), a complaint was filed in the Court of learned Metropolitan Magistrate. The Respondent exercised his right under Section 13(2) of the Act. Accordingly a sample was sent to the Director, Central Food Laboratory for analysis. A report was given by the Director, Central Food Laboratory. He found the sample to contain moisture as 20.01% and as insoluble in H.C.L. as 1.92 % as against the maximum standard of 12% and 1.3% respectively. He also found adulterating material, starches and colouring material in the sample.

The Respondent was after a trial convicted by the learned Metropolitan Magistrate by his Judgment dated 23rd /26th February, 1991. He was sentenced to rigorous imprisonment for 1 1/2 years and to pay a fine of Rs. 5,000 and in default of payment of fine to further undergo simple imprisonment for six months.

The Respondent filed an Appeal before the Sessions Judge, New Delhi. The Sessions Judge by his Judgment dated 13th February, 1995 acquitted the Respondent only on the ground that the trial Court, while recording the statement of the Accused/Respondent under Section 313 of the Criminal Procedure Code, did not read out the contents of the certificate of the Director, Central Food Laboratory to the accused.

As against this acquittal the appellants filed an appeal to the High Court of Delhi. As on identical grounds i.e. that the contents of the certificate of the Director, Central Food Laboratory had not been put to the accused while recording his statement under Section 313 Cr.P.C. many other accused had also

A been acquitted a number of other appeals had also been filed by the appellants.

B All those appeals came to be dismissed by the High Court by the impugned Order dated 20th November, 2000. The High Court dismissed all the appeals on two grounds (a) that non putting of the contents of the certificate of the Director, Central Food Laboratory, to the accused, whilst recording his statement under Section 313 Cr.P.C., was a vital omission and that the conviction could not therefore be maintained and (b) that all the appeals were barred by limitation as they were not filed within a period of 60 days as provided under by sub-section 5 of Section 378 Cr.P.C. Hence these appeals. In these appeals we are only concerned with the abovementioned two questions of law.

C Dealing with the first question first. This Court has, in the case of *Shivaji Sahabrao Bobade v. State of Maharashtra* reported in (1973) 2 SCC 793, held as follows:

D “It is trite law, nevertheless fundamental, that the prisoner’s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. *However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused.* In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. *It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction.* In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr. P.C., the omission has not been shown to have caused prejudice to the accused.”

H

(emphasis supplied)

The same view has been reiterated by this Court in the case of *Basavaraj R. Patil v. State of Karnataka* reported in (2000) 8 SCC 740.

Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material, has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him.

This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answers of the accused. If the accused could not give any plausible or reasonable explanation it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused.

We further find that in all these cases, the copy of the certificate of the Director, Central Food Laboratory had been supplied to the accused. They were thus aware of the contents of the certificate. It has to be seen that under the Prevention of Food Adulteration Act the prosecution is based upon the contents of either the report of the Public Analyst or the certificate of the Director of Central Food Laboratory. During their examination, under Section 313 Cr.P.C. questions pertaining to the certificate were put to the accused. The explanation of the accused, in respect of the certificate, had been called for. In our view in such cases it is enough if the attention of the accused is brought to the report or the certificate as the case may be. It is not necessary that the contents of the report be also put to the accused.

Let us now see what were the questions put to the accused in these cases. We have been shown the statement of the accused, under Section 313 Cr.P.C.

A in only two of the appeals. However, it is admitted that in other cases also the questions were similar.

In Criminal Appeal No. 1076 of 2001 [arising out of SLP (Crl.) No. 1617 of 2001] the question put to the accused and the answer obtained from him are as follows:

B

“Q.: It is further in evidence that on receipt of copy of P.A.’s and intimation letter, you exercised your right under Section 13(2) and Director, CFL vide his certificate Ex.PX declared the sample to be adulterated. What have you to say?

C

Ans.: It is a matter of record.”

In Criminal Appeal No. 1078 of 2001 [arising out of SLP (Crl.) No. 2437 of 2001] the question put and the answer given are as follows:

D

“Q.: It is further in evidence that intimation letter alongwith copy of PA report was served on you IO the Court and you exercised your right u/s 12(2) of the PFA Act and certificate of director is Ex. PX. What have you to say?

