Emperor Vs. Babibai

Emperor Vs. Babibai

SooperKanoon Citation : sooperkanoon.com/333423

Court : Mumbai

Decided On : Jul-16-1942

Reported in : (1942)44BOMLR807

Judge : John Beaumont, Kt., C.J. and ;Wassoodew, J.

Appeal No. : Criminal Application No. 223 of 1942

Appellant : Emperor

Respondent : Babibai

Judgement :

John Beaumont, C.J.

1 This is an application to the Court, which raises a question which must be of common occurrence, and is of considerable importance.

2. The accused woman was convicted by one of the Presidency Magistrates under Sections 342 and 373 of the Indian Penal Code, and the Magistrate sentenced her to four months' rigorous imprisonment on the charge under Section 373, and to two months' rigorous imprisonment on the charge under Section 342. The sentences were passed on April 8 last, and the accused was in prison until May 13 when she was released on bail; so that she has served about five weeks' imprisonment. Then on June 25 the conviction under Section 373 was set aside by this Court, but the conviction under Section 342 was upheld, and the accused

thereupon surrendered to her bail.

3. An application was then made to the Governor of the jail where she is imprisoned to ascertain his view as to the date from which the sentence under Section 342, which was upheld by this Court, commenced, and, presumably relying on Rule 392 of the Jail Manual, he expressed the view that the sentence under Section 342 would commence from the date on which the sentence under Section 373 was set aside. It will be noticed that the Magistrate gave no directions as to the sentences being concurrent, and, therefore, they were consecutive sentences. The learned Magistrate did not, in terms, direct that the sentence under Section 373 was to be served first, and that the sentence under Section 342 was to commence on the expiration of the sentence under Section 373, though, in my view, it would have made no difference in the result if he had given such a direction.

4. It seems to me, apart from authority, that where a person has been convicted of two offences, and given separate sentences on each, and one of those convictions is subsequently set aside, with the result that there is no sentence on that count, the necessary result must be that the sentence on the count which is upheld will commence from the date when the sentence was imposed.

5. Rule 392 of the Jail Manual is in these terms:--

If a prisoner is awarded two sentences for separate offences and while undergoing the first the same is reversed on appeal, the Second sentence shall, in the absence of any direction to the contrary in the writ or warrant, commence to count from the date on which the first was reversed.

6. Prima facie I should say that that rule is invalid. It is not the function of the jail authorities to determine the length of a sentence passed upon a prisoner, and the application of the rule in the present case would result in a prisoner sentenced to a term of two months' rigorous imprisonment only having to serve a term of two months and five weeks.

7. But our attention has been drawn to two rulings of Judges of this Court, Khandesh Sessions Judge's Letter No. (1879) Unrep. Cr. C. 139 and Queen-Empress v. Khandu (1890) Unrep. Cr. C. 523, which afford some justification for the rule. The first case occurred in 1879 and seems to have been a ruling given upon a letter from a Sessions Judge.' The second case of Queen-Empress v. Khandu, gave rise to a resolution of the Chief Justice and certain Judges in the following terms:--

The Criminal Ruling of 21st April 1879 that where a person already undergoing a sentence of imprisonment is sentenced to imprisonment which is ordered to commence after the expiration of the imprisonment to which he has been previously sentenced, such imprisonment commences from the time it is ordered to commence, viz., from the expiration of the previous imprisonment, whether by(1850) 15 Ad. & E. 974 reversal or completion of the punishment, is adhered to after consideration of the case of Gregory v. The Queen , and the Madras High Court Criminal Proceedings No. 201 of 15th February 1879, quoted at Weir's Criminal Rulings, third edition, page 993.

Where, therefore, a person was convicted on the same day in two separate cases and sentenced to a term of imprisonment in each, and the Court ordered that the sentence in the second case should commence on the expiration of the sentence in the first, and the conviction and sentence in the first case were reversed in appeal after the accused had undergone the whole of that sentence:--

Held, that the sentence in the second case commenced to run after the expiration of the sentence in the first, and not before.

8. With all respect to the learned Judges who passed that resolution they have misunderstood the English case to which they refer, and have fallen into the error of supposing that when a conviction is set aside in appeal, the sentence is thereupon terminated, as it would be if the Court reduced the sentence to the period already served. When a conviction is set aside, the sentence imposed is not terminated from that date; it is destroyed, and rendered null and void from its inception. No doubt in cases of serious crimes, when bail cannot be properly allowed, it inevitably happens that part of the sentence is served before it can be

set aside; but the imprisonment in such cases cannot be attributed to the conviction. If a man is sentenced to five years' rigorous imprisonment for dacoity, and his conviction is set aside after he has been in prison for two months, it would be grossly improper, and quite untrue, to say that he has served a sentence of two months' rigorous imprisonment for dacoity. What has happened is that he has been detained in one of His Majesty's Prisons, and subsequent events show that he ought not to have been so detained.

9. Where the Court, or the Legislature as in Section 397 of the Criminal Procedure Code, directs that a subsequent sentence shall commence on the expiration of a prior sentence, the direction presupposes the existence of a legal prior sentence. If the prior sentence is destroyed, a literal compliance with the direction would result in the failure also of the subsequent sentence for lack of a starting point. That was the question which arose in the English case of Gregory v. The Queen (supra) on which the Judges of this Court purported to act. In that case there were convictions on four counts, and the imprisonment on the first count was 'for the space of two months now next ensuing', on the second count, 'for the further space of two months, to be computed from and after the end and expiration of his imprisonment' for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient, so that the sentence on that count dropped out, and it was argued that the sentence on the fourth count therefore failed. The Court held that the sentence on the fourth count was not invalidated by the failure of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count.

10. It follows from that ruling that where there are two sentences, the second to commence on the expiration of the first, and the first is set aside, the second sentence must commence from the date of conviction. In the present case the order in which the sentences were to take effect was not determined, and any part of the sentences served must be attributed to the only sentence legally existing.

The accused therefore must be deemed to have commenced her sentence on April 8, 1942, and to have served: a portion of that sentence down to May 13. She will have to complete the rest of the two months as from the date on which she surrendered to her bail. Rule 392 of the Jail Manual is, in my opinion, invalid.

Wassoodew, J.

11. I agree.