

PETITIONER:
BONDADA GAJAPATHY RAO

Vs.

RESPONDENT:
STATE OF ADHRA PRADESH

DATE OF JUDGMENT:
16/03/1964

BENCH:
SARKAR, A.K.
BENCH:
SARKAR, A.K.
HIDAYATULLAH, M.
MUDHOLKAR, J.R.

CITATION:
1964 AIR 1645 1964 SCR (7) 251
CITATOR INFO :
D 1975 SC 236 (15)

ACT:
Criminal Trial-Appellant sentenced to imprisonment for life-Death during the pendency of appeal-Heirs whether can prosecute appeal-Code of Criminal Procedure, 1898, (Act 5 of 1898), s. 431, 435, 439-Constitution of India, Art. 136.

HEADNOTE:

The appellant was convicted under section 302 of the Indian Penal Code and sentenced to imprisonment for life by the High Court for the offence of the murder of his wife. He was granted special leave to appeal by this Court. During the pendency of the hearing of this appeal the appellant died. After his death his sons and daughter applied to this Court for permission to continue to prosecute the appeal.

It was pleaded by the legal representatives of the appellant that though that sentence of imprisonment could no longer be executed, it still affected the property of the deceased and the legal representatives were, therefore, interested in the appeal and should be permitted to continue it. The appellant, who held a high office in the Government of Andhra Pradesh had been suspended during the investigation of the charge against him and he was dismissed from service under certain service rules on his conviction. During this time the appellant had only been given a small allowance. On these facts it was pleaded that if the conviction was set aside, the estate of the deceased would be entitled to receive the full salary from the Government.

Held (Per Sarkar, J.): (i) Neither s. 431 nor the cases mentioned can be said to apply to the present case proprio vigore, for the present is not an appeal under the code of criminal procedure which is dealt with by s. 431 nor is it a revisional application like the one which came up for consideration in Pranab Kumar Mitra's case, while as for the English case, it is only of persuasive value.

Pranab Kumar Mitra v. The State of West Bengal, [1959] Supp. 1 S.C.R. 63 and Hodgson v. Lakeman, [1943] L.R. K.B. 15, distinguished.

(ii).The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to

be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allowed to continue it. This principle applies in appeals, revisions, and in petitions under Art. 136 of the Constitution.

A sentence of fine no doubt affects the property. In the present case, however, the sentence was not of fine but of imprisonment which on the death of the accused has become infructuous. In the present case the effect of the sentence imposed in this case being set aside would not directly entitle the legal representatives to the salary. They will have to obtain necessary orders from the Government for the purpose.

252

Held (Per Hidayatullah, J.): (i) This was an appeal against a sentence of imprisonment and an appeal of this character would normally abate on the death of the appellant because a criminal prosecution is concerned primarily with the punishment of an offender and not with the trial of an abstract issue about the truth or falsity of a prosecution case. The same principle must apply to appeals after conviction, except in so far as a judgment already rendered touches assets which would come to the legal representative. In so far as personal punishment (other than a fine) is concerned that stands dissolved by the death of the offender and an appeal to get that punishment set aside becomes infructuous and abates.

Pranab Kumar Mitra v. The State of West Bengal, [1959] Supp. 1 S.C.R. 63, Pritam Singh v. State, [1950] S.C.R. 453, distinguished.

Hodgson v. Lakeman, [1943] L.R.K.B. 15, Baghis v. Rows [1955] 1 Q.B.D. 573, referred to.

(ii). The principle laid down in Pranab Kumar Mitra v. The State of West Bengal and Another and in Pritam Singh v. The State has no application to the present matter because there is no analogy between an appeal by special leave and a revision under the code. The present case is not a case where the legal representatives after the death of the offender have to meet the liability of a fine or are required to protect the assets which they claim should reach them. In the present case no claim of the petitioners is jeopardized directly, by the judgment. Their claim is dependent upon the administrative action of Government which may not proceed upon the result of criminal prosecution. This appeal was only concerned with the correctness or otherwise of the conviction and not with any monetary claims depending upon the result of the appeal. In such a situation the ordinary rule that a criminal proceeding against a person comes to an end on his demise must apply also to special appeals in this court, such as this, even though the provisions of the Criminal Procedure Code may not be directly applicable.

