CHIEF EXECUTIVE OFFICER Vs TENZING GOPULAMA & ORS, 2008(4) GLT 707, 2008 CRI.L.J 3681-A CRITIQUE

By
Sri S.M. Deka
Director
North Eastern Judicial Officers' Training Institute (NEJOTI)

1. THE PREFACE

On the 23rd of July 2008 the Gauhati High Court delivered the Judgment reported as CHIEF EXECUTIVE OFFICER Vs TENZING GOPULAMA & ORS. 2008(4) GLT 707, 2008 CRI.L.J 368 . A perusal of the judgment to be referred hereinafter as TENZING caused considerable disturbance to the understanding of the Writer regarding the law relating to appeals against Orders of acquittals in criminal cases. To test the justification or otherwise of this disturbance it was necessary to have a closer look at the law on the matter. Despite the limited resources available to the Writer the exercise was undertaken. This essay is the product of the effort.

2. THE LEGISLATIVE BACKGROUND

The first comprehensive Code of Criminal Procedure (the Code hereinafter) was born in 1861. In the Code of 1861 Section 407 prohibited any appeal from an order of acquittal. For the first time the Code of 1872 by Section 272 permitted the Government to file an appeal from an order of acquittal. In the Code of 1872 Section 417 reads thus :- "The State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court". This section remained intact in the Code of 1898 till by Section 84 of the Code of Criminal Procedure (Amendment) Act 1955, the Section was substituted. The amended provision consisted of five sub-sections in place of the single section quoted above. Sub-section (1) is almost same as the original section 417 except for making the consequential change of subjecting the right of appeal to new subsection (5). Subsection (2) provides a right to the Central Govt. to prefer an appeal in cases investigated by the Delhi Special Police. Sub-section (3) makes provision for a right of appeal by the complainant in a case instituted upon a complaint if the High Court grants special leave to appeal. Sub-section (4) provides a period of limitation of sixty days for obtaining such special leave to appeal and lastly in sub-section (5) it was provided that if special leave sought by the complainant under sub-section (4) is refused the right of the State Govt. to appeal also will be lost. In the Code of 1973 Section 417 of the Code of 1898 became Section 378. A further restriction on the right of appeal

against acquittal was enacted by providing for obtaining of leave of the High Court in the cases of appeal by the State Govt. and the Central Govt. under sub-section (1) and (2) of the old provision. A new sub-section (3) making this significant change was enacted and other changes were only consequential to this change in that instead of five sub-section there are six sub-sections in Section 378 in the Code of 1973. Only other significant change is the provision for separate period of six months as the period of limitation for obtaining of special leave where the complainant is a public servant.

Lastly, Section 378 of the Code of 1973 underwent further significant changes through the Code of Criminal Procedure (Amendment) Act 2005 which came into force with effect from the 23rd June 2006. Sub-section (1) and (2) had been bifurcated into 1(a) and 1(b) 2(a) and 2(b). Under Section 278 1(a) and 2(a) in case of an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate and the Central Govt. respectively may direct the public prosecutor to present an appeal to the Court of Session. By sub-section 1(b) and 2(b) the provision for an appeal to the High Court in cases not falling under 1(a) and 2(a) has been retained. In sub-section (3) there has been a consequential change to the effect that only in appeals to the High Court leave of the High Court has to be obtained as before.

3. TENZING – THE FACTS

Three Criminal cases instituted upon complaints for offences under Section 184 of the Cantonments Act 1924 were by order dated 14.01.2008 eventually dismissed under Section 256 of the Code of Criminal Procedure, 1973 by the Judicial Magistrate, Shillong because the complainant failed to produce evidence despite the grant of several adjournments. The complainant filed three applications in revision in the High Court and prayed for restoration of the complaints. The High Court concluded (1) that there is no illegality in the dismissal of the complaints, (2) that no appeal lies against the dismissal of the complaints in the case because the offence involved is not cognizable and non bailable, (3) that though revision is maintainable in law on facts the order of dismissal merit no interference and lastly (4) that the complainant can file second complaints for the offence and is allowed to do so. The last three conclusions as above need closer scrutiny in the light of the Statute Law narrated in paragraph 2 of this essay.

