

PETITIONER:
THE STATE OF KERALA

Vs.

RESPONDENT:
NARAYANI AMMA KAMALA DEVI

DATE OF JUDGMENT:
19/03/1962

BENCH:
GUPTA, K.C. DAS
BENCH:
GUPTA, K.C. DAS
KAPUR, J.L.
DAYAL, RAGHUBAR

CITATION:
1962 AIR 1530 1962 SCR Supl. (3) 943
CITATOR INFO :
RF 1964 SC1645 (16)
F 1973 SC 84 (7)

ACT:
Criminal Trial-Conviction-Death of accused-Revision to High Court, after the death of the accused if maintainable-Appellate and Revisional jurisdiction-Distinction between-Code of Criminal Procedure, 1898 (Act V of 1898), ss.431, 439.

HEADNOTE:

One N, a cashier of a bank, was convicted of an offence under s. 381 of the Indian Penal Code on a charge of theft of a certain amount belonging to the Bank and was convicted to one year's rigorous imprisonment. His appeal to the Sessions Court was unsuccessful. On that very date within few hours after the pronouncement of the judgment by the Sessions Court he died. A revision petition was filed in the High Court by his wife and his two minor sons under s. 439 of the Code of Criminal Procedure. The High Court of Kerala set aside the conviction of the deceased accused. The State of Kerala came up in an appeal to the Supreme Court by a certificate granted by the High Court. The question is whether an application for revision under s. 439 of the Code of Criminal Procedure could be entertained by the High Court after the death of the accused person against whom the order was made.

Held, that in a proper case the High Court can exercise its power of revision of an order made against an accused person even after his death, and the High Court was right in 944

holding that the application for revision could be entertained under s. 439 of the Code of Criminal Procedure. Held, with regard to the revisional jurisdiction of the High Court there is no provision similar to s. 431 of the Code, for is there any provision whether a revisional application can be or cannot be made in respect of an order of conviction when the convicted person is dead. The opening words of s. 439 of the Code, produce the result that revisional jurisdiction can be exercised by the High Court by being moved either by the convicted person himself or by

any other person or sue motu, on the basis of its own knowledge derived from any source whatsoever without being moved by any person at all. All that is necessary to bring the High Court's powers of revision into operation is such information as makes the High Court think that an order made by a Subordinate Court is fit for the exercise of its powers of revision.

The important distinction between ss. 431 and 439 is that while the appellate jurisdiction can be exercised only after an appeal is filed by the convicted person or against an order of acquittal under ss. 411 or 417, there is no such limitation on the court's revisional jurisdiction.

Imperatrix v. Dongaji Andaji, (1878) I.L.R. Bom. 564 referred to.

Pranab Kumar Mitra v. State of West Bengal, (1959) Supp. 1 S.C.R. 63, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Criminal Appeal No. 55 of 1961.

Appeal from the judgment and order dated October 5, 1960, of the Kerala High Court in Criminal Revision Petition No. 337 of 1959.

G.S. Pathak and V. A. Seyid Muhammad, for the appellant.

C.K. Sivasankara Panickar, B. Mahalingier and M. B. K. Pillai, for the respondents.

1962. March 19. The Judgment of the Court was delivered by DAS GUPTA, J.-Can an application for revision under s.439 of the Criminal Procedure Code be entertained by the High Court after the death of
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the accused person against whom the order was made ? That is the important question raised in this appeal. Gobindankutty Nair, a Cashier of the Trivandrum Branch of the State Bank of India was convicted by the Sub-Divisional Magistrate, Trivandrum, of an offence under section 381 of the Indian Penal Code on a charge of theft of an amount of Rs. 10,000/- belonging to the Bank. A Fiat Car which has been purchased by the accused was seized by the police during the investigation of the case and it was alleged that this had been purchased with the money stolen by the accused. The car was sold under the orders of the Court and the sale proceeds deposited in Court. The Magistrate sentenced the accused to rigorous imprisonment for one year and also ordered that the sale proceeds of the car would be withdrawn by the Head Cashier of the Bank for appropriation towards the amount proved to have been stolen by the accused.

