

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

Monday, the 15th day of July 2024 / 24th Ashadha, 1946

CRL.A NO. 1186 OF 2024

SC 1354/2022 OF SPECIAL COURT UNDER POCSO ACT, MANJERI, MALAPPURAM

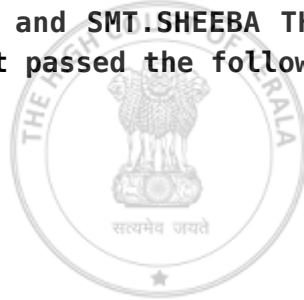
APPELLANT(S)/ACCUSED:

ABDUL KHADER, AGED 49 YEARS, S/O MUHAMMED, CHELUPADATH HOUSE,
PATHAMOOCHI, VENGARA POST, MALAPPURAM, PIN - 676304.

RESPONDENT(S)/STATE/COMPLAINANT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, (REPRESENTING INSPECTOR OF POLICE, VENGARA POLICE STATION) ,
PIN - 682031.

This Criminal appeal coming on for admission upon perusing the
appeal and upon hearing the arguments of ADVS.SIDHARTH O., ANWIN JOHN
ANTONY, P.C.MOIDEEN, SUSANTH SHAJI, MOHAMMED ASIF P., ALBIN A. JOSEPH,
Advocates for the appellant and SMT.SHEEBA THOMAS, the PUBLIC PROSECUTOR
for the respondent, the Court passed the following:



CR

P.G. AJITHKUMAR, J.

Crl.Appeal No.1186 of 2024

Dated this the 15th day of July, 2024

ORDER

This is an appeal against conviction. The appellant invoked the provisions of Section 374(2) of the Code of Criminal Procedure, 1973 (Code of 1973, for short) to file the appeal. The appeal was filed on 10.07.2024. A question arises whether this appeal could be filed under the provisions of the Code of 1973 or should have been filed under the provisions of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS, for short). Section 415 of the BNSS is the provision corresponding to Section 374 of the Code of 1973.

2. The learned counsel for the appellant would submit that the trial was held under the provisions of the Code of 1973, and therefore the appellant's right to appeal accrued as per the provisions of the Code of 1973. It is contended that the appellant cannot be compelled to invoke the provisions of the BNSS to file the appeal since the trial took place under the Code of 1973.

3. The learned counsel for the appellant invites my attention to **Pylikunju and others v. State of Kerala and others [1977 KLT 252]** and also **Hiralal Nansa Bhavsar and another v. State of Gujarat [1976 CrLJ 84]** in order to fortify his contention that in a case where the trial took place under the provisions of the Code of 1973, the appeal shall be filed and decided by the provisions of the Code of 1973 itself. It is the further submission of the learned counsel that the appeal being continuation of the trial, the appeal shall also be dealt with as per the same procedure under which the trial was held. In that regard, the learned counsel places reliance on **Soban v. State of Kerala [2021 (3) KHC 383]**.

4. The appellants herein were convicted as per the judgment dated 12.06.2024. Needless to say that the trial and conviction were as per the provisions of the Code of 1973. But the appeal was filed on 10.07.2024. If so, which provisions; whether Section 374(2) of the Code of 1973 or Section 415(2) of the BNSS that governs the appeal filed by the appellant? A similar question would arise when an application is filed in a pending appeal which was filed before

01.07.2024. This question has larger ramification since its answer delineates the procedure to be followed in the investigation, inquiry, trial, appeal and applications pending on 01.07.2024; whether the provisions of the Code of 1973 or the BNSS.

5. Sections 484(1) and (2)(a) of the Code of 1973, which are relevant to answer the aforementioned question, read:

Section 484,- Repeal and savings:

(1) The Code of Criminal Procedure, 1898 (V of 1898) is hereby repealed.

(2) Notwithstanding such repeal, -

(a) If, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force:



Provided that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

(b) xxxx;

(c) xxxx;

(d) xxxx;

(3) xxxx.

6. The corresponding provision in the BNSS is Section 531. Sub-sections (1) and (2)(a) of Section 531 read as follows:

Section 531,-Repeal and savings:

(1) The Code of Criminal Procedure, 1973 is hereby repealed.

(2) Notwithstanding such repeal—

(a) if, immediately before the date on which this Sanhita comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1973, as in force immediately before such commencement

(hereinafter referred to as the said Code), as if this Sanhita had not come into force;

(b) xxxx;

(c) xxxx.

(3) xxxx.

7. Both provisions are pari materia except that the proviso to Clause (a) of Sub-section (2) and Clause (d) of Sub-section (2) in the Code of 1973 do not form part of Section 531 of the BNSS.