Held (Per Mudholkar, J.): (i) The decision of this court in Pranab Kumar Mitra v. The State of West Bengal has no bearing upon an appeal brought to this court by special leave. It is no doubt true that the power conferred by section 435 of the Code on the High Court and certain other courts and by Article 136 of the Constitution on this Court is discretionary. Under section 439 of the Code the High Court can exercise any of the powers conferred on a court of appeal by sections 423, 426, 427 and 428 or on a court by s. 338 and has also the power to enhance the sentence. Under Section 435 of the Code, the High Court can suo motu call for the record of any inferior court but this power cannot

be exercised by this court under article 136 of the Constitution. Therefore there is a fundamental difference between the power of the High Court in revision and the power of this Court in Art. 136 of the Constitution.

Pranab Kumar Mitra v. The State of West Bengal, [1959] Supp. 1 S.C.R. 63, distinguished.

(ii). In a criminal matter the issue is personal between the accused person and the State and the right of appeal is also personal to the appellant. There is admittedly no express provision permitting the substitution of legal representatives of a deceased appellant in a criminal appeal brought to this Court by

253

special leave. The policy of the law discernible from s. 431 of the Code has to be borne in mind. The policy under section 431 of the Code is that every criminal appeal under chapter XXXI will abate except an appeal from a sentence of fine. There is no provision which prescribes the continuation of the appeal on the death of the appellant in cases where the sentence is of imprisonment.

The interest of the legal representatives in the present case is not a direct interest in the sense that it cannot arise out of the decision of this court even if it is in favour of the appellant. The only interest which the applicants have is a contingent one and is not one which could flow directly out of the ultimate decision of this Court.

Hodgson v. Lakeman, (1943) L.R.K.B. 15, Regina v. Rowe, (1955) (1) Q.B.D. 573, Hesketh v. Atherton, Leach v. Wanstead School Board, Siberry v. Connolly, Constantine v. Illingworth, Jones v. Gallowfield, Rivers v. Glasse, (all cited in Short and Mellor, Practice on the Crown Side of the King's Bench Division 2nd Ed. at p. 425), United States v. Mook, 125 F.2d 706, The State of Kerala v. Narayani Amma Kamala Devi, [1962] Supp. 3 S.C.R. 943 and Imperatrix v. Dongali Andaji, (1879) I.L.R. Bom. 564, referred to and discussed.

(iii).....The Legislature has by limiting in section 431 of the Code the survival of appeals to appeals against sentences of fine has chosen to recognise only one kind of interest and no other. This Court in exercise of its inherent powers or discretionary powers would not be acting according to correct legal principles in recognising a kind of interest which the legislature has not chosen to recognise. In the circumstances the applicants ought not to be granted special leave to prosecute the appeal.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 179 of 1961. Appeal by special leave from the judgment and order dated October 31, 1960, of the Andhra Pradesh High Court in Criminal Appeal No. 161 of 1960.

K. R. Chaudhuri, for the appellant.

A. S. R. Chari, B. R. G. K. Achar, and R. N. Sachthey, for the respondent.

March 16, 1964. The following judgments were delivered-
SARKAR, J.-This is an appeal from a sentence of imprisonment for life imposed on the appellant upon his conviction for the offence of the murder of his wife. The appeal was filed with the special leave of this Court granted under Art. 136 of the Constitution but the appellant died pending the appeal. His legal representatives now seek leave to continue the appeal.

There would seem to be authority for the proposition that revision petitions and some appeals from sentences of fine might be continued by his legal representatives on the death
254

