IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 200 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGDISHCHANDRA VAIKUNTHRAI

Versus

JAGDAMBAPRASAD VAIKUNTHRAI PANDE

Appearance:

MR J.B.PARDIWALA, FOR SHRI K.B.ANANDJIWALA
FOR MS AMY YAJNIK for Petitioner
NOTICE SERVED for Respondent No. 1
Ms KATHABEN GAJJAR, ASST. PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision:10/05/2000

C.A.V. JUDGEMENT

#. This is a criminal revision application filed by

the original accused u/s 401 of Criminal Procedure Code, 1973 (for short, Cr.PC) read with Section 397 of the Cr.PC challenging the judgement Exh.9 dated 26.2.1981 rendered by the learned Additional Sessions Judge, Rajkot District, Rajkot (for short Appellate Judge) in Criminal Appeal No.18 of 1980, which was there on his file by which he has confirmed the judgement of conviction and sentence dated 29.4.1980 rendered by the Judicial Magistrate (Railways) First Class, Rajkot, (who will be referred to hereinafter as the "learned Magistrate" for the sake of brevity and convenience) rendered in Criminal Case No.299 of 1979 which was there on his file.

#. The Revision-Petitioner in this present matter was accused while the present Revision-Opponent no.1 Jagadambaprasad Vaikhunthrai Pande was the original complainant in Criminal Case No.299 of 1979 which was pending before the learned Magistrate. For convenience, the parties will be referred to hereinafter as the complainant and accused.

#. The case of the original complainant Shri Jagadambaprasad Vaikhunthrai Pande, in a nutshell, is as follows:-

#. On or about 23.7.1979, a report was made by APWI, Virpur, to Sub-Inspector of Railway Protection Force that a piece of rail was found missing from Railway Bridge No.8 near Navagadh Railway Station, in Jetalsan Division. On receipt of that report a search was made for missing rail piece. On or about 26.7.1979 missing rail piece was found near Gayatri Auto Garage at Navagadh of which the present accused was the proprietor. A detailed panchnama was drawn in the presence of panch witness and thereafter accused produced a rail piece of length of 14 ft. before the complainant who is a Sub-Inspector of Railway Protection Force. It is the case of the prosecution that the accused had no bill or receipt for the payment of the price paid for the said rail piece and he could not account for having possession of that rail piece. Thereafter one witness Shri Satishchandra Rameshchandra Gautam who was Sub-Inspector, SIPF, recorded the statement of the accused and thereafter the complainant lodged his complaint in the Court of the learned Magistrate at Rajkot. That complaint was filed against the accused for an offence punishable u/s 3 of the Railway Property (Unlawful Possession) Act, 1966 (29 of 1966) (the same will be referred to hereinafter as "the Act" for convenience and brevity). As per the complaint, the complainant made an accusation against the accused in

his complainant that the accused was found with posssession of rail piece of 14 ft in length, which is "railwy property" as defined u/s 2 (d) of the Act, which was reasonably suspected of having been stolen. Thus, it is the case of the prosectuion that the accused has committed an offence punishable u/s 3 of the Act.

#. The learned Magistrate framed a charge exh.17 against the accused and recorded plea exh.18 of the accused. Accused pleaded not guilty to the charge and he stated to the learned Magistrate that he wanted to be tried and defend the case lodged against him. The learned Magistrate recorded the depositions of six witnesses. Thereafter on declaration of the evidence being closed by the prosecution, the learned Magistrate recorded the further statement of the accused as per the provisions of Section 313 of Cr.PC. Accused did not lead any evidence in his defence. Thereafter, the learned Magistrate after hearing the arguements of the learned advocates for both the parties and after appreciating the evidence led by the prosecution came to the conclusion that the accused has committed an offence punishable u/s 3 of the Act and further that the case for which charge at exh.17 has been framed, is proved beyond reasonable doubt and therefore the prosectuion has proved its case. By coming to the aforesaid conclusion, the learned Magistrate rendered his detailed judgement dated 29.4.1980 in Criminal Case No.299 of 1979 and by that judgement the accused was convicted u/s 248(2) for an offence punishable u/s 3 of the Act and sentenced to undergo a simple imprisonment for 3 months and also to pay a fine of Rs.250/- and in default to undergo further simple imprisonment for 15 days. By said judgement the muddamal rail piece of 14 ft length was ordered to be handed over to the railway authorities.