8. In **Pylikunju**(supra) this Court considered the question whether an accused who was convicted and sentenced to pay a fine less than Rs.100/- by a Judicial Magistrate of the First Class had the right of appeal. The legal imbroglio arose on account of the commencement of the Code of 1973 was that the right of appeal available under the provisions of the Code of 1898 to a person convicted and sentenced to pay a fine less than Rs.100/- was taken away by the provisions in the Code of 1973. This Court held that an accused who was convicted after a trial held under the provisions of the Code of 1898 would have the right of appeal

under that Code. It was held:

“Therefore, if it is the new Code that applies, the dismissal of the appeal is correct. But the case wherein the petitioners were convicted was charge-sheeted before the Judicial First Class Magistrate prior to the commencement of the new Code and it was pending trial when that Code came into force. Therefore, under S.484(2)(a) of the new Code the trial had to be proceeded with under the old Code as if the new Code had not come into force. S.404 of the old Code deals with right of appeal, and no appeal would lie except as provided in that section. It is an accepted doctrine that the right to file an appeal is a vested right. (See: **Garikapapati Veeraya v. Subbiah Choudhry**[AIR 1957 SC 540]). The vested right can be taken away by a subsequent legislation only if there are clear indications therein to that effect. S 484 does not contain any provision which affects the right of appeal in cases pending at the commencement of the new Code. Therefore, the right of appeal conferred on the petitioners under S.408 of the old Code remained in tact.”

9. A Full Bench of the Gujarat High Court in **Hiralal Nansa Bhavsar** (supra) took a similar view insofar as the

right of appeal is concerned. True, the settled principle is that an appeal is a continuation of the trial. This Court in **Soban** (supra) reiterated that view although, in a different context. That principle also fortifies that the right of appeal of a person convicted after a trial held as per the provisions of the Code of 1973 has to be decided with reference to the provisions of that Code and, not in terms of the provisions in the Sanhita.

10. The principle of law laid down in the aforesaid decisions can have applications to decide only the question as to the substantive right of a convicted person to appeal. How far that principle applies inasmuch as the procedural provisions applicable to the appeals is a different question altogether.

11. The Full Court in **Hiralal Nansa Bhavsar** (supra) further held that when a Court has already taken cognizance of a prosecution under the Code of 1898 and the order of conviction is recorded after coming into force of the new Code of 1973, further proceedings in respect of appeal against the said order of conviction would be governed by the provisions of the old Code because the right of appeal is a substantive

right which accrued to the parties, to the prosecution at the time when the Court takes its cognizance. That view is, however, not able to be followed for the reason that a party to the prosecution has no vested right in procedural provisions. The intention of the Parliament in that regard is apparent from the wordings of Section 531(2)(a) of the BNSS. The right saved therein is only that each of the proceedings, namely; investigation, inquiry, trial, appeal and application commenced before commencement of the BNSS shall be continued or held or made according to the provisions of the Code of 1973 as if the BNSS has not been come into force. On completion of one such proceedings initiated under the Code of 1973 in a matter, further steps are to be taken according to the provisions of the BNSS.

12. In **Hitendra Vishnu Thakur and others v. State of Maharashtra and others [(1994) 4 SCC 602]** the Apex Court considered the effect of the amendment made to the Terrorist and Disruptive Activities (Prevention) Act, 1985 specifically to Section 20. Clause (b) of Section 20(4) stood amended with effect from 22.05.1993 and clause (bb) was

newly introduced. As per the amendment, the period for grant of statutory bail was reduced from 'one year' specified under clause (b) to '180 days' and a provision at clause (bb) was inserted enabling the Designated Court to extend the period of detention beyond 180 days upto one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention. The ambit and scope of an Amending Act and its retrospective operation were culled out in the following manner in paragraph 25:

"(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural Statute should not generally speaking

be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.

(v) A Statute which not only changes the procedure but also creates a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

13. The Apex Court in **Neena Aneja and another v. Jai Prakash Associates Ltd. [(2022) 2 SCC 161]** held that in the absence of a contrary intent express or implied, procedural amendments are presumed to be retrospective. That principle was followed by a Division Bench of this Court in **Anoop K. A. @ Anoop @ Anu v. Union of India [2021 (2) KHC 267]**. The principles laid down in the aforementioned decisions fortify the view that a party to a prosecution has no vested right in procedural provisions and therefore on the commencement of the BNSS on 01.07.2024 the procedure prescribed therein shall apply to all appeals, applications, trial, enquiry and investigation commenced on or after that date.

14. A learned Single Judge of the Punjab and Haryana

High Court in **XXXX v. State of UT Chandigarh and another[CRM-M-31808-2024]**, dated 11.07.2024] after juxtaposing the provisions of Section 484 of the Code of 1973 and Section 531 of the BNSS, culled out the following principles:

9. As a sequel to the above-said rumination, the following principles emerge:
 - I. The Code of Criminal Procedure, 1973 stands repealed w.e.f. 01.07.2024. Ergo; no new/fresh appeal or application or revision or petition can be filed under Code of Criminal Procedure, 1973 on or after 01.07.2024.
2. The provisions of Section 4 and Section 531 of BNSS, 2023 are mandatory in nature as a result whereof any appeal/application/revision/petition/trial/inquiry or investigation pending before 01.07.2024 are required to be disposed of, continued, held or made (as the case may be) in accordance with the provisions of Code of Criminal Procedure, 1973. In other words; any appeal/application/revision/petition filed on or after 01.07.2024, is required to be filed/instituted under the provisions of BNSS, 2023.
3. Any appeal/application/revision/petition filed on or

after 01.07.2024 under the provisions of Cr.P.C., 1973 is non-maintainable & hence would deserve dismissal/rejection on this score alone. However, any appeal/application/revision/petition filed upto 30.06.2024 under the provisions of Cr.P.C., 1973 is maintainable in law. To clarify; in case any appeal/application/revision/petition is filed upto 30.06.2024 but there is defect (Registry objections, as referred to in common parlance) and such defect is cured/removed on or after 01.07.2024, such appeal/application/revision/petition shall be deemed to have been validly filed/instituted on or after 01.07.2024 and, therefore, would be non-maintainable.

4. Section 531 of BNSS shall apply to "revision", "petition" as also "petition of complaint" (ordinarily referred to as complaint before Magistrate) with the same vigour as it is statutorily mandated to apply to "appeal/application/trial/inquiry or investigation" in terms of Section 531 of BNSS."

15. As stated, the provisions of Section 484 of the Code of 1973 and 531 of the BNSS are pari materia except that the proviso to Clause (a) and Clause (d) of Sub-section 2

are omitted in the BNSS. The exception carved out by Clause (a) of Sub-section (2) of Section 531 says that any application, appeal, trial, enquiry or investigation pending as on the date of commencement of the BNSS, the same shall be disposed of, continued, held or made as per the provisions of the Code of 1973. The principles evolved by the Punjab and Haryana High Court in the above decision except that contained in paragraph 9(iii) are consistent with the intent of Clause (a) of Sub-section (2) of Section 531 of the BNSS. I am unable to agree with the view contained in paragraph 9(iii) of that decision for, mere misquoting of a provision or mistake in the nomenclature shall not fail a petition. It is trite that omission or error in mentioning the correct provision of law by itself would not denude the power of the authority so long as source of power is traceable from enabling provision. (See: **P. R. Naidu v. Government of Andhra Pradesh [AIR 1977 SC 854]**; **State of Karnataka v. Krishnaji Srinivas Kulkarni and others [1994 (2) SCC 558]**; **M/s. Pepsi Foods Limited and another v. Special Judicial Magistrate and others[(1998) 5 SCC 749]**; **B.S.E.**

Brokers Forum, Bombay and others v. Securities and Exchange Board of India and others [2001 (3) SCC 482]; Mohammed Ashraf P. M. v. State of Kerala [2019 (2) KHC 792].

16. The contents and substance of Section 374 of the Code of 1973 and Section 415 of the BNSS are identical. The changes in Section 415 are to suit the other provisions in the BNSS which do not affect the substratum of the precursor. To the same effect is Section 389 of the Code under which execution of sentence is suspended on the application of a convicted person and the corresponding provision in the BNSS ie. Section 430. Therefore, for the reason of stating wrong provision under which the appeal/application is filed, the same cannot be dismissed as not maintainable. In order to make the proceedings regular and proper the appellant/applicant shall be directed to amend/correct by adding correct provision in the appeal/application.

17. If an appeal requires representation owing to some filing defects or there is delay in filing the appeal what shall be the date of filing of the appeal is another question. What

the Punjab and Haryana High Court held is that if in an appeal/application/revision/petition filed on or before 30.06.2024 there is a filing defect and such defect is cured on or after 01.07.2024, such appeal/application/revision/petition shall be deemed to have been validly instituted on or after 01.07.2024 and not maintainable. I am unable to agree with that view also. Once the filing defect is cured and the appeal/application/revision/petition is properly represented, its date of filing shall relate back to the date of its first presentation. The applicable law shall be decided with reference to the date of its first presentation and not to its representation.

18. Viewed so, the guideline issued by the Punjab and Haryana High Court in paragraph No.9 of the aforementioned decision, except that contained in paragraph No.9(iii) can be followed.

What emerges from the above in the context of this case is that,-

1. An appeal filed on or after 01.07.2024 shall be governed by the procedure provided under the

BNSS and not by the provisions of the Code of 1973.

2. Whether the judgment of conviction was before or after 01.07.2024, if the appeal is filed on or after 01.07.2024, the same can be filed following the procedure contained in the provisions of the BNSS.
3. All applications filed and steps taken in the appeals filed prior to 01.07.2024 shall be under the provisions of the Code of 1973.
4. When an appeal/application is represented after curing filing defects its date of filing shall relate back to the date of its first presentation.

Accordingly, I hold that this appeal filed on 10.07.2024 should have been filed under Section 415(2) of the BNSS. The appeal, however, does not require a dismissal as not maintainable. The appellant shall file petition/s for amendment/correction of the memorandum of appeal and application appropriately. Ordered accordingly.

Sd/-

P.G. AJITHKUMAR, JUDGE

PV