4. ANALYSIS OF THE STATEMENT OF LAW IN TENZING :

(A) In para 11 of TENZING occurs the following :

> **"** *At the first instance under clause (a) and (b) to sub-section (1) of Sec.378 of Cr.P.C. an appeal can be filed in the Court of Sessions from the orders of acquittal passed by the Magistrates only, if the offences are cognizable and non-bailable. (emphasis supplied)"*

The above statement obviously is a mistake, typographical or otherwise. As already indicated in paragraph 2 above Section 378 of the Code of Criminal Procedure, 1973 provides for appeal to the Court of Session only in a specified class of cases and the cases falling outside that class are still amenable to appeal to the High Court. The shadow of the above error seems to have fallen on other conclusions as well in TENZING so much so that condition applicable only to cases of orders of acquittal passed by Magistrates that is offences requiring to be cognizable and non-bailable under Clause 1(a) and 2(a) of Section 378 of the Code, 1973 has been read as applicable throughout. In other words the said condition was read into cases falling under Sub-section 1(b), 2(b) and (4) as well. Apart from the fact that no rules of grammar and syntax and principle of interpretation will countenance such distribution of the condition the consequences of such an interpretation would be in the teeth of the object and purpose of the provision for appeal against orders of acquittal passed by Magistrate in cases relating to cognizable and non-bailable offences.

The Objects and Reasons of the Code of Criminal Procedure (Amendment) Act, 2005 for amendment of Section 378 read thus :

> **"***In order to guard against the arbitrary exercise of power and to reduce reckless acquittals, Section 378 is being amended to provide that an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence filed on police report would lie to the Court of Session and the District Magistrate will be authorized to direct the Public Prosecutor to file such appeals. In respect of all other cases filed on a police report, an appeal against an order of acquittal passed by any court other than the High Court should lie only to the High Court and the authority to direct the Public Prosecutor to present an appeal shall, continue to be with the State Govt***."**

A look at the legislative history of the provision for appeal against acquittal shows that the matter moved from total prohibition of 1861, to lifting of the ban in 1872, to calibrated restriction of 1955 and 1973 and than to the relaxation of the restrictions in 2005 in some cases. Under the latest amendments to achieve the object of guarding against reckless acquittals at the hands of the Magistracy in cases of graver offences provision has been made for appeal to the Court of Session and failing there the further appeal to the High Court also remains available under Section 378(1) (b). Instead of achieving the object of the amendment quoted above the view of law indicated in para 11, 12, 13, 14 and 15 of TENZING to the effect that an appeal against an order of acquittal be it of the Magistrate or of any other Court, be it on police report or on complaint will only be permissible if the offence is only cognizable and non-bailable will severely restrict and frustrate the said object. Acquittals in relation to more than

hundred offences under the Penal Code listed in Part-I of the first schedule of the Code, 1973 and in relation to most of the offences under Part-II of the said schedule according to TENZING would not be amenable to appeals because these offences are not cognizable and non bailable. The Part-II offences comprise almost all the offences under the special laws on energy, economy, environment, ecology, food, healthcare, revenue, taxation, intellectual property etc. It is trite to say that a construction which results in holding that the Legislature set out to achieve the object of preventing reckless acquittals at the hands of Magistrates by amending Section 378 of the Code but failed to achieve the object or did so only by opening the unguarded floodgates of reckless acquittals in non-cognizable and bailable offences has to be avoided on the principle expressed in the maxim "Ut res magis valeat quam pereat" (to give effect to the matter rather than having it fail).

Since the amended provision came into force only with effect from 23rd June 2006 no case law on the amended provision could be discovered till now i.e. 1st January 2009. TENZING did not consider the extent of the change in law. It is remarkable that TENZING seems not to have noticed that KRISHNA KAMAR GUPTA 2003 Cr.L.J 149 of the Delhi High Court and OM GAYATRI 2006 Cr.L.J 601 of the Bombay High Court criticized in TENZING as not addressing or examining the relevance of pre conditions and circumstances which permit filing of an appeal against an order of acquittal" did not at all deal with the law after 23rd of June 2006 and did not have any occasion to consider Section 378(1) (a). Be that as it may the legislative history of the Code 1973 after 23rd June 2006 and the principle of interpretation stated above would show that except for curving out an area for appeals to the Court of Session and the consequential changes the law of appeal against acquittals has remained the same since 01,04,1974 and as such no fault can be found with KRISHNA KUMAR GUPTA (Supra) of the Delhi High Court and OM GAYATRI (Supra) of the Bombay High Court. There is no necessity of further burdening this part of the writing with case law from other High Courts, of which there is no dearth, entertaining and dealing with appeals against orders of acquittals passed by Magistrates in cases relating to offences which are non-cognizable and bailable like those in the two Judgments from the Delhi and the Bombay High Court not followed in TENZING.

In THE ASSISTANT REGISTRAR OF COMPANIES –Vs- STANDARD PAINT WORKS 1971(2) SCC 85 the Supreme Court dealt with an appeal against an order of acquittal in a non-cognizable and bailable offence passed by a Magistrate.

In view of the above the statement at the end of para 15 of the TENZING holding that "the appeal against the order of acquittal is limited to the offences which are cognizable and non-bailable in nature and not in other cases" is per incuriam.