of the accused pending the proceeding: see s. 431 of the Code of Criminal Procedure and *Pranab Kumar Mitra v. The State of West Bengal*(1). It appears that in England appeals from similar sentences are permitted to be continued by the executors of the deceased appellant: see *Hodgson v. Lakeman*(2). It is true that neither s. 431 nor the cases mentioned can be said to apply to the present case proprio vigore, for the present is not an appeal under the Code which is dealt with by s. 431 nor is it a revisional application like the one which came up for consideration in *Pranab Kumar Mitra's* case, while as for the English case, it is only of persuasive value. All the same however I think it must now be held that appeals from sentences of fine may be permitted to be continued by the legal representatives of the deceased appellant. First, I find no provision making such appeals abate. If they can be continued when arising under the Code, there is no reason why they should not be continued when arising under the Constitution. If revision petitions may be allowed to be continued after the death of the accused so should appeals, for between them no distinction in principle is possible for the purpose of continuance. It is true that the Code of Criminal Procedure which creates the revisional powers of a Court provides that such powers may be exercised suo motu but it does not seem to me that *Pranab Kumar Mitra's* case(1) was based on this for on that ground all revision cases should have been permitted to be continued and the permission should not have been confined to cases of fine. Indeed in that case this Court proceeded on the basis that there was no statutory provision applying to the case. It observed, "even in the absence of any statutory provisions, we have held..... that the High Court has the power to determine the case even after the death of the convicted person, if there was a sentence of fine also imposed on him, because that sentence affects the property of the deceased in the hands of his legal representative". A sentence of fine affects property equally when the case is taken further up in appeal or in revision, If it is just and proper to continue the hearing in one case after the death of the accused, it would be equally so in the other case. The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allowed to continue it. A sentence of fine no doubt affects the property. In the present -case, however, the sentence was not of fine but of imprisonment which on the death of the accused has become

(1) [1959] 1 S.C.R. 63.

(2) [1943] L.R.K.B. 15.

255

infructuous. There is no one now who can be imprisoned. It is, however, said that though that sentence can no longer be executed, it still affects the property of the deceased and the legal representatives are, therefore, interested in the appeal and should be permitted to continue it. The matter is put in this way. The appellant, who held a high office in the Government of Andhra Pradesh had been suspended during the investigation of the charge against him and he was dismissed from service under certain service rules on

his conviction. During this time the appellant had only been given a small allowance. It was said that if the conviction was set aside, the estate would be entitled to receive the full salary from the Government.

It seems to me that this contention is not accurate. It may be that if the sentence is set aside that may assist the legal representatives in their effort to obtain the full salary to which the deceased's estate would have been entitled. But the effect of the sentence imposed in this case being set aside would not directly entitle the legal representatives to the salary. They will have to obtain necessary orders from the Government for the purpose. It has not been shown to us that such order will automatically follow the setting aside of the conviction. Neither has it been shown that the legal representatives cannot move the Government to pass such orders on the ground that the correctness of the conviction could not be tested because of the death of the appellant. For these reasons I am unable to hold that the justice of the case requires that the legal representatives of the deceased should be permitted to continue the appeal. It would be extending the principle applied to the case of a sentence of fine, if on the basis of it this appeal was allowed to be continued by the legal representatives after the death of the appellant and for such an extension I find no warrant.

In my view, for these reasons the legal representatives are not entitled to continue the appeal. That being so and as the sentence was one of imprisonment which would not affect anyone after the death of the accused, it cannot be said that there is anyone interested in the appeal. There is no, question, therefore, in such a case for proceeding further with the appeal.

HIDAYATULLAH, J.-The appellant was convicted under s. 302 of the Indian Penal Code and sentenced to imprisonment for life by the High Court of Andhra Pradesh. He was granted special leave to appeal by this Court. During the pendency of this appeal the appellant died on August 30, 1963. After his death his sons and daughters applied to this Court on October 5, 1963 for permission to continue to prosecute the appeal. Their petition is all that we are concerned with at the present moment.

The appellant was working as Superintending Engineer (Electricity) in the service of the Government of Andhra Pradesh. The case against him was that on August 10, 1959 he

256

committed the murder of his wife by shooting her in the back with a revolver. He was acquitted by the Sessions Judge of Krishna Division, Masulipatnam but, on appeal by the State Government the order of acquittal was set aside and he was convicted and sentenced as above. In view of the appellant's death we are of course not interested any further in considering the details of the offence, if any, unless we allow the heirs of the appellant to prosecute the appeal after his death and this is precisely what the present petitioners claim they are entitled to do. It is admitted, however, that no analogous contention was ever raised in this Court, though appeal on the death of a sole appellant were, before this, treated as abated. One would expect that an appeal of this character would normally abate on the death of the appellant because a criminal prosecution is concerned primarily with the punishment of an offender and not with the trial of an abstract issue about the truth or falsity of a prosecution case. The maxim *actio personalis moritur cum persona* is often invoked in this behalf.