#. Being aggrieved against and dissatisfied with the said judgement dated 29.4.1980, of conviction and sentence rendered in Criminal Case No.299 of 1979 the accused preferred Criminal Case No.18 of 1980 in the court of the learned Additional Sessions Judge, District Rajkot.

#. In that Criminal Appeal No.18 of 1980 the learned Appellate Judge heard the arguments of the learned advocates for both the parties, perused the record of the case and after reappreciation of evidence led by the prosecution, rendered his judgement Exh.9 dated 26.2.1981 and by that judgement the appeal preferred by the accused was dismissed meaning thereby the judgement of conviction and sentence dated 29.4.1980 rendered by the learned

Magistrate in Criminal Case No.299 of 1979 was confirmed and upheld.

#. Being aggrieved against and dissatisfied with the said judgement dated 26.2.1981 rendered by the appellate Judge in Criminal Appeal No.18 of 1980, the accused has preferred this Criminal Revision Application challenging the correctness and legality and propriety of the order confirming the judgement of the trial court.

#. I have heard Shri K.B. Anandjiwala and Shri J.B.Pardiwala, the learned advocates for the Revision-Petitioner in detail, at length. I have also heard the arguments of Ms Kathaben Gajjar, the learned APP, for the Revision-Opponent no.2 i.e. the State. It appears from the record that Revision-Opponent no.1 is duly served with Notice of this Court. I have gone through two judgements one of the trial Court and the other of the appellate Court. I have also gone through the evidence of the witnesses of which typed copies has been supplied by Shri J.B. Pardiwala. Before considering the submissions made by both the parties, it would be in the fitness of things to know the powers of the High Court in such type of Criminal Revision Applications and the scope of such type of Criminal Revision Applications which is preferred before the High Court.

##. Before this Court takes up rival submissions for consideration, it is necessary to know the scope and powers of this Court when a Criminal Revision APplication is preferred against the judgement of the trial Court which is confirmed by Appellate Judge.

##. In the case of Khatra Basi Samal and another v. The State of Orissa etc. AIR 1970 SC 272 the Hon'ble Supreme Court has held in paragraph 10 and 11 as follows:-

"10. This Court has had to. examine the jurisdiction of the High Court under this section on several occasions. In D. Stephens v. Nosibulla (1) it was pointed out (see at p. 291) that :-

"The revisional jurisdiction conferred on the High Court under section 439 of the Code of Criminal Procedure is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal against which the Government

has a right of appeal under section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has take.n a wrong view of the law or misapprehension the evidence, on record".

Again in Logendranath Jha & Others v. Polailal Biswas 1951 SCR 576 = (AIR 1951 SC 316) where the High Court had set aside an order of acquittal of the appellants by the Sessions Judge and directed their retrial, this Court (see at p. 681) said :-

"Though sub-section (1) of section 439 authorises the High Court to exercise, in its, discretion, any of the powers conferred on a court of appeal by section 423, sub-section (4) specifically excludes the power to 'convert a finding of acquittal into one. of conviction'. This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court could in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial court as 'perverse' and 'lacking in perspective', the High Court cannot reverse pure findings of fact based on the trial court's appreciation of the evidence in the case".

In K. Chinnaswamy Reddy v. State of Andhra Pradesh, 1963-3 SCR 412 at p. 418 = (AIR 1962 SC 1788 at p.1791) the court proceeded to define the limits of the jurisdiction of the High Court under s. 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said:

": ..... this jurisdiction should in our opinion be exercised by 'the High Court only in exceptional cases, when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there

has been a flagrant miscarriage of justice. It is not possible to. lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the. High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appeal Court or where the acquittal is based on a compounding of the offence, which is invalid under the law."