(B) In TENZING Section 401 of the Code, 1973 finds mention in the penultimate sentence of para 2 again towards the end of para 17 and lastly in the middle of para 22. Except for the mere mention the provisions of the said section have not been discussed and considered in detail. Once the holding in TENZING that the order of acquittal under Section 256 of the Code, 1973 is not appealable is shown to be erroneous and appeal is shown to be maintainable under Section 378 of the Code, 1973 to the High Court as has been done in (A) above provision of Section 401 (4) of the Code 1973 will rule the matter and no revision at the instance of the complainant who could have appealed can be entertained by the High Court. The conclusion at the end of para 14 and those in para 22 of TENZING being in the teeth of Section 401 (4) of the Code, 1973 is thus per incuriam.

5. THE SECOND COMPLAINT

The third conclusion in TENZING needing scrutiny is the direction for filing a fresh complaint on the same facts. The discussion on this point is spread across para 24 to 31 of TENZING. It may be apposite to mention here that the complainant approached the High Court seeking restoration of the complaints and at the end of para 23 of the Judgment the High Court dismissed the three revisions. The counsel for the accused respondent objected to the direction. In these circumstances the holding as to maintainability of a second complaint cannot but be obiter of the first water. In TENZING on the question of maintainability of a fresh complaint on the same facts after dismissal of the first complaint five Supreme Court Judgments have been relied on by the High Court. They are PRAMATHA NATH TALUKDAR -Vs- SAROJ RANJAN SARKAR, AIR 1962 SC 876, MAJOR GENERAL A.S. GAURAYA & ANR. –Vs- S.N. THAKUR & ANR, AIR 1986 S.C. 1440, JATINDER SINGH –Vs- RANJIT KAUR, AIR 2001 S,.C 784, YASH PAL- Vs- STATE OF PUNJAB, AIR 1977 S.C. 2433 and STATE OF KARNATAKA –Vs- C. NAGARAJA SWAMY, (2005)8 SCC 370. At the core of the doctrine of precedent is the cliché that a precedent is an authority for what it actually decides and not for what can be deduced from it. In none of the first three Supreme Court decisions noted above the dismissal of the complaints occurred after appearance of the accused. Dismissal of a complaint may occur even before the requirements of Section 200 Cr.P.C. can be completed or at the stage of 203 Cr.P.C. as in PRAMATHA (Supra) or under 256 of the Code as in the present case. All the three varieties of dismissals do not lead to the same legal consequences. A fresh complaint may be permissible under the first two but not in case of a dismissal under Section 256 Cr.P.C. because dismissal thereunder is acquittal and an accused once acquitted be after full trial or statutorily under 256 of the Code cannot be tried once again. Indeed JATINDER SINGH (Supra) extracts whereof have been quoted in para 27 of TENZING eloquently says as much in clear words as follows :-

" There is no provision in the Code or in any other statute which debar a complainant from preferring a second complaint on the

same allegation if the first complaint did not result in a conviction or acquittal or even a discharge." **(underlining supplied)**

The last two of the five Supreme Court Judgments do not at all deal with the topic of a fresh complaint after dismissal of the first complaint either at the stage of Section 200 Cr.P.C., Section 203 Cr.P.C. or under 256 Cr.P.C. The two Judgments of the Gauhati High Court relied on in TENZING namely PARIMAL CHAKRABORTY –Vs- RANJIT DEB NATH & ORS., 2004(3) GLT 213 and RAMKRISHNA SINGH & ORS. –Vs- NAMITA DAS 2006 (1) GLT 462 also did not at all answer the question whether after dismissal of the first complaint under Section 256 of Cr.P.C. a fresh complaint can be filed.

On the question of appealability of an order of acquittal under Section 256 of the Code 1973 and/or that under Section 247 of the Code, 1898. Delhi and Bombay High Courts, whose view was criticized in TENZING are not the only High Courts. Other High Courts like Calcutta, Kerala, Andhra Pradesh, Allahabad, Orissa respectively in 1986 Cri.L.J. 2110, 1978 Cri.L.J. 1376, 1976 Cri.L.J. 289, AIR 1961 Allahabad 352 (DB) and AIR 1964 Orissa 231 hold the same view. Even if these were cited in TENZING probably they would have met with the same criticism because TENZING began with a misconception that appeal against acquittal lies only if the order of acquittal is passed in relation to cognizable and non-bailable offence. It may be appropriate to mention here that some of the above noted decisions from the High Courts deal with appeals against order of acquittal under Section 247/256 Cr.P.C. in cases relating to non-cognizable and bailable offences.

