

BHARATKUMAR RAMESHCHANDRA BAROT

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v.

STATE OF GUJARAT

(Criminal Appeal No. 448 of 2018)

MARCH 26, 2018

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[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Criminal Procedure, 1973: s.377 – Session Court awarded to the appellant 10 years rigorous imprisonment for offence under s.302 IPC – On State’s appeal under s.377, High Court enhanced the sentence from 10 years to life imprisonment – On appeal, held: Once the Sessions Judge found the appellant guilty for commission of the offence of the murder punishable under s.302 IPC, the only punishment that can be awarded in law is either the “death penalty” or “imprisonment for life” and the “fine” – s.302 IPC, in clear terms, provides that “whoever commits murder shall be punished with “death” or “imprisonment for life” and shall also be liable to “fine” – Any punishment less than the life imprisonment, as prescribed under s.302 IPC, if awarded by any Court is per se illegal and without authority of law – Indeed, there is no such discretion left with the Court in awarding the punishment except to award the punishment which is prescribed under s.302 IPC – Penal Code, 1860 – s.302 – Sentence/Sentencing.

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Code of Criminal Procedure, 1973: s.377 – Object of – Held: The object of s.377 is that when the State files an appeal seeking enhancement of jail sentence awarded by the Sessions Judge, the jail sentence cannot be enhanced unless the accused is given an opportunity to defend it – The accused is also entitled to pray for his acquittal or award of lesser punishment – If the accused, after service of notice fails to raise this plea then the High Court would be justified in deciding the State’s appeal on merits which is confined to only for enhancement of jail sentence – Therefore, the accused cannot later claim remand the case for rehearing of the appeal.

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Code of Criminal Procedure, 1973: s.377(3) – Requirement under, non-compliance – Plea by appellant that he was deprived of his right to oppose the appeal and also his right to urge the grounds

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- A *for his acquittal as provided in s.377(3) of the Code; that appellant was not afforded adequate opportunity to defend himself in the appeal filed by the State for enhancement of jail sentence; that sufficient time was not given to amicus curiae to prepare the case which caused prejudice to the appellant – Held: Plea is not sustainable – Notice of appeal was duly served on the appellant –*
- B *It was not the case of the appellant that he had no knowledge of filing of the appeal by the State against him or there was any infirmity in effecting service of notice of appeal which rendered the proceedings in appeal as bad in law – Despite notice having been served personally on the appellant, he did not appear – Though,*
- C *the appellant had an independent right of appeal but he did not file any regular appeal questioning the legality of the order of the Sessions Judge convicting him for commission of the offence of murder – High Court, having found that there was no representation on behalf of the appellant despite personal service effected on him, was justified in appointing a lawyer as amicus curiae to safeguard the appellant’s interest and to assist the Court as well – The amicus curiae had never made any complaint in the High Court for not giving him more time for preparation of the case – High Court, therefore, ensured compliance with s.377(3).*
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Dismissing the appeal, the Court

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- HELD: 1. There was due compliance with the requirements of Section 377(3) of the Code by the High Court and, therefore, no fault could be noticed in the reasoning and conclusion arrived at by the High Court so far as the compliance of Section 377(3) of the Code is concerned. The object of Section 377 of the Code is that when the State files an appeal seeking enhancement of jail sentence awarded by the Sessions Judge, the jail sentence cannot be enhanced unless the accused is given an opportunity to defend it. The accused is also entitled to pray for his acquittal or award of lesser punishment. If the accused, after service of notice fails to raise this plea then the High Court would be justified in deciding the State’s appeal on merits which is confined to only for enhancement of jail sentence. Therefore, there is no ground to remand the case for rehearing of the appeal. [Paras 17, 23] [693-F ; 694-E]**
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2. Once the Sessions Judge found the appellant guilty for commission of the offence of the murder punishable under Section 302 IPC, the only punishment that can be awarded in law is either the “death penalty” or “imprisonment for life” and the “fine”. Any punishment less than the life imprisonment, as prescribed under Section 302 IPC, if awarded by any Court is *per se* illegal and without authority of law. [Paras 25, 27] [694-H; 695-B]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 448 of 2018.