The Criminal Procedure Code in s. 431 also provides that all -appeals filed under s. 41 I-A sub-s. 2 or s. 417 shall finally abate on the death of the accused and every other appeal under Chapter XXXI shall finally abate on the death of the appellant, except an appeal against a sentence of fine. The section cannot cover a case such as the present because this appeal was not filed under any of the sections mentioned in s. 431 or under Chapter XXXI.

It is contended that without the aid of a provision like s. 431, Criminal Procedure Code, the appeal must be treated as continuing and it is pointed out that for this reason and for the additional reason that the powers of revision can be exercised suo motu this Court allowed legal representatives to continue to prosecute criminal revisions under s. 439 of the Code in *Pranab Kumar Mitra v. The State of West Bengal and Another*(1) and *Pritam Singh v. The State*(2). It is urged that on a parity of reasoning this appeal can be continued by the heirs. It is not my purpose to consider, whether in the absence of any direct injury to the living every criminal proceeding must come to an end after the death of the accused whether before his conviction or after. But there must always be some discernible reason for permitting another person to continue an appeal whether civil or criminal after the death of the appellant. An appeal is not a heritable asset and does not revolve as a matter of course upon an executor or heir. Even under the civil law an express provision is required for substitution of another person in the place of the person deceased before the appeal can be continued and this is again subject to whether the cause of action survives or not. The same principle is again to the

(1) [1959] (1) S.C.R. 63.

(2) [1950] S.C.R. 453.

257

forefront in s. 431 when it allows an appeal in respect of fine to be continued but not appeals involving imprisonment. The intention there too appears to be to afford only those persons a right whose interests are directly jeopardized by the judgment. In so far as personal punishment (other than a fine) is concerned that stands dissolved by the death of the offender and an appeal to get that punishment set aside becomes infructuous and abates.

The only question in this case is whether the principle laid down in the two cases of this Court cited above should govern special appeals or the principle underlying s. 431. It may be said at once that the former is not a direct precedent applicable to the present matter because there is no analogy between an appeal by special leave and a revision under the Code. The latter can be suo motu but not the former. The petitioners claim that the father, if he were acquitted, would have been entitled to claim his pay for the period upto his death since on his conviction he was removed from service by the Government and the amount thus involved is Rs. 40,000/-. The petitioners say that if the appeal were now allowed they would be able to ask for this amount and in this way claim an interest in the appeal. This is not a case where the legal representatives after the death of the offender have to meet the liability of a fine or are required to protect the assets which they claim should reach them. This is a case where the petitioners claim to have the judgment of the High Court reexamined so that they may be able to prefer a claim to the salary to which their father would have been entitled if he had been acquitted of the criminal charge. In my judgment, no claim of the petitioners is jeopardized directly by the judgment. Their

claim is dependent upon the administrative action of Government which may not proceed upon the result of the criminal prosecution. In other words, the claim on the strength of which the present petitioners seek to join in this appeal is too remote and not directly consequential upon the issue to be tried. The appeal was only concerned with the correctness, or otherwise of the conviction and not with any monetary claims depending upon the result of the appeal. In such a situation the ordinary rule that a criminal proceeding against a person comes to an end on his demise must apply also to special appeals in this Court, such as this, even though the provisions of the Criminal Procedure Code may not be directly applicable.

At the hearing counsel cited cases from the English Courts and the Supreme Court of the United States. The English cases referred to are collected in Short & Mellor's Practice of the Crown Office and Griffith's Guide to Crown Practice and the cases of the United States are referred to in Annotations.

L/P(D)ISCI-9 ..

258

in 87 Lawyer's Edition 1234 and 1 Lawyer's Edition II Series 1879. The English practice appears to be that there must be a, direct monetary liability attaching to the living by reasons of the impugned judgment before they can be allowed to continue an appeal filed by a dead person. See Hodgson v. Lakeman(1) and Regina v. Rowe(2). The American practice also appears to be the same.