##. During the course of the arguments, Shri Pardiwala, the learned advocate for the Revision-Petitioner has fairly conceded that he knows the scope of this Criminal Revision Application in which a judgement of conviction and sentence rendered by the trial Court is challenged and that judgement is confirmed by the learned Appellate Judge. He has further submitted that the Revision-Petitioner has a very little scope to argue on merits of the case when there is a concurrent finding of the trial Court and first appellate Court. He has then argued that two courts below have relied on statement exh.12 of the accused recorded by PW 1 Satishchandra Rameshchandra Gautam (Exh.10). He has also argued that PW 1 - Satischandra Rameshchandra Gautam, who recorded the statement at exh.11 of the accused was Sub Inspector (SIPF). He has argued that two courts below have considered the statement exh.11 of the accused. In view of the fact that Shri Gautam had powers to record such statement u/s 9 of the Act, this statement of the accused recorded u/s 9 of the Act, is practically statement equivalent to the statement of offender recorded u/s 108 of the Customs Act. He has further argued that both the Courts below relied on said statement exh.12 of the accused and placing reliance on that statement, two courts below have come to following conclusions:-

(i) the accused was found with conscious possession of rail piece which is a "railway property";
(ii) the accused had reason to believe that (a) the said piece of rail was a railway property; and

(b) that railway property was a stolen property.

The trial Court therefore came to the conclusion that the accused has committed an offence punishable under Section 3 of the Act and that judgement has been confirmed by the Appellate Judge.

##. Shri J.B. Pardiwala, the learned advocate for the Revision-Petitioner has argued that looking to the judgements of both the Courts, he is not inclined to argue the case on merits and therefore he has nothing to advance so far as conviction of the accused for an offence under Section 3 of the Act is concerned. Shri Pardiwala has fairly conceded to this Court that looking to the powers of this Court u/s 401 of the Cr.PC for deciding the Criminal Revision Applications, he has limited his arguments only on the point of quantum of sentence. By reading sub-section (a) of Section 3 of the Act, he has argued that in the case of first offence, accused can be sentenced to undergo imprisonment for a term which may extend to five years or with fine or with both and therefore he has submitted to this Court that Revision-Petitioner requests this Court to show sympathy against him against whom a Criminal Case was lodged practically before 21 years. He has further argued that after a lapse of 21 years, the accused has become an older person and no purpose would be served if he is sent to jail to serve out a sentence imposed by the trial court and confirmed by the appellate Judge. He has further argued that on reading the latter part of sub-section (a) of Section 3 of the Act, it appears that in case of conviction, Court cannot in absence of special and adequate reasons to be mentioned in the judgement inflict imprisonment which shall not be less than one year and such fine shall not be less than Rs.1,000/-. He has argued that when the former part of sub-section (a) of Section 3 makes it clear that the Court can inflict a sentence of either imprisonment which may extend to five years or with fine or with both and therefore here in this case the Revision-Petitioner requests this Court to show a mercy by showing a sympathetic approach by sentencing him only with fine and sentence of 3 months may be altered to sentence undergone. In support of his arguments, Shri Pardiwala has cited an authority of Allahabad High Court in the case of ANWAR UDDIN V. STATE reported in 1976 Cr.LJ page 1786 (Allahabad). That case was for an offence u/s 3 of the Railway Property (Unlawful Possession) Act, 1966, for which the present accused has also been convicted and sentenced. In that case there was nothing to show that the applicant himself was responsible for committing the theft or encouraging

the theft. As per the evidence recorded by the trial Court, from the very beginning it is the case of the accused that one truck driver had come to accused and for some repairing work of truck, accused had prepared a bill of Rs.235/-. It is the defence of the accused that the said truck driver had no money with him and in consideration of bill for repairing charges, the truck driver had given the said rail piece of 14 ft. There is also no case against the accused that the accused himself was involved in committing the theft of the rail piece. In the said authority which is cited by the learned advocate for the Revision-Petitioner, the occurrence of offence took place in the year 1969. The trial Court convicted and sentenced accused of that case by Judgment against which the accused of that case had preferred an appeal and the appellate Court confirmed the conviction on 1st February 1972. Thereafter, the accused of that case preferred a Criminal Revision Application to the Allahabad High Court and while disposing of that Criminal Revision Application on 14.11.1975, the Court observed that accused of that case might have come in possession of the article in question having purchased from some other person and the case had also become aged and considering the facts and circumstances of the case the Allahabad High Court held that under Sction 3 of the Act, it is possible to award the sentence of fine only which should not have been less than Rs.1,000/-. Shri Pardiwala has cited another authority of STATE OF UTTAR PRADESH V. BANS RAJ SINGH reported in 1974 Cr.L.J. 1240. In the second cited authority the case was for an offence u/s 3 of the Act. As observed in para 12 of the said case, on reading the opening part of cl.(a) of Section 3, it is clearly stated that for the first offence an accused can be sentenced to imprisonment which may extend to five years or with fine, or with both. It is, thereafter stated in later part of that clause that in the absence of special and adequate reasons to be mentioned in the judgment of the court such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees. Considering the language of Section 3 of the Act, the Allahabad High Court came to the conclusion that in a case for an offence punishable under Section 3 of the Act, the Court may sentence an accused only to imprisonment and there do not exist any special and adequate reasons for giving a lesser sentence, the sentence of imprisonment shoulld not be less than one year and similarly if the Court in a particular case chooses to sentence an accused to fine only and there are no special or adequate reasons to reduce the fine, the fine should not be less than one thousand ruppes. To interpret the latter part of cl.(a)