The accused's appeal to the Sessions Court was unsuccessful. Though no separate order was made by the Sessions Court in respect of the Magistrate's order for withdrawal of the sale proceeds of the car by the Head Cashier, that order was also by implication affirmed by him. The Sessions Court delivered judgment on August 13, 1959, and on that very date within a few hours of the pronouncement of judgment the accused Gobindankutty Nair died. On November 11, 1959, the widow of the accused and his two minor sons presented an application under s. 439 in the High Court, of Judicature of Kerala against this judgment of the Sessions Court. They prayed that the order of conviction and sentence passed against the accused and also the order as regards the sale proceeds of the car should be set aside. The High Court rejected a preliminary contention raised on behalf of the State of Kerala that the accused

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Gobindankutty Nair having died, this application for revision was not maintainable. It then considered the application on its merits and set aside the conviction of the accused and also the order directing the payment of the sale proceeds of the motor car to the Head Cashier. The High Court however granted a certificate under Art. 134(1)(c) of the Constitution that this was a fit case for appeal to this Court and on that certificate this appeal has been preferred by the State of Kerala.

The principal point urged in support of the appeal is that after the death of the accused no revision application lay to the High Court against the order of the Sessions Court maintaining his conviction. Learned Counsel for the appellant has based his argument in support of this contention on the principle embodied in the maxim *actio personalis moritur cum persona* and has urged that-except where the statute has stepped in to make any special provisions no proceedings either against the accused or on behalf of the accused can be entertained or continued in the Court in respect of any crime said to have been committed by a person after the death of such person. He has drawn our attention to Salmond's observations in his "Jurisprudence" Eleventh Edition, page 442 That criminal responsibility must die with wrong doer himself, and has urged that as all criminal proceedings are personal actions, proceedings in connection with a crime can, in the absence of any statutory provision, neither be commenced or continued against an accused person or on his behalf unless he is in existence. It may be noted however that Salmond himself goes on to in discussing the matter that the modern opinion rejects the conclusion based on the received maxim *actio personalis moritur cum persona*, that all actions for penal redress must be brought against a living offender and must die with him. What is more important to notice is: that we are not concerned here with the question of

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criminal proceedings being continued or commenced against a person but with the question whether when a criminal proceeding has ended unfavourably to an accused person, an action can be taken in the Court in respect thereof. On this question the common law maxim is of little, if any, use and the answer to the question must be found in other provisions of law.

The Criminal Procedure Code gives a right of appeal to the convicted person in certain cases. If, after the conviction and before an appeal has been filed the convicted person dies, there is no provision for any appeal on his behalf. What will happen when after an appeal has been filed by the convicted person, he dies, is provided for 'in s. 431 of the Criminal Procedure Code. That section provides that every appeal against acquittal and every other appeal under Chapter XXXI except an appeal from a sentence of fine shall finally abate on the death of the appellant. The High Court or the Court of Sessions cannot therefore exercise its appellate jurisdiction in favour of a dead person even if an appeal has been filed by him, except in an appeal from a sentence of fine.'

As regards the revisional jurisdiction of the High Court there is no provision similar to s. 431. Nor is there any provision whether a revisional application can be or cannot be made in respect of an order of conviction when the convicted person is dead.- We cannot but notice the important distinction that while the appellate jurisdiction can be exercised only after an appeal is filed by the convicted

person or against an order of acquittal under s. 411 or a. 417, there is no such limitation on the Court's revisional jurisdiction.

The opening words of s. 439 of the Criminal Procedure Code, viz., "in the case of any proceedings the record of which has been, called for by itself or which has been reported for orders or

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which otherwise comes to its knowledge", produce the result that revisional jurisdiction can be exercised by the High Court by being moved either by the convicted person himself or by any other person or suo motu, on the basis of its own knowledge derived from any source whatsoever without being moved by any person at all. All that is necessary to bring the High Court's powers of revision into operation is, such information as makes the High Court think that an order made by a Subordinate Court is fit for the exercise of its powers of revision. But, says Mr. Pathak, look " at the words that follow in this section stating what powers can be exercised. These words, viz., the High Court may in its discretion exercise any of the powers conferred on a court of appeal by es. 423, 426, 427, and 428..... make it clear that a High Court's power of revision does not extend to anything more than what the court of appeal can do. When therefore a court of appeal cannot give any relief in respect of an order of conviction and sentence of fine or any other order made against an accused person after the accused person is dead, how can the High Court in revision give any such relief after the accused person's death. This argument confuses the definition of the extent of power with the conditions for the exercise of the power. The conditions for the exercise of the power of revision are laid down in the opening clauses of s. 439 which has just been set out above, while the next clause that the High Court may exercise any of the powers conferred on a court of appeal under a. 423, a. 426, s. 427 and o. 428..... define the extent of the power. The fact that the extent of the power of a court in revision does not extend-except as regards the power of the courts by s. 439 to enhancement of the sentence to more than what the appellate court's power, does not effect the position that while the conditions for the exercise of the powers of courts of appeal is

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that an appeal must be preferred by the convicted person, that condition is conspicuous by its absence where the conditions of the exercise of the powers of revision are laid down in s. 439.