There is good reason for holding that a criminal prosecution in which the State is anxious to bring an offender to book with a view to getting him punished for a crime comes to an end on the death of the person arraigned. The same principle must apply also to appeals after conviction, except in so far as a judgment already rendered touches assets which would come to the legal representatives or the executor as the case may be. Beyond this it is not possible to conceive of remoter interests because if the law were to take into account such remote interests every appeal would have to be continued after the death of the appellant. In my judgment, the present petitioners do not claim any direct interest and the appeal must, therefore, be taken to have abated. I agree that the petition be dismissed and the appeal held to have abated.

MUDHOLKAR, J.-This appeal raises an interesting and important question. It is whether the heirs at law of a deceased person who had brought an appeal to this Court by special leave in which he had challenged his conviction and sentence for an offence, are entitled to prosecute the appeal after his death during the pendency of the appeal. The applicants are the children of the deceased who was a Superintending Engineer (Electricity) in the service of the Government of Andhra Pradesh. He was charged with an offence under s. 302, Indian Penal Code for having committed the murder of his wife by shooting her with a revolver. During the investigation of the offence he was placed under suspension with effect from August 10, 1959 and was allowed subsistence allowance for some time. His defence at the trial was that while his wife was picking up the revolver from the teapoy on which he had kept it, suspecting that he would shoot himself with it, it went off accidentally and killed her. This defence was accepted by the Sessions Judge and he was acquitted. On appeal by the State the High Court of Andhra Pradesh set aside the acquittal and convicted him of an offence under s. 302, I.P.C. and sentenced him to undergo imprisonment for life. He thereupon sought and

obtained special leave from this Court to prefer an appeal. During the pendency of the appeal he died. According to the applicants a sum of Rs. 40,000/- would be due to the deceased, being the difference between the subsistence allowance actually paid by the Government to him and the total emoluments that would have been payable to him from the date of

(2) [1955] 1 Q.B.D. 573

(1) [1943] K.B. 15.

259

suspension till his death and that they as his legal heirs would be entitled to act this amount in case the conviction and sentence are set aside by this Court.

In support of his contention that the appeal has not abated by reason of the death of the appellant Mr. K. R. Chaudhuri points out that s. 431 of the Code of Criminal Procedure (hereafter referred as the Code) which speaks about appeals is limited in its application to appeals under Ch. XXXI of the Code and would not fetter the powers of this Court under Art. 136 of the Constitution to hear an appeal brought before it by special leave even though the person who brought it is no longer alive. It is no doubt true that s. 431 of the Code only says that appeals under s. 411A, sub-s. (2) and s. 417 shall finally abate on the death of the accused and every other appeal under Chapter XXXI except an appeal from a sentence of fine shall finally abate on the death of the appellant. It does not, therefore, in terms apply to an appeal permitted to be preferred by this Court in exercise of its discretion under Art. 136 of the Constitution. The argument of Mr. Chaudhuri is that the power conferred upon this Court by Art. 136 is wide and discretionary and is analogous to that conferred upon the High Court by s. 439 read with s. 435 of the Code. Therefore, upon an analogy of the decision of this Court in *Pranab Kumar Mitra v. The State of West Bengal* and another(1) this Court has the power to hear the appeal and to permit the applicants to prosecute it. He does not contend that the applicants have a right to be brought on the record in place of the deceased appellant but submits that to meet the ends of justice it would be right and proper to permit the applicants to prosecute the appeal because if it succeeds they will be able to claim from the Government the arrears with respect to salary due to their deceased father from the Government.

It seems to me that the decision upon which reliance has been placed has no bearing upon an appeal brought to this Court by special leave. It is no doubt true that the power conferred by s. 435 of the Code on the High Court and certain other courts and by Art. 136 of the Constitution on this Court is discretionary. In so far as the High Court and certain other courts are concerned the discretion is to call for and examine any record of any proceeding before an inferior criminal court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order passed by the inferior court and as to the regularity of any proceeding of such court. Under s. 435 these courts have power to act in this manner suo motu and s. 440 provides that no party has a right to be heard either

(1) [1959] Supp. 1 S.C.R. 63.