of Section 3, it is stated that the sentence of imprisonment and fine both are obligatory would be inconsistent with the opening part of clause (a) and therefore in the opinion of the Allahabad High Court it was not necessary for the trial Court to have also sentenced the respondent to fine along with sentence of imprisonment of one year RI awarded to him and therefore looking to opening part of clause (a) of Section 3 of the Act, the Court can inflict sentence of fine only in deserving cases.

##. Shri Pardiwala has cited another authority in the case of JAGDISH CHANDER V. STATE OF DELHI reported in AIR 1973 SC 2127. In the case of this authority the accused was tried for an offence punishable under Section 304A of the Indian Penal Cr.PC. The incident took place on April 20, 1965 and the trial Court convicted the accused of that case on April 30, 1966 sentencing him to rigorous imprisonment for 6 months and to a fine of Rs.500/-. His appeal was dismissed by the learned Additional Sessions Judge on September 7, 1966, and his revision was disallowed on September 11, 1969. He was ordered to be released on bail by the Hon'ble Supreme Court on February 2, 1970, and the Criminal Appeal No.20 of 1970 which was before the Honourable Supreme Court was decided on 3.5.1973. The Honourable SUpreme Court has observed that the criminal proceedings against the appellant have thus gone on, since April 1965 which means a little more than 8 years. The circumstances in which the collision between the truck and the appellant's scooter occurred seems prima facie to suggest that they (their drivers) were both to blame. The penalties designed to deter the crime should be gauged so far as possible to the degree of scoial danger that is represented by the crime and its repetition. The Honourable Supreme Court has observed in para 9 of this judgement as follows:-

> "... To send the appellant back to Jail to serve the sentence of 6 months after 8 years seem to us to be highly unjust for the kind of offence which has been upheld against him by the three courts below. It is unlikely to have any reformatory effect on him. Harassment of a criminal trial for more than 8 years and the expense which he must have incurred, in our opinion, can legitimately be taken into account when considering the question of sentence to be imposed by this Court at this point of time. The appellant is stated to have served out only three weeks of imprisonment but on a consideration of

all the relevant circumstances of the case we think it would be just and porper to reduce the sentence of imprisonment to that already undergone but to increase the sentence of fine from Rs.500/- to Rs.700/-. Out of the fine, if realised, Rs.500/- should be paid to the mother of the deceased child. We, however, cannot help expressing our grave concern over the inordinate delay in the disposal of criminal cases including appeals and revisions. If our criminal justice is to achieve its real purpose and it it is to inspire the confidence of the people generally causes for such delays should be eliminated as early as practicable. Law's delays tend to turn justice sour. The appeal is allowed in part in the terms stated above. Appeal partly allowed."

##. By citing the aforesaid authorities, Shri Pardiwala the learned advocate for the Revision-Petitioner has argued that in this present case offence took place around 23.7.1979 and as per the case of the prosecution and report exh.24 of Parshottam Nanji Gangman out of 10 pieces of rail, one piece of rail was found missing and therefore as per his arguments it is not the case of the prosectuion that this rail piece was uprooted from the regular railway line with an intention to cause any accident. No such charge is also framed against the accused and therefore this is a case in which one rail piece out of 10 pieces was found missing i.e. it was stolen away and as per the defence of the accused one truck driver had come and gave it in lieu of repairing charges of the motor truck. Thus, Revision-Petitioner is not directly involved in this case. He received the rail piece from the truck driver in lieu of the repairing charges. Shri Pardiwala has further argued that as per the facts of the case the complainant went to garage of the accused on 26.7.1979 and the statement of the accused was recorded and thereafter complaint was lodged against the accused in the trial Court. The Trial Court rendered judgement in this connection on 29.4.1980. Thereafter, as against the judgement of conviction and sentence of the trial Court, the Revision-Petitioner approached the Sessions Court and that appellate Court delivered judgement on 26.2.1991. Being dissatisfied with and aggrieved against the said judgement of the appellate court dated 26.2.1981, the Revision-Petitioner has filed this present Criminal Revision Application on 22.4.1981 which was admitted on 23.4.1981 and order of bail was passed by this Court. Shri Pardiwala has argued that this Criminal Revision Applicaiton is being heard in the

