

PETITIONER:
STATE OF RAJASTHAN

Vs.

RESPONDENT:
RAMDEEN & OTHERS

DATE OF JUDGMENT 04/03/1977

BENCH:
GOSWAMI, P.K.
BENCH:
GOSWAMI, P.K.
CHANDRACHUD, Y.V.
SHINGAL, P.N.

CITATION:
1977 AIR 1328 1977 SCR (3) 139
1977 SCC (2) 630
CITATOR INFO :
R 1982 SC 800 (11)

ACT:
Code of Criminal Procedure, 1973, s. 378(1) and (3)--Whether two separate petitions are necessary under sub-section (1) and (3), or a composite memorandum of appeal can contain prayer for leave to appeal.

HEADNOTE:

The State filed an application under s. 378(3) of the Cr.P.C., 1973, for leave to appeal against the acquittal of the respondents, of the charges under s. 302 and 302/149 I.P.C., by the Trial Court. The application, although made under s. 378(3) contained all the requisites for a memorandum of appeal. The High Court granted the appellant leave to the appeal, but dismissed the appeal filed thereafter, on the ground that it had not been filed within ninety days of the date of judgment appealed from, and was therefore time-barred under Art. 114(a) of the Limitation Act, 1963. Allowing the appeal by special leave the Court,

HELD (1) The High Court has not laid down any rules in the matter of application for leave to appeal by the State. The matter will have to be decided in terms of s. 378(1) and (3) of the Code of Criminal Procedure, 1973. An appeal can be filed by the State within ninety days from the date of the order of acquittal, and a prayer may be included in that appeal for entertaining the appeal under sub-section (3) of section 378 Cr.P.C. The appeal may otherwise become time-barred if the High Court takes more than ninety days for disposal of the application for leave, and refuses to exercise its jurisdiction to condone the delay. The right conferred under the section cannot be put in peril by an interpretation of section 378, Cr.P.C. which is likely to affect adversely or even perhaps to destroy that right. [141 C-H]

(2) The fact that the appellant's application mentioned section 378(3) is not decisive of the true character of the application which to all intents and purposes was a memorandum of appeal. [142 C-D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 343 of 1976.

(Appeal by Special Leave from the Judgment and Order dated 27-1-1975 of the Rajasthan High Court in D.B. CrI. Appeal No. 575/74)

S.M. Jain, I. Makwana and D. Shandari, for the appellant.

Doongar Singh and S.K. Garnbhir, for the respondents.

The Judgment of the Court was delivered by

GOSWAMI, J. The respondents were tried by the Sessions Judge, Merta (Rajasthan) for offences under sections 302, 302/149 and some other minor sections of the Indian Penal Code. Respondent Goparam was acquitted of all the charges. The other respondents also were acquitted of the charges under sections 302 and 302/149, IPC. Respondent Sangram was convicted under section 304 Part 11, IPC. Respondent Dayalram was convicted under section 324 IPC. Respondents Budharam and Ramdeen were convicted under section 323

140

Being aggrieved by the judgment of the Sessions Judge, the State of Rajasthan preferred an appeal against acquittal of the major charges under section 378 of the Code of Criminal Procedure, 1973.

The Sessions Judge delivered the judgment on March 30, 1974 and the Code of Criminal Procedure, 1973, came into force from April 1, 1974. The appeal was, therefore, preferred under the new Code.

It appears that the State of Rajasthan preferred a petition for leave to appeal under section 378(3) of the Code of Criminal Procedure, 1973, on June 27, 1974, which was within the period of limitation prescribed under article 114(b) of the Limitation Act, 1963. Article 114(a) of the Limitation Act, 1963, provides for a period of limitation for appeal from an order of acquittal under subsection (1) or sub-section (2) of section 417 of the Code of Criminal Procedure, 1898 (hereinafter to be described as the Old Code). The Limitation Act being an act of the year 1963, does not naturally refer to section 378 of the Code of Criminal Procedure Code, 1973. Section 378 of the Code of Criminal Procedure, 1973, is equivalent to section 417 of the Old Code with an important difference in case of appeal against acquittal by the State. Under the Old Code there was no provision for taking leave of the High Court by the State for presentation of an appeal to the High Court against an original or appellate order of acquittal. There was, however, provision for obtaining special leave to appeal under section 417(3) of the Old Code against an order of acquittal in any case instituted upon complaint. With some changes about limitation, with which we are not concerned, provision for special leave to appeal in any case instituted upon complaint has been retained in the new Code. Unlike in the Old Code, section 378(3) provides that no appeal under sub-section (1) or sub-section (2) thereof shall be entertained except with the leave of the High Court. Such a provision for obtaining leave of the High Court by the State was absent in the Old Code.