E

Ans.: The certificate is erroneous and it is the result of the negligence committed by the F.I. in the sample proceeding.”

F

Thus it is to be seen that the questions clearly indicated that what was being put to the accused were the contents of the certificate. It is also to be seen that the accused clearly understood that what was being put to them was the contents of the certificate. The accused Ashwani Kumar (in Criminal Appeal No. 1078 of 2001 [arising out of SLP (Crl.) No. 2437 of 2001]) in fact answered that the certificate was erroneous and was a result of negligence committed by the Food Inspector in the sample proceedings. Similarly accused Dharampal (in Criminal Appeal No. 1076 of 2001 [arising out of SLP (Crl.) No. 1617 of 2001]) answered that the report was a matter of record. The

G

accused gave their answers to the contents of the certificate. Clearly no prejudice had been caused to them. Before us also it could not be shown that any prejudice had been caused to them. This aspect of the matter was completely overlooked by both the Sessions Judge and the High Court. In our view, neither the Judgment of the Sessions Judge nor the reasoning of the High Court on this

H

point can be sustained.

The second question had only been urged before the High Court. The submission made before the High Court was that the appeal had not been filed by a public servant and therefore the limitation for filing such an appeal was 60 days. This submission found favour with the High Court. In all fairness, to counsel appearing for the respondents before us, it must be stated that such a contention was not canvassed before this Court, as it is clearly an untenable contention. Before us it was submitted by Mr. Lalit, that the appeals should have been filed within 90 days from the date of the Order as provided in Article 114 of the Limitation Act.

To understand what the periods of limitation under Section 378 of the Cr.P.C. are one must first look at Section 417 as it stood in the Criminal Procedure Code, 1898. Section 417, as it then stood, read as follows:

“417. (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal.

(5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1).”

Thus it is to be seen that, under Section 417 of the Criminal Procedure Code,

A 1898, an appeal against acquittal could be filed by the State Government or by the Central Government. An appeal against acquittal could in cases instituted upon complaint, be filed by the complainant provided the complainant obtained special leave to appeal from the High Court. Under Section 417(4) no application for grant of special leave could be entertained by the High Court after an expiry of 60 days from the order of acquittal. Thus, under Section 417

B an application for special leave to appeal had to be made only by the complainant. If the State Government or the Central Government filed an Appeal then no application for special leave to appeal had to be made.

C It is because of this that Article 114(a) of the Limitation Act provided that an appeal, by the State Government or the Central Government under sub-sections (1) or (2) of Section 417 of the Criminal Procedure Code, 1898, was to be filed within 90 days from the date of the Order. Article 114(b) provides that an Appeal under sub-section 3 of Section 417 of the Criminal Procedure Code, 1898; must be filed within 30 days from date of grant of special leave.

D Thus under Section 417 of the Criminal Procedure Code, 1898 no application for special leave to appeal had to be made by the State Government or the Central Government, if they filed an appeal against acquittal. The period of 60 days provided in Section 417(4) did not apply to an appeal by the State Government or the Central Government. The period of limitation for the State

E Government or the Central Government was only under Article 114(a) of the Limitation Act.

F Also to be noted that the right of the State Government to file an Appeal under Section 417(1) was subject to provisions of sub-section (5). Sub-section (5) provided that if special leave to appeal had been refused to a complainant then the State Government could not maintain an appeal.

In the Criminal Procedure Code, 1973, Section 417 has been substituted by Section 378, which reads as follows:

G "378. *Appeal in case of acquittal.* - (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [or an

H order of acquittal passed by the Court of session in revision].