month of April 2000 and therefore practically hanging sword of conviction and sentence has been there on accused since last about 21 years and therefore by citing the aforesaid authority of JAGADISH CHANDER (supra) Shri Pardiwala has argued that looking to the fact about 21 years have passed, no useful purpose would be served to send the accused in jail and therefore he has argued that sentence of imprisonment be set aside by enhancing the sentence of fine, if this Court deems it just and fit.

##. The question of sentence is a matter of discretion and the discretion lies primarily with the trial Judge and the appellate Court would not lightly interfere with that sentence. However, the appellate Court can modify, alter or reduce the sentence when sentence is found to be unduly harsh or requires otherwise to be modified. It can only do so only if there are strong reasons for example, some important consideration has been overlooked or some judicial principle has been disregarded or the trial Court has proceeded on wrong principle and as a result an error was committed in imposition of the sentence. The Supreme Court has observed that nature of proof has nothing to do with the question of sentence. The Court has to decide it in all circumstances of the case that particular reference to extenuating circumstances. If there are any extenuating circumstances which can be said to be mitigating the enormity of the crime, then, the punishment can be reduced to a lesser one.

##. As held in the case of S.P. MALIK V. STATE OF ORISSA reported in 1982 Cr.L.J. 19 (Patna) the High Court is entitled to examine the legality, propriety and correctness of the sentence.

##. Looking to the above legal position with regard to sentence, this Court has considered the following special facts and circumstance of this case:-

(i) The accused is not directly involved in the offence of theft being committed for Muddamal rail piece.

(ii) As per the evidence of PW No.4 - Ghanshyam Parshottam Nanji who made a report Exh. 24 while he was on duty for visit of Culvert No.8 on 23.7.1979, found that out of 10 rail pieces one rail piece was missing and therefore this is a simple case of theft of rail piece from quantity of 10 pieces of rail.

(iii) Muddamal rail piece was found from the place

outside the garage in name of Gayatri Motor Garage of the accused. The accused is running the said garage in which vehicles are being repaired. As per the case of the accused and as observed by the learned Judge of the trial Court in para 23 of his judgement, one truck driver had given this rail piece to the accused in lieu of repairing charges of the truck. It is quite possible that accused might not be knowing the seriousness of taking this type of rail piece from the truck driver, in lieu of repairing charges.

(iv) The offence took place on 29.7.1979 and this present judgement is being delivered in the month of May 2000 and therefore practically 21 years have passed.

This Court feels that it is of no use to send the accused to jail after 21 years. This Court puts a note on record that tension of the accused regarding the proceeding in respect of rail piece being hanged over him, for last 21 years and therefore this Court is of the view that ends of justice would be met if sentence of imprisonment is set aside by enhancing the sentence of fine being paid by the accused.

##. Therefore, considering all the aspects of the case and the legal position with regard to sentence, this Criminal Revision Application deserves to be partly allowed so far it relates to the point of sentence only without disturbing the finding of conviction for which there is a concurrent finding of two courts below.

##. Hence, this Criminal Revision Application deserves to be partly allowed and therefore accordingly it is partly allowed by modifying the sentence by setting aside the sentence of imprisonment inflicted by the trial Court (i.e. sentence of S.I. for 3 months) and by enhancing the sentence of fine imposed by the trial court and accordingly Revision-Petitioner is convicted u/s 3 of the Railway Property (Unlawful Possession) Act and he is sentenced to undergo SI for the period till raising of the Court and to pay a fine of Rs.10,000/- (Rupees Ten Thousand Only) and in default to undergo SI for one year. The Revision Petitioner is directed to appear before the trial Court to serve out the sentence as aforesaid within 21 dyas from the date of this order. As regards an order for muddamal rail piece the order of the trial Court is

not disturbed by this order.

***

(mohd)