Since the State filed an appeal against acquittal in this case soon after the coming into force of the new Code, the State of Rajasthan preferred an application describing it as a petition for leave to appeal under section 378(3) of the Code of Criminal Procedure, 1973, with a prayer "to accept this petition to file an appeal in the present case "Although the application was described as one under section 387(3) of the Code of Criminal Procedure, all

the facts and other requisites for a memorandum of appeal, including the grounds on which the appeal was rounded, were given in as great a detail as was necessary. The High Court after hearing the State granted leave to appeal on August 16, 1974. The State thereafter filed again a petition of appeal on September 10, 1974. This date is clearly beyond the period of ninety days prescribed under article 114(e) of the Limitation Act, 1963. The High Court dismissed the appeal on January 27, 1975 as time-barred.

In view of section 8 of the General Clauses Act, 1897, it is not disputed before us that article 114(a) is applicable in this case. The respondents, however, submit that the petition of appeal should have

141

been presented within ninety days of the judgment of the Sessions Judge which was on March 30, 1974. Since that was not done and there was not even an application for condonation of delay, the High Court had no alternative then to dismiss the appeal as time-barred. The respondents further add that it was the practice of the Rajasthan High Court to present a memorandum of appeal after obtaining leave of the High Court. It was, therefore, incumbent upon the appellant to have preferred the petition of appeal within ninety days as prescribed under the law. The High Court also while refusing leave to appeal to the Supreme Court observed in its order that "the practice of this court is that separate memo of appeal has to be filed in all matters relating to the grant of leave to appeal under section 378 Cr. P.C.".

It is difficult to appreciate the reference to practice, by the High Court, so far as appeals by State are concerned when the new Code of Criminal Procedure, for the first time, provided for obtaining leave to appeal by the State only from April 1, 1974. It is admitted that there are no rules laid down by the High Court in the matter of application for leave to appeal by the State. It is, therefore, not possible to decide the matter relying upon the so-called practice soon after the provision has been introduced.

The matter will, therefore, have to be decided in terms of section 378(1) and (3) of the Code of Criminal Procedure, 1973. Section 378(1), so far as it is material for our purpose, provides that the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal. Sub-section (3) of that section provides that such an appeal shall not be entertained except with the leave of the High Court. Under the law it will be perfectly in order if a composite application is made giving the necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer for leave to entertain the appeal. It is not necessary, as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against the order of acquittal. If such a procedure is adopted, as above, it is likely, as it has happened in this case, the appeal may be time-barred if the High Court takes more than ninety days for disposal of the application for leave. The possibility that the High Court may always in such cases condone the delay on application filed before it does not, in law, solve the legal issue. The right conferred by section 378(1), Cr.P.C., upon the State to prefer an appeal against acquittal will be jeopardised if such a procedure is adopted, for in certain cases it may so happen that the High Court may refuse to exercise its discretion to condone the delay. The right conferred under the section cannot be put in peril by an

interpretation of section 378, Cr.P.C. which is likely to affect adversely or even perhaps to destroy that right.

Besides, under article 114 of the Limitation Act, in an appeal from an order of acquittal by the State, the period of limitation is

142

ninety days from the date of the order appealed from; whereas in an appeal from an order of acquittal, in any case instituted upon complaint, the period is thirty days from the date of the grant of special Leave. Thus there is a clear distinction between the two types of appeals with regard to terminus a quo under article 114. It is therefore, not necessary to wait until the grant of leave by the High Court to present a memorandum of appeal against acquittal at the instance of the State. Thus appeal can be filed by the State within ninety days from the date of the order of acquittal and a prayer may be included in that appeal for entertaining the appeal under sub-section (3) of section 378, Cr. P.C. If the leave sought for is not granted by the High Court, the appeal is not entertained and stands dismissed.

We are, therefore, clearly of opinion that the application for leave to appeal, which was made by the State in this case, is equivalent to a memorandum of appeal under section 373(1) read with sub-section (3) of that section of the Code of Criminal Procedure 1973. The fact that the application mentioned section 378(3) is not decisive of the true character of the application which to all

intents and purposes was a memorandum of appeal. There was therefore, no need for presentation of a second petition of appeal nor for an application for condonation of delay in this case. The petition of appeal was filed within time and the High Court committed an error of law in dismissing the same as time-barred.

In the result the appeal is allowed. The order of the High Court is set aside. The petition of appeal of June 27, 1974, shall be restored to the file of the High Court and treated as a memorandum of appeal under section 378(1) of the Code of Criminal Procedure, 1973, and, since leave had already been granted by the High Court, the appeal will be disposed of in accordance with law.

Appeal allowed.

143