However these cases do not deal with the related aspect regarding maintainability of a fresh complaint after dismissal of the first complaint under Section 247/256 of the Code. At this stage it may be mentioned that Sections 247 and 403 of the Code. 1898 reincarnated respectively as Section 256 and 300 of the Code, 1973. Way back on the 19th of December 1928 a Division Bench of Calcutta High Court answered the question "whether an acquittal under S. 247 Criminal P.C. is an acquittal which would bar a further trial under S. 403, Sub-S(1), Criminal P.C. ?" Unanimous independent answer of both the Judges of the Division Bench is a firm affirmative. That is SUKU RAM KOCH AND OTHERS –Vs- KRISHNA DEB SARMA, AIR 1929 Calcutta 189 (DB).

On the 10th April 1929 a Division Bench of the Bombay High Court answered the same question similarly. That was in SHANKAR DATTATRAYA VAZE –Vs- DATTATRAYA SADASHIVA TENDULKAR, AIR 1929 Bombay 408 (DB). Lastly, the nearest and in time and place is HARI DAYAL SINGH –Vs- BHJAN CHANDRA SAHA, AIR 1961 Tripura 41. Incidentally this is equivalent to a decision of the Agartala Bench of the Gauhati High Court. This is a case relating to non-cognizable and bailable offence under Section 489 of the Penal Code. On dismissal of the complaint under Section 247 of the 1898 a second complaint was filed. The second

complaint was quashed by holding that "the only way in which such an acquittal can be set aside is in accordance with the provision of Section 417 Cr.P.C." This means only way is to appeal to the High Court against the acquittal after obtaining special leave under Section 417 (3) of the Code 1898 which has now become , 378 (4) of the Code 1973.

Unfortunately none of these decisions were placed before the High Court in TENZING. Presumably the conclusion as to the direction for filing a second complaint would not have been passed had at least AIR 1961 TRIPURA 41 been placed. Under the provisions of Sub-section (2) of Section 30 of the North Eastern Areas (Reorganization) Act, 1971 AIR 1961 Tripura 41 and the directions given and proceedings taken there continue to be operative and effective as directions given and proceedings taken by the common High Court that is the Gauhati High Court. Only a Division Bench of the Gauhati High Court or the Supreme Court can overrule the law stated there.

There is another legal hurdle against maintaining a fresh complaint in the case after dismissal of the first complaint. The limitation for the offence under Section 184 of the Cantonments Act 1924 is six months as provided in Section 271 thereof. In the Cantonments Act 2006 which has replaced the 1924 Act with effect from 18.12.2006 the relevant sections have respectively become Section 247 and 337 but the law as to limitation has remained unchanged. Presumably the offence in TENZING took place sometime in 2007 and the direction for filing of the second complaint is dated 23rd of July 2008. The second complaint would be barred by limitation and would not be maintainable. There is no provision for extending the period of limitation in the Cantonments Act 1924 nor under the new Act of 2006. Section 473 of the Code. 1973 clearly can apply only in respect of the period " contained in foregoing provision of this chapter" meaning period prescribed by the Code , 1973 and not the period provided by a special law like the Cantonments Act 1924.

To end this point of the essay it will be appropriate to mention the following. The Supreme Court on the 16th day of August, 2002 decided MOHD. AZEEM –Vs- A. VENKATESH AND ANOTHER, (2002)7 SCC 726 and on the 29th day of April 2008 decided S. RAMA KRISHNA –Vs- S. RAMI REDDY, 2008 Cri.L.J. 2625. Both the Judgments dealt with orders of statutory acquittal on dismissal of complaints under Section 256 of the Code, 1973 relating to non-cognizable and bailable offences under Section 138 of the Negotiable Instruments Act, 1881. In the first case of Andhra Pradesh High Court on appeal under Section 378(4) of the Code, 1973 affirmed the dismissal but the Supreme Court set aside the orders of the High Court and the Magistrate and ordered retrial by restoring the complaint. In the second case the same High Court reversed the dismissal but the Supreme Court disagreeing with the High Court affirmed the dismissal and the consequent statutory acquittal under Section 256 of the Code, 1973.

6. THE CONCLUSION

The upshot is that TENZING attracts the label of a judgment per incuriam .

The three conclusions in TENZING –

(1) that appeal against order of acquittal lies only in cases relating to cognizable and non-bailable offence ;

(2) that revision at the instance of a complainant whose complaint has been dismissed under Section 256 of the Code of 1973 that is after the statutory acquittal of the accused is maintainable and lastly;

(3) that a fresh complaint can be filed by a complainant afflicted with a dismissal of his first complaint under Section 256 of the Code of 1973 being in the teeth of the Statute, principles of interpretation and precedents are per incuriam and need correction by a Larger Bench.