

Emperor Vs. Ismail Alibhai

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Court : Mumbai

Decided On : Sep-14-1914

Reported in : (1914)16BOMLR934

Judge : Heaton and ;Shah, JJ.

Appeal No. : Criminal Appeal No. 854 of 1914

Appellant : Emperor

Respondent : ismail Alibhai

Judgement :

Heaton, J.

1. This is an appeal against a conviction for using criminal force to deter a public servant from the discharge of his duties. The offence consists in this that the two accused succeeded in preventing the arrest of a person who was believed to be taking part in traffic in cocaine. The two accused were sentenced and we are dealing with the appeal of one of them.

2. On the evidence, I think, the Magistrate was right in holding that the offence was committed. The chief question argued is this: Is a previous conviction one of the matters which a Court is permitted to consider in imposing sentence 1 The imposing of sentence is, within the wide limits allowed by the law, a matter of

discretion; it is not a matter of proof. That is it is a matter within the sphere not of evidence but of penology. Section 54 of the Indian Evidence Act is a part of the law of evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the enquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction, is irrelevant to help to establish an accused person's guilt. But the law of evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be, is largely left to practice and to the common sense and knowledge of the world of the Court. Where they are definitely indicated this is done in the Indian Penal Code and the law of Criminal Procedure, the Whipping Act and so forth; most emphatically not in the Law of Evidence. One might as reasonably, I think, look to the Law of Evidence for information as to the maximum sentence to be imposed. In my judgment, therefore, to apply Section 54 of the Indian Evidence Act to the matter now before us is as much out of place as to apply, say, the Hindu Law to an European's will. Of course, the previous conviction, if it is to be taken into account, must be proved to the satisfaction of the Court, and in the matter of proving it, it may be that the provisions of the Indian Evidence Act apply. I do not wish to express any opinion on that point.

3. Having regard to the previous conviction, I think that the sentence imposed in this case is appropriate to the offence and I would dismiss the appeal and confirm the conviction and sentence.

Shah, J

4. I agree that the conviction and sentence must be confirmed in this case. The conviction is undoubtedly right. We took time to consider the question of sentence. It is argued by Mr. Velinkar that the sentence must be based upon materials which are relevant under the Indian Evidence Act, and that the previous conviction which is taken into consideration by the lower Court is irrelevant under Section 54 of that Act.

5. The previous conviction is used in this case not for the purpose of affecting the punishment to which the accused is legally liable, but merely to influence the Court in determining the amount of punishment, which it should award. The conviction in this case is under Section 353 of the Indian Penal Code, and the previous conviction in question was for assaulting an Abkari sepoy on the 5th August 1905,- apparently Under Section 353 of the Indian Penal Code. I think that under Section 165 of the Indian Evidence Act the judgment must be based upon facts declared by the Act to be relevant and duly proved. Under the Criminal Procedure Code the judgment or the particulars to be recorded by a Presidency Magistrate would include the punishment, to which the accused is sentenced. It is clear that the sentence must be based upon facts which are relevant under the Indian Evidence Act. I am, however, unable to accept Mr. Velinkar's argument that under Section 54 a previous conviction is irrelevant just as the fact that the accused person has a bad character is irrelevant. His contention in effect is that the expressions ' bad character' and ' previous conviction' are mutually convertible terms within the meaning of Section 54. If the section, as it is now and as it was before the Amending Act III of 1891, be carefully read, it seems to me clear that these expressions cannot be treated as having exactly the same meaning and scope. Though the fact of bad character is irrelevant except as provided in the section itself, it does not follow that a previous conviction is similarly irrelevant.

6. The case of Emperor v. Duming (1903) 5 Bom. L.R. 1034 which is relied upon by Mr. Vehnkar in support of his contention, is really not in point. There the evidence of a previous conviction was admitted before the conviction of the accused of the offence charged; and the observations in the judgment have relation to that fact. The question raised in this appeal, viz., whether after conviction the proof of a previous conviction not covered by Section 75 of the Indian Penal Code can be given, did not arise and could not have been considered in that case.

7. I have also considered the provisions of Section 348 of the Code of Criminal Procedure in connection with this point. In my opinion the section does not touch the point that has been argued in this appeal.

8. It follows that the proof of a previous conviction not contemplated by Section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of Section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment. The lower Court was justified in taking it into consideration in deciding the question of punishment after the accused was found guilty. I do not say that any previous conviction not covered by Section 75, Indian Penal Code, is relevant to the question of sentence. But the question of relevancy of a previous conviction not falling under Section 75, Indian Penal Code, must be considered and decided in each case as it arises with reference to the circumstances of that case.