From the Judgment and Order dated 08.10.2015 of the High Court of Gujarat at Ahmedabad in Criminal Appeal (For Enhancement) No. 1303 of 2014.

Abhishek Singh, Samir Ali Khan, Advs. for the Appellant.

Ms. Mamta Singh, Ms. Jesal Wahi, Ms. Hemantika Wahi, Ms. Vishakha, Advs. for the Respondent.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Leave granted.

2. This appeal is filed by the accused against the final judgment and order dated 08.10.2015 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal (for Enhancement) No.1303 of 2014 whereby the High Court allowed the appeal filed by the State of Gujarat under Section 377 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code”) and enhanced the sentence imposed on the appellant (accused) by the Trial Court from 10 years rigorous imprisonment to imprisonment for life.

3. Facts of the case lie in a narrow compass so also the issue involved in the appeal is short as would be clear from the facts stated hereinbelow.

4. The appellant was prosecuted and eventually convicted for the offences punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) and Section 135 of the Bombay Police Act (hereinafter referred to as “the B.P. Act”) by order dated 04.09.2014 passed by the 3rd Additional Sessions Judge, Mehsana (Gujarat) in Sessions Case No.71/2012 for committing murder of the deceased by name - Dilipbhai Ratnaji.

A 5. The Sessions Judge, however, awarded to the appellant 10 years' rigorous imprisonment and fine of Rs.5000/- and, in default of payment of fine, to further undergo 5 months' simple imprisonment so far as offence under Section 302 IPC was concerned and so far as for the offence punishable under Section 135 of the B.P. Act was concerned, the appellant was awarded 3 months' simple imprisonment and fine of
B Rs.500/- and, in default of payment of fine, to further undergo 15 days' simple imprisonment.

 6. The State felt aggrieved by the award of the lesser punishment of 10 years under Section 302 IPC to the appellant as against what is specified under Section 302 IPC and filed criminal appeal under Section
C 377 of the Code, out of which this appeal arises, praying therein for its enhancement and make it in conformity with the punishment specified under Section 302 IPC.

 7. The appellant was served with the notice (dasti) of the appeal filed by the State. The appellant (accused), however, did not appear
D despite service of dasti notice made on him and nor filed any criminal appeal challenging his conviction on merits. The High Court, therefore, appointed Mr. U. Oza, advocate, as *amicus curiae* to assist the Court on behalf of the accused (appellant herein) for defending him.

 8. By impugned judgment, the High Court allowed the State's
E appeal and enhanced the sentence from "10 years" to "life imprisonment" for the offence of murder under Section 302 IPC. In other words, the High Court enhanced the sentence and awarded sentence of "life imprisonment" to the appellant as provided under Section 302 IPC. So far as the imposition of fine was concerned, it was upheld.

F 9. It is against this judgment of the High Court, the appellant (accused) has felt aggrieved and filed this appeal by way of special leave in this Court.

 10. Heard Mr. Abhishek Singh, learned counsel for the appellant (accused) and Ms. Mamta Singh, learned counsel for the respondent-
G State.

 11. Mr. Abhishek Singh, learned counsel appearing for the appellant (accused) while assailing the legality and correctness of the impugned judgment argued essentially on one point.

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12. Referring to Section 377(3) of the Code, learned counsel urged that the appellant (accused) was not afforded adequate opportunity to defend himself in the appeal filed by the State for enhancement of the jail sentence and hence the impugned judgment is rendered bad in law having been passed without following the procedure provided under subsection (3) of Section 377 of the Code.

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13. In other words, his submission was that the appellant was deprived of his right to oppose the appeal and also his right to urge the grounds for his acquittal as provided under Section 377(3) of the Code. Learned counsel urged that it is for this reason, the enhancement of jail sentence made by the High Court is rendered illegal and without jurisdiction.

