

Emperor Vs. Ahmad Ebrahim

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Court : Mumbai

Decided On : Jul-29-1934

Reported in : AIR1935Bom37; (1934)36BOMLR1126

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

Appeal No. : Criminal Application for Revision No. 192 of 1934

Appellant : Emperor

Respondent : Ahmad Ebrahim

Judgement :

John Beaumont, Kt., C.J.

1. These are four applications in revision in which the Government of Bombay ask that the sentences imposed may be enhanced. The cases are distinct, but they have certain features in common. In each case the accused was convicted of theft of a petty nature, and previous convictions against him for similar offences were either proved or admitted. The sentences imposed in two cases were six months' rigorous imprisonment and in two cases four months' rigorous imprisonment and the Government of Bombay consider that those sentences should be enhanced.

2. Now the cases disclose, not for the first time, a practical difficulty with which the Presidency Magistrates are faced. Under Section 362 of the Criminal Procedure Code the Magistrate has to record the evidence in cases in which an appeal lies,

and in other cases he is not bound to record the evidence. Whether an appeal lies or not depends on the sentence which the Magistrate ultimately passes. Under Section 411 of the Code there is an appeal where there is a sentence for a term exceeding six months. Consequently, the Magistrate really has to make up his mind, before he has heard the evidence, whether he is likely to pass a sentence exceeding six months. If he thinks, from the nature of the offence charged, that he probably will not impose a sentence of more than six months, then he does not record the evidence. But when he has convicted the accused he may then be informed for the first time that the accused is an old criminal with many previous convictions. It is, I understand, the practice of the prosecuting authorities not to inform the Magistrate about previous convictions before the trial, and I should be very sorry to say anything to suggest that that practice is not right. It is founded on the desire of the prosecuting authorities to see that the accused has fair play, and, although the Code which contains provisions for preventing a jury from being informed about previous convictions before giving their verdict contains no similar provision in the case of Judges or Magistrates, it is, I think, impossible to say that even the trained mind of a Judge or Magistrate will not be in any way affected by the knowledge that the accused has been previously convicted of offences similar to the one with which he is charged. But, although I think the prosecution are quite right in not informing the Magistrate about previous convictions, they may, I think, without impropriety, indicate to the Magistrate that they think that the case is one in which it is desirable that the evidence should be recorded. An intimation of that sort cannot, I think, prejudice the trained mind of a Magistrate and the difficulty of finding, after he has tried the case, that he ought to have recorded the evidence can be saved. But, where the Magistrate does find that he has tried the case without recording the evidence and that a longer sentence than six months ought to be passed, I think his only course is to record the evidence afresh. The Government Pleader has contended that in a case where the sentence given is one from which no appeal lies the High Court has power under Section 439 to enhance the sentence, and I think he is correct in his contention. Under Sub-section (3) of that section the High Court cannot impose a greater sentence than could have been inflicted by a Presidency Magistrate or Magistrate of the First Class. But here the Presidency Magistrate could have inflicted a sentence up to

two years, though in order to do that he would have had to record the evidence. Moreover, it is to be noticed that the limit is not a limit measured by the sentence which the trial Court could have imposed, but is measured by the sentence which a Presidency Magistrate or a Magistrate of the First Class could have imposed. So that I have no doubt whatever that we could enhance the sentence up to a period of two years. But, I think, we ought to be slow to exercise that power, because under Sub-section (6) of Section 439 the accused is entitled, before having the sentence enhanced, to challenge his conviction, and where he has been given a sentence which is not appealable by a Presidency Magistrate, and there is no evidence recorded, he has really no material on which he can challenge his conviction, and he is in a worse position than if he had been given an appealable sentence. We are bound, I think, to bear that circumstance in mind, and not to exercise the power of enhancement in cases of this nature unless the circumstances are special.

3. In these cases I do not think that the circumstances have any very peculiar features about them. In all the cases the offences were petty. In one case the accused stole two race-tickets on the tote for which he was given six months' rigorous imprisonment, and in another case the accused stole a sheet which was covering the complainant when sleeping out of doors. In that case the complainant rather put temptation in the way of the accused. In revision No. 248 the accused was convicted of picking the pocket of the complainant and there is certainly a technical flaw in that conviction. The learned Magistrate did record evidence in that case but he convicted the accused, not on the evidence, but on his plea of guilty, and in fact the accused did not plead guilty. He admitted that he had picked up the complainant's purse from the ground, but the charge against him was that he had taken it from the complainant's pocket. Therefore, the learned Magistrate was wrong in convicting the accused on his plea of guilty. But if we set the conviction of the accused aside we should only do so on the terms that the accused was re-tried, and as we have a record of the evidence and are satisfied that any new trial would certainly result in a conviction, it will be kinder to the accused not to interfere with the present sentence of four months of which he has already served about a half. In the remaining case the charge was against the accused for stealing a coat. So that all the charges were petty in their character, and I do not think in the

circumstances that the fact of the previous convictions, although it might have justified the Magistrate in recording the evidence afresh and passing an appealable sentence, justifies us in interfering in revision. Therefore, no order will be made on any of the applications.

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