



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 301 OF 2022
WITH
CRIMINAL APPLICATION NO. 3373/2022
IN
CRIMINAL REVISION APPLICATION NO.301/2022

- 1) Ikba s/o Chandulal Shaikh,
Age 39 years, Occ. Agriculture.
- 2) Lahu /o Tulshiram Gaware,
Age 40 years, Occ. Agriculture. ... Applicants

VERSUS

- 1) The State of Maharashtra
- 2) Krushna s/o Bhikaji Pawar,
Age 52 years, Occ. Agriculture.
- 3) Shital w/o Krushna Pawar,
Age 44 years, Occ. Agriculture.
- 4) Sanjay s/o Bhikaji Pawar,
Age 48 years, Occ. Agriculture. ... Respondents

...

Advocate for Applicant : Mr. Sachin S. Panale
A.P.P. for Respondent No. 1 : Mr. A.S. Shinde
Advocate for Respondent Nos. 2 to 4 : Mr. M.P. Kale

...

AND
CRIMINAL REVISION APPLICATION NO. 318 OF 2022
WITH
CRIMINAL APPLICATION NO. 3633 OF 2022
IN
CRIMINAL REVISION APPLICATION NO. 318/2022

- Sambhaji s/o Digambar Kachgunde,
Age 45 years, Occ. Agriculture,
R/o. Prashant Nagar, Tal. Ambajogai,
District Beed. ... Applicant

VERSUS

The State of Maharashtra
Through Police Inspector,
Ambajogai Police Station,
Tq. Ambajogai, Dist. Beed.

... **Respondent**

...

Advocate for Petitioner : Mr. K. N. Shermale
A.P.P. for the Respondent : Mr. A.S. Shinde

...

WITH
CRIMINAL REVISION APPLICATION NO. 320 OF 2022
WITH
CRIMINAL APPLICATION NO. 3644 OF 2022
IN
CRIMINAL REVISION NO. 320/2022

Bajrang s/o Vitthal Hake,
Age 59 years, Occ. Agriculture,
R/o. Prashant Nagar Ambajogai,
Tal. Ambajogai, District Beed.

... **Petitioner**

VERSUS

The State of Maharashtra
Through Police Inspector,
Ambajogai Police Station,
Tq. Ambajogai, Dist. Beed.

... **Respondent**

...

Advocate for Petitioner : Mr. K. N. Shermale
A.P.P. for the Respondent : Mr. A.S. Shinde

...

CORAM : **MANGESH S. PATIL &**
S. G. CHAPALGAONKAR, JJ.

RESERVED ON : **03.11.2023**
PRONOUNCED ON : **05.01.2024**

JUDGMENT : (MANGESH S. PATIL, J.)

We have heard the learned advocates and the learned A.P.P. in all these matters.

2. Following question has been referred to us for determination :

“Whether in the absence of a Rule regulating the procedure framed by the High Court for admission or listing the Revision without surrender, the High Court under revisional jurisdiction under Section 397¹ of the Cr.PC. shall suspend the sentence without the surrender or arrest of the accused for sending him to jail for the execution of the sentence, as a matter of course ?”

Though the question is articulated to appear as one, in fact it raises two issues :

- 1) Whether in the absence of Rules the High Court while exercising the revisional jurisdiction under Section 397 of the Code of Criminal Procedure can entertain the revision even when the convict whose appeal against conviction has been dismissed, has not surrendered ?
 - 2) Whether while exercising the revisional jurisdiction under Section 397 of the Code of Criminal Procedure the High Court can suspend the sentence without the accused having surrendered, as a matter of course ?
3. Having heard the learned advocates and the learned A.P.P, in our considered view, as far as the first issue is concerned, the decision of the Supreme Court in the matter of **Bihari Prasad Singh Vs. State of Bihar; (2000) SCC (Cri) 1380** lays down the law and there remains nothing to be decided by this Court. The following observations from **Bihari Prasad Singh (supra)** are sufficient :

“The only question that requires consideration in the present case is whether the High Court while exercising its revisional jurisdiction can refuse to hear or entertain the matter on the ground that the accused has not surrendered. Under the provisions of the Criminal Procedure there is no such requirement though many High Courts in this country have made such provision in the respective rules of the High Court. But it is stated to us that there is no such rule in the Patna High

¹ Section 397 - Calling for records to exercise powers of revision

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Court. In that view of the matter, the High Court was not justified in rejecting the application for revision solely on the ground that the accused has not surrendered.”

