

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 20th October, 2023

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

I.A. No.01 of 2023 in CrI. A./19/2023/(Filing No.)

Petitioner : State of Sikkim

versus

Respondent : Ganesh Dhakal

Application under Section 5 of the Limitation Act, 1963

Appearance

Mr. S. K. Chettri, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the Petitioner.

Mr. Rahul Rathi, Advocate for the Respondent.

ORDER

Meenakshi Madan Rai, J.

1. A delay of 578 days has occurred on the part of the Prosecution in filing the Appeal under Section 377(1)(b) and (3) of the Code of Criminal Procedure, 1973. The instant I.A. has been filed seeking condonation of such delay.

2. Learned Additional Public Prosecutor submits that the Appeal assails the Judgment dated 26-08-2021 and Order on Sentence dated 31-08-2021, as the Respondent was a government employee and convicted for the offence of rape under Section 376(1) of the Indian Penal Code, 1860, when he ought to have been convicted and sentenced as per the provisions of Section 376(2)(b) and (c) of said Code. Advancing grounds for the delay, Learned Additional Public Prosecutor submitted that sixty days thereafter would be afforded to the Prosecution to file the Appeal post the pronouncement of the Order on Sentence. Meanwhile, on 16-11-2021, the Respondent filed an Appeal assailing the

aforementioned Judgment before this Court. When the said matter was being heard on 10-04-2023 by this Court, it came to the notice of the Petitioner/Appellant herein, that, the Respondent was a government employee and was posted in the Indian Reserve Battalion, at Yangang, Namchi District and by virtue of his employment he ought to have been convicted under the above provisions as already agitated. Hence, on 12-04-2023, the Learned Additional Public Prosecutor forwarded a letter to the Director General of Police intimating him that in CrI. A. No.14 of 2021 (*Ganesh Dhakal vs. State of Sikkim*) pending before this High Court the Additional Public Prosecutor had sought some time to take steps in the matter for enhancement of sentence. On 13-04-2023, the Legal Officer of the Police Headquarter was also of the opinion that Appeal could be preferred. On 06-05-2023, the Deputy Inspector General of Police was of the same opinion. On 11-05-2023 the File was forwarded to the office of the Advocate General for necessary opinion. On 17-05-2023, the Additional Advocate General also opined that an Appeal could be preferred and the File was thus processed on the same day for obtaining government approval. On 19-05-2023 the approval of the government was obtained and the File forwarded to the office of the Advocate General on 23-05-2023. Thereafter, the Appeal was filed before this Court on 26-05-2023 by which date a delay of 578 days had ensued. That, in view of the issue involved as argued, the delay being *bona fide* may be condoned as it was unintentional and the grounds put forth sufficiently explain the delay.

3. Learned Counsel for the Respondent objecting to the prayer for condonation of delay submitted that no indulgence

should be afforded to the Petitioner/Appellant for the delay caused as it would seriously prejudice the Respondent. That, the issue of the government employment of the Respondent was evident during the trial before the Court of Learned Judge, Fast Track, South and West, at Gyalshing, however, the Prosecution during the entire trial failed to take any steps in this context or draw the attention of the Learned Trial Court to the issue and hence it cannot be raised now belatedly to the disadvantage of the Respondent. Besides the Prosecution has failed to explain the delay on a day to day basis and has put forth only excuses, which thereby deserve no consideration and the Petition ought to be dismissed outright.

4. We have given due consideration to the submissions put forth.

5. At the outset, it is relevant to remark that the Prosecution has almost always delayed in filing Appeals and thereby inconvenienced not only the Court but also prejudiced the Respondent in the matter.

6. Be that as it may, having considered the grounds put forth for the delay, it becomes imperative for this Court to opine out that there appears to be gross negligence on the part of the Prosecution for having failed to notice at the trial stage the error committed which thus had a percolating effect and has led to the instant Petition being filed. However, while considering the broader ends of justice, we refer to the decision of the Hon'ble Supreme Court in ***Sheo Raj Singh (Deceased) through Lrs. and Others vs. Union of India and Another***¹, wherein it was *inter alia* held as follows;

¹ 2023 SCC OnLine SC 1278

37. Having bestowed serious consideration to the rival contentions, we feel that the High Court's decision to condone the delay on account of the first respondent's inability to present the appeal within time, for the reasons assigned therein, does not suffer from any error warranting interference. As the aforementioned judgments have shown, such an exercise of discretion does, at times, call for a liberal and justice-oriented approach by the Courts, where certain leeway could be provided to the State. The hidden forces that are at work in preventing an appeal by the State being presented within the prescribed period of limitation so as not to allow a higher court to pronounce upon the legality and validity of an order of a lower court and thereby secure unholy gains, can hardly be ignored. Impediments in the working of the grand scheme of governmental functions have to be removed by taking a pragmatic view on balancing of the competing interests.

CONCLUSION

38. For the foregoing reasons and the special circumstances obtaining here that the impugned order reasonably condones the delay caused in presenting the appeal by the first respondent before the High Court, the present appeal is, accordingly, dismissed. Pending applications, if any, also stand disposed of."

7. Consequently, on the ground that a serious question of law is to considered and should delay not be condoned, travesty of justice would ensue, we are inclined to and do condone the delay, subject to payment of costs of ₹ 30,000/-(Rupees thirty thousand) only, by the Prosecution to be deposited with the Sikkim State Legal Services Authority, for use in the One Stop Centre, at Lumsey, Gangtok. The deposit shall be made within ten days from today failing which the costs shall be enhanced.

8. I.A. No.01 of 2023 stands disposed of accordingly.

(Bhaskar Raj Pradhan)
Judge
20-10-2023

(Meenakshi Madan Rai)
Judge
20-10-2023