It appears to us therefore that in a proper case the High Court can exercise its power of revision of an order made against an accused person even after his death.

This view was expressed by the Bombay High Court in *Imperatrix v. Dongaji Andaji*(1). The direct question in that case was whether the appeal lodged by a convicted person abates on his death. Melvill J. and Kemball J. differed on this question. Melvill J. being of the opinion that on the death of the appellant the appeal abated while Kemball J. came to a contrary conclusion. Chief Justice Westropp, to whom the case was referred agreed with Melvill J. that the appeal abated. All the three learned Judges appear to have however been of opinion that the death of convicted person would be no impediment in the way of the court's exercising its power of revision. Melvill J. observed

"In a recent case the Chief Justice and myself did consider the proceedings in a criminal case after the death of the convict. But the

proceedings in that case had been called for under s. 297, and we were sitting as a Court of Revision. No person has any right to be heard before the High Court in the exercise of its powers of revision. The Court is not supposed to be acting on the application of the convict, but in the exercise of its power of supervision over subordinate courts, and with a view to correcting their errors. I think that we should have power to interfere in the present case, as a Court of Revision, if we saw any error, in law, invalidating the conviction, or if the sentence were too severe (1) (1878) LL.R. (Bom.) 564.

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for the offence which has been held by the Sessions Court to be proved. But I can see no error in law, nor is the sentence excessive, if the facts be as the Sessions Court has found them. We cannot therefore exercise our powers of revision..... "

Kemball J. has also observed

" I have no doubt that, as a Court of Revision, we could dispose of this case Chief Justice Westropp, after expressing his opinion that the appeal has abated, went on to observe : .

"I think that the High Court has, however, the right to call for the record,' and make such order thereon as it may deem to be due to justice. I do not understand that my opinion is required by my brothers Melvill and Kemball on the question whether such a case has, been made as to render it desirable that the record should be brought up."

It is thus clear that though apparently the High Court's powers of revisions were not exercised in that case, all the three judges agreed in thinking that in a proper case this could and should be done even after the death of the convicted person.

This case was considered' by this Court in Pranab Kumar Mitra v. The State of West Bengal (1). The question in Pranab Kumar Mitra's case was, whether where the accused has been sentenced to &:fine and imprisonment till the rising of the Court and the convicted person had served out his nominal sentence of imprisonment and died when his application in revision was pending before the High Court, the High Court could exercise its powers of revision in respect of the question of conviction and sentence. It was held that such powers could be

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

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exercised and could not be limited on the analogy of s. 431 of the Code which did not apply to a revision case. After referring to the decision of the Bombay High Court in Dongaji Andaji's Case (1) and the distinction drawn by the learned Judges therein between the High Court's power to deal with an appeal on the death of a convicted person and its power to exercise revisional jurisdiction even after such death,, this Court went on to observe at p.70 of the Report

"We may assume that the Legislature was aware of the decision of the Bombay, High Court, referred to above, when it 'enacted s. 431 for the first time in the Code of 1882. If the

Legislature intended that an application in revision pending in a High Court, should be dealt with on the same footing as a pending appeal it would have enacted accordingly. But in the absence of any such enactment, we may infer that the power of revision vested in the High Court under Chapter XXXII of the Code, was left untouched-to be exercised according to the exigencies of each case."

It appears, to us that though in Pranab Kumar's Case(2) this Court was directly concerned with the effect of a convicted person's death on a pending revisional application, the judgment also expresses the view that a revisional application could be entertained even after the death the convicted person. On this authority and also for the reasons discussed earlier, we have come 'to the conclusion that the High Court was right in holding that the application for revision could be entertained under s. 439 of the Code of Criminal Procedure.

We see no reason also to interfere with the order made by the High Court in exercise of such power of revision.

The appeal is accordingly dismissed.

Appeal dismissed.

(1) (1878) I.L.R. (Bom.) 564.

(2) (1959) Supp. 1 S.C.R.63