Admittedly, the Bombay High Court has not framed the rules as is contemplated in the matter of **Bihari Prasad Singh**, therefore, it is well nigh clear that in the absence of the rules the High Court cannot refuse to entertain and decide the revision even when the accused has not surrendered. Consequently, there is no option for the High Court but to entertain a revision in the absence of the rules mandatorily requiring the accused to surrender.

4. The debate essentially revolves around the second issue and is indeed a bit complex one. In order to appreciate the issue it is imperative to understand the scheme of the Code of Criminal Procedure (Cr.P.C.). By virtue of Section 389² of the Cr.P.C., the Court convicting the accused has been conferred with a power to suspend the sentence for a limited period to enable the accused to challenge the order of conviction. It also enables the appellate Court to suspend the sentence during pendency of the appeal. The appellate Court which upholds the conviction and sentence awarded by the trial court has no powers under Section 389 of Cr.P.C. to suspend the sentence. The course to be followed in such a situation is to issue a warrant as mandated by Section 418³ of the Cr.P.C. which lays down provision

² 389. Suspension of sentence pending the appeal; release of appellant on bail.—

- (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:
[Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:
Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.]
- (2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.
- (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—
- (i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
- (ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.
- (4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

³ Section 418 - Execution of sentence of imprisonment

- (1) Where the accused is sentenced to imprisonment for life or to imprisonment for a term in cases other than those provided for by section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant:

Provided that where the accused is sentenced to imprisonment till the rising of the Court, it shall not be necessary to prepare or forward a warrant to a jail and the accused may be confined in such place as the Court may direct.

- (2) Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in sub-section (1), the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest.

regarding execution of sentence of imprisonment.

5. Section 386⁴ of the Cr.P.C. provides for the powers of the appellate Court and Section 387⁵ of the Cr.P.C. makes provisions regarding judgments to be rendered by the subordinate appellate Courts. It lays down that provisions of Chapter XXVII regarding the judgments of the criminal courts of original jurisdiction shall, so far as may be applicable to the judgment in the appeal by the Court of Session or the Chief Judicial Magistrate. Section 387 also contains a proviso whereby the appellate Court has been given discretion to direct the accused to be brought up or required to attend, to hear the judgment. This necessitates the rules contained in Chapter XXVII to be followed to the extent possible even by the appellate Court. By virtue of sub Section 5 of Section 353⁶ of the Cr.P.C. which is a part of Chapter XXVII, wherever the accused is in custody, he has to be brought up to hear the judgment to be pronounced. Use of the word “shall” in that sub Section clearly shows the mandatory nature of the course to be followed. Sub Section 6 of Section 353⁷ governs a situation where the accused is not in custody. It lays down that he shall be required by the Court to attend to hear the judgment, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or if he is to be

4 Section 386 - Powers of the Appellate Court

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction—
 - (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
 - (ii) alter the finding, maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
- (c) in an appeal for enhancement of sentence—
 - (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
 - (ii) alter the finding maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
- (d) in an appeal from any other order, alter or reverse such order;
- (e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

5 Section 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.

6 Section 353 - Judgment

(5) If the accused is in custody, he shall be brought up to hear the judgment pronounced.

7 (6) If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted:

Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

acquitted. It also contains a proviso where there are number of accused but only some of them attend the Court at the time of pronouncement of the judgment, permitting the Court to pronounce the judgment, even in the absence of some of them, in order to avoid undue delay.