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14. Learned counsel also urged that sufficient time was not given to the learned amicus curiae to prepare the case. It was urged that this also caused prejudice to the appellant.

15. In reply, learned counsel for the respondent (State) supported the reasoning and conclusion of the High Court and contended that the appeal has no merit.

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16. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to dismiss the appeal as, in our opinion, it has no merit.

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17. Coming first to the submission as to whether there was any non-compliance with the requirements of Section 377(3) of the Code by the High Court, in our considered opinion, there was due compliance with the requirements of Section 377(3) of the Code by the High Court and, therefore, no fault could be noticed in the reasoning and conclusion arrived at by the High Court so far as the compliance of Section 377(3) of the Code is concerned. This we say for the following reasons.

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18. In the first place, the High Court served dasti notice to the appellant (who was respondent before the High Court). The notice of the appeal was, therefore, duly served on the appellant. In other words, it was also not the case of the appellant that he was not served or had no knowledge of filing of the appeal by the State against him or there was any infirmity in effecting service of notice of appeal which rendered the proceedings in appeal as bad in law.

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A 19. Second, despite notice having been served personally on the appellant, he did not appear. Though, the appellant had an independent right of appeal but he did not file any regular appeal questioning the legality of the order of the Sessions Judge convicting him for commission of the offence of murder.

B 20. Third, the High Court, having found that there was no representation on behalf of the appellant despite personal service effected on him, was justified in appointing a lawyer as *amicus curiae* to safeguard the appellant's interest and to assist the Court as well.

C 21. Fourth, the *amicus curiae* had never made any complaint in the High Court for not giving him more time for preparation of the case. Even in this appeal, *amicus curiae* did not file any affidavit to this effect. Therefore, this submission raised by the *amicus curiae* is without any foundation and is accordingly dismissed.

D 22. In our considered opinion, the High Court, therefore, ensured compliance with Section 377(3) of the Code and we do not find any ground to interfere in this finding.

E 23. The object of Section 377 of the Code is that when the State files an appeal seeking enhancement of jail sentence awarded by the Sessions Judge, the jail sentence cannot be enhanced unless the accused is given an opportunity to defend it. The accused is also entitled to pray for his acquittal or award of lesser punishment. If the accused, after service of notice fails to raise this plea then the High Court would be justified in deciding the State's appeal on merits which is confined to only for enhancement of jail sentence. We, therefore, find no ground to remand the case for rehearing of the appeal.

F 24. Now coming to the question of enhancement of jail sentence made by the High Court, we are inclined to concur with the reasoning of the High Court. Indeed, we are surprised to find as to how the Sessions Judge could award 10 years' jail sentence to the appellant for commission of offence of murder punishable under Section 302 IPC. It is simply unheard of.

G 25. Once the Sessions Judge found the appellant guilty for commission of the offence of the murder punishable under Section 302 IPC, the only punishment that can be awarded in law is either the "death penalty" or "imprisonment for life" and the "fine".

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26. Section 302 IPC, in clear terms, provides that “whoever commits murder shall be punished with “death” or “imprisonment for life” and shall also be liable to “fine”. A

27. Any punishment less than the life imprisonment, as prescribed under Section 302 IPC, if awarded by any Court is *per se* illegal and without authority of law. Indeed, there is no such discretion left with the Court in awarding the punishment except to award the punishment which is prescribed under Section 302 IPC as mentioned above. B

28. In the light of the foregoing discussion, we are of the considered opinion that the High Court was justified in modifying the jail sentence awarded to the appellant by the Sessions Judge and rightly enhanced the sentence by awarding punishment of “Life imprisonment” under Section 302 IPC to the appellant (accused) in place of “10 years jail sentence awarded by the Sessions Judge. C

29. No other point was argued by the learned counsel for the appellant except the one dealt with by this Court *supra* and we have not found any merit therein. D

30. The appeal thus fails and is accordingly dismissed.