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code the Central Government may also direct the Public Prosecutor to present an appeal subject to the provisions of sub-section (3) to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave, to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

A comparison of Section 378 with the old Section 417 shows that, whilst under the old Section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of Section 378(3) the State Government or the Central Government have to obtain leave of the High Court before their appeal could be entertained. Sub-Section (4) of Section 378 is identical to Sub-Section (3) of Section 417. Thus a complainant desirous of filing an appeal against acquittal must still obtain special leave. Thus, Section 378 makes a distinction between an appeal filed by the State Government or the Central Government, who only need to obtain "leave", and an appeal by a complainant who needs to obtain "special leave". The limi-

A tation provided in sub-section (5) is only in respect of applications under sub-section (4) i.e. application for special leave to appeal by a complainant. A complainant may be either a public servant or a private party. If the complainant is a public servant then the period of limitation for an application for special leave is 6 months. If the complainant is a private party then the period of
B limitation for an application for special leave is 60 days. The periods of 6 months and/or 60 days do not apply to appeals by the State Government [under sub-section (1)] or the Central Government [under sub-section (2)]. Appeals by the State Government or the Central Government continue to be governed by Article 114(a) of the Limitation Act. In other words, those appeals must
C /be filed within 90 days from the date of the order appealed from. Needless to state if there is a delay in filing an appeal by the State Government or Central Government it would be open to them to file an application under Section 5 of the Limitation Act for condonation of such delay. That period can be extended if the court is satisfied that there was sufficient cause for not preferring the appeal within the period of 90 days. The High Court was thus wrong in concluding that the appeals had to be filed within 60 days as provided in
D Section 378(5).

It must also be noted that sub-section (6) of Section 378 is identical to sub-section (5) of Section 417. Thus under Section 378 also the State Government cannot maintain an appeal if special leave to appeal is refused to the
E complainant. In this behalf there is no change. Section 417(1) specifically provided that it was "subject to provisions of sub-section (5)". Section 378(1) similarly provides that it is "subject to sub-sections (3) and (5)". Sub-section (3) is the newly added provision which now provides that an appeal by the State or Central Government cannot be entertained without leave of the High Court.
F However the reference to sub-section (5) in sub-section (1) is clearly an inadvertant mistake. As pointed out above sub-section (5) of Section 378 applies only to application for special leave by a complainant. Sub-section (5) of Section 378 has no application to an appeal by the State Government or to an application for leave under sub-section (3). What the Legislature clearly
G intended was to continue to provide that an appeal by the State Government would not be maintainable if special leave to appeal had been refused to a complainant. Thus sub-section (1) of Section 378 was to be subject to provisions of sub-section (6) and not sub-section (5) as inadvertently provided therein. Inadvertantly the figure (5) in Section 417(1) was continued, without
H noticing that now under Section 378 the relevant provision was sub-section (6).

In our view it is clear that the figure (5) in Section 378(1) is inadvertently retained. Thus in Section 378(1) the figure (6) will have to be read in place of the figure (5).

There is one last fact which must be mentioned. We find that the main argument on the question of limitation was made before the High Court on behalf of Respondent Dharampal [i.e. the Respondent in Criminal Appeal No. 1076 of 2001 (arising out of SLP (Crl.) No. 1617 of 2001)]. It had been argued on his behalf that the Appeal against his acquittal was barred by limitation as there was a delay of 95 days. The High Court accepted this contention. We however find from a copy of an Order produced before us that in this Appeal, before the High Court, the delay had already been condoned. The Order, which is available in this SLP Paper Book, reads as follows:

ORDER

21.5.96 Present: Mr. B.T. Singh for the Petitioner

Crl. M. 2245/96.

Leave granted.

This application is disposed of.

Crl. M. 2246/96.

Delay in refiling the appeal is condoned.

This application is disposed of.

Crl. A. 92/96.

Let the appeal be registered. Appeal is admitted.

Sd/-

Arun Kumar, J.

Sd/-

May 21, 1996.

Mohd. Shamim, J.”

A The delay already having been condoned there was no question of the High Court subsequently entertaining and upholding an argument on delay. This does not seem to have been brought to the notice of the High Court.

B In any view of the matter, the impugned Order cannot be sustained. The Orders of the Sessions Judge dismissing the Appeals also cannot be sustained. Therefore, the impugned Judgment dated 20th November, 2000 as well as the Orders of the Sessions Judge in the above mentioned three cases are set aside. The appeals which had been filed by the respondents in the Court of Additional District and Sessions Judge are hereby restored to the file of the Additional District & Sessions Judge, New Delhi. They shall now be disposed of on merits, in accordance with law.

C These appeals stand disposed of accordingly. There will be no Order as to costs.

S.K.S.

Appeals disposed of.