L/d)D)ISCI-9,a)

260

personally or by a pleader before such court, with one exception. That exception is that the High Court cannot make an order under s. 439 of the Code to the prejudice of an accused person unless he is given an opportunity of being

heard either personally or by pleader in his defence. When the record comes before the High Court it may in its discretion exercise any of the powers conferred on a Court of appeal by sections 423, 426, 427 and 428 or on a Court by s. 338 and has also the power to enhance the sentence. Article 136 of the Constitution confers discretion upon this court whether to grant special leave or not. But this Article does not confer any power upon this Court to call for the record of any court or tribunal suo motu for the purpose of examining it and making an appropriate order. It only empowers this Court to grant leave to a person to bring his appeal before it and afford him an opportunity of showing such error as may be existing in the judgment or order appealed from. There is a fundamental difference between a power which is exercisable by a Court suo motu and a power which can be exercised only when it is moved in that behalf by a party. For the exercise of suo motu power the appearance of a party before the Court concerned is not a prerequisite. Indeed as s. 440 provides, it is for the Court to decide whether or not to allow the party to appear before it and be heard. But of course the principle of natural justice would preclude a court even in such a case from making an order to the prejudice of a party without giving the party an opportunity to be heard. In so far as an appeal is concerned, by whichever way it is brought, whether as of right conferred by a provision in the Constitution or by any other law or by special leave the appellants has a right to be heard and a right to prosecute the appeal. A Court exercising suo motu powers may choose at any stage to drop the proceeding and not proceed to examine the records at all. But as long as an appeal is pending before a Court and there is a person legally competent to prosecute it and there is no legal impediment to its being heard, the Court has no discretion to refuse to go on with the appeal even though initially it may have been brought before it by its leave. As soon as the leave is granted a right accrues in favour of the party who has been granted leave. It may be that where this Court finds that leave has been improperly obtained or given it may revoke the leave. But that is quite different from saying that without revoking the leave it can drop the appeal. This distinction between revisional powers and appellate powers has been adverted to in the decision relied upon⁽¹⁾ at p. 70. Sinha, J. (as he then was) has observed:

"The revisional powers of the High Court vested in it by s. 439 of the Code, read with s. 435, do not create any right in the litigant, but only conserve the power of the High Court to see that justice is

(1) [1959] Supp. 1 S.C.R. 63.

261

done in accordance with the recognized rules of Criminal Jurisprudence, and that subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code. On the other hand, as already indicated, a right of appeal is a statutory right which has got to be recognized by the courts, and the

right of

appeal, where one exists, cannot be denied in exercise of the discretionary powers even of the High Court."

Thus, when the special leave granted by this Court has not been revoked it can exercise with respect to the appeal

before it what may be called appellate powers. While hearing an appeal from the decision of a High Court, this Court will, therefore, be competent to exercise only such powers as the High Court itself could exercise in relation to the appeal. In so far as the procedure for hearing a criminal appeal by special leave is concerned this Court has framed certain rules. Order XXI of Supreme Court Rules, 1950 contains those rules. Rule 23 of that Order provides for the entering of appearance by parties in the appeal. Rule 24 provides for the filing of statements of case by the parties. Rule 25 provides for setting down the appeal for hearing. Rule 26 empowers the Court to direct the engagement of an Advocate at the cost of the Government in a proper case where the accused person is not represented by an Advocate 'on record of his choice. Rule 27 provides for giving a notice to the accused where he is not represented on the date fixed for the hearing of the appeal and permits the accused person if he so wishes to present his case by submitting his argument in writing and provides for the consideration of the written argument at the hearing. Sub-rule (2) of that rule dispenses with necessity of production of the accused person in custody at the hearing of the appeal. There is no express rule which states as to what has to be done where the accused person who is an appellant is not present or represented at the hearing of the appeal. Order XLV, rule 5, however, preserves the inherent power of the Court to make such orders as may be necessary to meet the ends of justice or to prevent the abuse of the process of the Court. Thus this Court has the power to prevent the abuse of its process and it will be an abuse of its process if the appellant despite service of notice of the date of hearing chooses to remain absent at the hearing. Now, just as the Court can, under r. 18 of O. XXI dismiss an appeal for non-prosecution where the appellant refuses to take the necessary steps for bringing the appeal to hearing, it must be deemed to have similar power to dismiss it where the appellant is not present or is not represented. Where the absence of the appellant is due to the fact that he is dead it would still be a case of non-prosecution and, therefore, this Court would have the right and the duty to dismiss the appeal. Since the power