6. Once having seen that by virtue of Section 387 of the Cr.P.C. the rules contained in Chapter XXVII, to the extent possible, are applicable even in respect of the appellate Court, the appellate Court would be expected to follow sub Sections 5 and 6 of Section 353 and if the accused is in jail shall direct him to be brought up to hear the judgment and if he is not in custody, require him to attend to hear the judgment.

7. Having understood the scope and ambit of the aforementioned provisions *vis a vis* the procedure to be followed by the appellate Court, it would be apt to refer to the provision of Section 418 of the Cr.P.C. As can be seen, it mandatorily requires the Court passing the sentence of imprisonment to forthwith forward a warrant to the jail if the accused is confined therein and if he is not present in the Court, being on bail or otherwise and for whatever reason, to issue a warrant for his arrest for the purpose of forwarding him to the jail.

8. If such is the scheme, when the law mandates the appellate Court to call upon the accused to hear the judgment, no sooner the appeal is dismissed, the procedure contemplated under Section 418 of the Cr.P.C. will have to be followed and to see to it that the order of conviction is put to execution. If that be so, no sooner the appeal against conviction is dismissed, the accused will have to be immediately taken into custody or will have to surrender himself. Even if he is on bail, the order of bail would automatically come to an end on conclusion of the appeal. The life of bail being only till pendency of the appeal, the accused would also be under obligation to surrender.

9. The upshot of the discussion, no sooner the appellate Court dismisses

the appeal against conviction, if the accused is not already in custody being on bail or otherwise, a warrant will have to be issued under Section 418 of the Cr.P.C. If he subsequently challenges the order regarding dismissal of the appeal by preferring a revision under Section 397 of the Cr.P.C., the High Court being a revisional Court will have the power and jurisdiction to see to it that the accused, whose conviction has been upheld by the lower appellate Court, has in fact, subjected himself to law by surrendering himself.

10. It is in this context, in our considered view, the observations of the Supreme Court in the matter of **Vivek Rai and another Vs. High Court of Jharkhand through Registrar General and others; 2015 A.I.R. (SC) 1088** would be relevant :

“It has not been disputed even by the learned counsel for the High Court that the Rule does not affect the inherent power of the High Court to exempt the requirement of surrender in exceptional situations. It cannot thus be argued that prohibition against posting of a revision petition for admission applies even to a situation where on an application of the petitioner, on a case being made out, the Court, in exercise of its inherent power, considers it appropriate to grant exemption from surrender having regard to the nature and circumstances of a case. Thus, the exception as found in corresponding Supreme Court Rules that if the Court grants exemption from surrender and directs listing of a case, the Rule cannot stand in the way the Court’s exercise of such jurisdiction, has to be assumed in the impugned Rule.”

If after dismissal of the appeal against conviction, the accused prefers a revision, even if the High Court in the absence of rules cannot refuse to entertain and decide it, as is observed, it would have inherent power to exempt him from surrendering.

11. In a given case, taking into consideration the facts and circumstances, the High Court in exercise of the revisional jurisdiction could exercise the discretion to suspend the sentence even without the accused surrendering himself or is arrested. Conversely, though it can still decide the revision, it

may simultaneously direct that a warrant is issued as contemplated under Section 418, so that the law could take its course and ensure that the convict whose conviction has not been suspended suffers the sentence. If it is a matter of mischief, where the accused is seeking to misuse the process, as a custodian of law the High Court would be justified in issuing such a direction for his arrest albeit it would be independent of the issue regarding maintainability of the revision.

12. We, therefore, answer the question referred to us as follows :

Though the High Court would not be justified in refusing to entertain the revision in the absence of the Rules for regulating listing of the revisions without surrender, it has powers to simultaneously ensure compliance with the provisions of Sections 353(5), 353(6) and Section 418 of the Code of Criminal Procedure under its inherent powers contained in Section 482 and in exercise of its supervisory jurisdiction under Section 397 read with Section 401 of Cr.PC., and may suspend the sentence without the surrender or arrest of the accused, in its discretion.

(S. G. CHAPALGAONKAR, J.)

(MANGESH S. PATIL, J.)

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