262

to prosecute the appeal inhered in the appellant alone, no one else can claim to exercise it unless the law conferred such a right upon that other person. This the law may do expressly as it has done in O. XXII of the Code of Civil Procedure or impliedly as it has done in s. 431 of the Code. Apart from the fact that in a criminal matter the issue is personal between the accused person and the State the fact remains that the right of appeal is also personal to the appellant. It cannot be allowed to be exercised by another unless there is some provision in law which would permit it to be exercised or unless such a course is permissible by reference to a principle. There is admittedly no express provision permitting the substitution of the legal representatives of a deceased appellant in a criminal appeal brought to this Court by special leave. We have, however, to bear in mind the policy of the law as enacted in s. 431 of the Code. The policy is that every criminal appeal under chapter XXXI will abate except an appeal from a sentence of fine. Thus, instead of there being any principle on the strength of which the legal heirs of a person could be allowed to prosecute after his death an appeal brought by him challenging his conviction and sentence of imprisonment the policy of the law is definitely opposed to it.

Moreover, only a person who can properly represent a deceased appellant can be allowed to be brought on record in his place and prosecute the appeal. That is the principle upon which the provisions of 0. XXII of the Code of Civil Procedure are based. That again is the principle followed by the Courts in England in allowing appeals in which the challenge was to a fine imposed upon the appellant to be continued by the executors and administrators of the deceased appellant. As an instance of this would first refer to *Hodgson v. Lakeman*(1). In that case Viscount Caldecote C.J., permitted the executors of the deceased appellant claiming an interest in the appeal against his conviction and sentence of fine to prosecute the appeal. The fine, though a small one, would have been a burden on the estate and thus the executors could be said to have had an interest in having that burden removed. This case was distinguished in *Regina v. Rowe*(2) In that case the widow of the deceased appellant sought leave to prosecute the appeal in which he had challenged his conviction on four counts of obtaining money by false pretences and the sentence of imprisonment to 18 months. The ground on which the widow's application was supported was that the conviction against her husband affected her chances of employment and her position among her friends and that if interest is the test, then the widow also had an interest. This argument was repelled by Lord Goddard C.J. who said that the Court cannot take notice of that because the interest she

(1) [1943] 1 K.B. 15. (2) [1955] 1 Q.B.D. 573.

263

has was not a pecuniary one. It was further urged before the Court that where any person might be prejudiced by a conviction against a deceased person, and an appeal was lodged before the death of that person, the Court should allow the appeal to be continued by that person so that if there had been a miscarriage of justice and the heirs of the deceased were living under the shadow of the fact that their relative had died a convict, the interests of justice would require that the appeal be heard. To this argument the answer of the learned Chief Justice was that this would be a case for making an application for a tree pardon. In the course of the judgment he observed:

"..... we cannot allow a widow or an executor or an administrator of a deceased person to appeal to this court unless they can show a legal interest. If a person is sentenced to pay a fine and dies having appealed, or even if he dies after payment of the fine-it might be immediately afterwards-it may be that the court would allow executors or administrators to appeal merely on the ground that if the conviction were quashed they could recover the fine for the benefit of th

e estate

of the deceased which they are bound to administer. In *Hodgson v. Lakeman*(1) to which our attention was called, which was a case before the Divisional Court, but the principle would be the same, the appellant was dead, and the court allowed the executors to continue the appeal because there was a pecuniary interest. Supposing, as sometimes happens, a man is convicted on indictment and fined pound 500; the money has to be paid, and the Crown can recover that money whether he is alive or dead, for it can recover it against his

estate, and, therefore, it would be an injustice if the executors were not allowed to appeal and to say that the conviction was wrong, because, if it was wrong, the money would be saved.

It may be that it is artificial to say that if there is a pecuniary penalty an appeal might lie, whereas if corporal punishment or imprisonment is imposed there cannot be an appeal, but at the same time I do not see any ground on which we can say in the present case that anybody has an interest. It may be that the widow would be very glad to have her husband's name cleared, but we cannot take any notice of that sentimental interest. There is nobody affected now by the judgment of the court because

[1943] K. B. 15.

264

the judgment was a sentence of imprisonment and the prisoner has died. It would be a very novel step if, in these circumstances, we said that the court would entertain an appeal."

In Short and Mellor's (The Practice on the Crown Side of the King's Bench Division, second edition) it is stated at p. 425 that the practice does not seem to be uniform and reference is made to some cases. In one of them-Hesketh v. Atherton(1) the counsel was allowed to argue an appeal after the death of one of the parties. But in Leach v. Wanstead School Board (2) (2) wherein a conviction against the father of a child for not sending the child to school was challenged in appeal and the father and the child had died in the meanwhile, the Court refused to allow the case to be argued on the ground that there was no interest surviving. In Siberry v. Connolly(3) where there was a claim for seaman's wages, the appellant's executors were allowed to take the place of the deceased appellant. In Constantine v. Illingworth(4) where the defendant in a criminal case had died, the Court ordered the case to be struck out. The same was done in Jones v. Fallowfield(5). In Rivers v. Glasse(6) where the respondent had died and the appellant had given notice to the executors to support the conviction, the Court heard and determined the case and gave costs to the respondent's executors. The position so far as the United States is concerned is set out as follows(7):

"The death of an accused ordinarily abates a criminal action, including review proceedings pending at that time.

The interest of the deceased's representatives or next of kin in clearing his good name was held in United States v. Mook(8) not to be sufficient to allow the appellate court, after the defendant's death pending his appeal from a conviction of violating the Interstate Commerce Act, to decide the appeal on the merits. The court however, added: 'we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law.'"

Thus in that jurisdiction also the basis of intervention, when permitted, is a survival of an interest in the heirs or executors of the deceased. That interest would only be a

pecuniary one

(1) Short and Mellor at p. 425. (2) *ibid.*

(3) *ibid.* (4) *ibid.*

(5) *ibid.* (6) *ibid.*

(7) 1 L.Ed. 2nd Series, p. 1879. (8) 125 F2d. 706.

265

and where the estate is not affected by the conviction there would be no ground for allowing the intervention of the heir or executor. It may be that the interest of the heirs of the deceased convict to clear his name should be recognised and they ought to be allowed an opportunity to clear it. But unless it is recognised by the legislature the court cannot take notice of it. So far as the Court is concerned, the only question arising in the appeal before us is whether the conviction and sentence of imprisonment are correct in law. The only person who had an interest in the appeal before the Court in showing that both were not justified was the appellant and since he is dead, the interest which he had ceases to exist and cannot pass to anyone.

Another case which was referred to at the bar was *The State of Kerala v. Narayani Amma Kamala Devi* (1) in which the decision in *Pranab Kumar Mitra's* case (2) was relied upon and reference was made to *Imperatrix v. Dongaji Andaji* (3) In that case also the question was whether the High Court could exercise its revisional powers against an accused person even after his death. There the Court was not concerned with its own powers with respect to a criminal appeal brought before it by special leave.

It is then said that the applicants have an interest inasmuch as the estate of the deceased appellant would be enriched by Rs. 40,000/- if this Court ultimately finds the appellant innocent and if the Government, acting on the basis of the decision of this Court which is binding upon it, rescinds the suspension order passed against the appellant and in conformity with it pays the arrears of salary due to the appellant. This interest is not a direct interest in the sense that it cannot arise out of the decision of this Court even if it is in favour of the appellant. The only interest which the applicants have is a contingent one and is not one which could flow directly out of the ultimate decision of this Court. If we may mention, the argument advanced in *Rowe's* case (4) before Lord Goddard C.J., that by clearing her deceased husband's name the widow's chances of securing employment would improve was not accepted as creating a pecuniary interest such as to justify granting her permission to prosecute the appeal.

Indeed, the legislature has, by limiting in s. 431 of the Code the survival of appeals to appeals against sentences of fine has chosen to recognise only one kind of interest and no other. There could be several other kinds of interest, as was suggested during the arguments at the bar. But this Court, in

(1) [1962] Supp. 3 S.C.R. 943. (2) [1959] Supp. 1 S.C.R. 63. (3) (1879) I.L.R. Bom. 564. (4) [1955] 1 Q. B.D. 573.

266

exercise of its inherent powers or discretionary powers, would not be acting according to correct legal principles in recognising a kind of interest which the legislature has not chosen to recognise. In the circumstances, therefore, I am clear that the applicants ought not to be granted leave to prosecute the appeal.

Leave to prosecute appeal refused.

267

JUDIS