Ulfat Vs. State

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Court : Allahabad

Decided On : Oct-06-1967

Reported in : 1970CriLJ767

Judge : K.B. Asthana, J.

Appellant : Ulfat

Respondent : State

Judgement :
ORDER

Kondaiah, J.

1. The prisoner Ulfat was convicted for an offence under Section 395, I. P. Code by the Sessions Court at Aligarh on 11-5-1962 and was sentenced to undergo rigorous imprisonment for a term of tun years. He filed an appeal from jail which was put up before me in Chambers and was dismissed by me on 31-10-1962. However, in the mean-time Uifat had been convicted by the Sessions Judge of Mathura for an offence under Section 395, I. P. C. and sentenced to six years' Rule I. on 29-9-1962. His appeal from jail against the latter conviction was also dismissed by me in Chambers on 11-12-1962. It appears that when the Sessions Judge of Mathura recorded the conviction of Ulfat and sentenced him to six years' Rule I. it was not brought to his notice that Ulfat was already undergoing a term of imprisonment under a previous conviction. No orders under Section 397, Criminal

Procedure Code were passed, When I dismissed the appeal of Ulfat against his subsequent conviction and maintained the sentence there was no information laid before me that the appellant was already undergoing imprisonment under a previous conviction. The prisoner Ulfat then submitted this application from jail praying that his sentence for the subsequent conviction be made concurrent with the sentence awarded to him in the previous conviction. The papers were laid before me in Chambers on 28-9-1986 and I directed that a query be made from the Government Advocate in the matter. By my order dated 4-10-1966 I further asked the Government Advocate whether this Court had jurisdiction and competency to make the sentence concurrent at this stage. The learned Assistant Government Advocate submitted a note to the effect that no application under Section 561-A of the Criminal Procedure Code would lie after this Court had dismissed the appeal and this Court had no power or jurisdiction in the matter. Since I had some doubts I made an order on 6-6-1967. that the matter be heard in Court and notice be issued to the prisoner fixing a date and asking him to arrange for his representation. 1 further ordered that if the prisoner was not in a position to engage a counsel, the Court will appoint an amicus curiae,

2, Meanwhile, the office of the High Court put before me cases of two other prisoners, Sampu and Shyam Lal, in which similar question arose. The opinion of the learned Government Advocate was sought in these cases also and the submission was made that this Court had no jurisdiction left in the matter, I directed these cases also to be listed along with the matter of Ulfat.

3. On 19-5-1967. when I found that the prisoners had not been able to arrange for their representation through a counsel, I appointed Sri S. K, Sahai, Advocate, to appear as amicus curiae and to assist the Court. All the three cases have been put up before me today for orders.

4. I have heard Sri S.K. Sahai for the prisoners and Sri P.C. Srivastava, learned Assistant Government Advocate for the State. The Court is grateful to Sri S.K. Sahai for having prepared the cases on behalf of the prisoners and for having ably placed the law and the rules on the material questions which arose thus assisting the Court on behalf of the prisoners. The Court also appreciates the fair manner in

which Sri P.C. Srivastava, learned Assistant Government Advocate, put the case on behalf of the State.

5. As observed above, I am proceeding to pass orders in the 3 cases on the basis that the attention of the learned Sessions Judges who convicted the three prisoners in the subsequent trials was not drawn to the fact that the accused were already undergoing imprisonment under a previous conviction. It is clear, therefore, that no occasion arose before the learned Sessions Judges for exercise of their jurisdiction under the provisions of Section 397 of the Criminal Procedure Code. The appeals from jail of the prisoners both against the first and second conviction having been dismissed by the Judge in Chambers in the High Court, their convictions and sentences stood affirmed. In the High Court also no information was laid that the appellants were already undergoing imprisonment under some previous conviction, In the High Court also there thus arose no occasion to consider the cases of the appellants for making the subsequent sentence concurrent under the provisions of Section 397. of the Criminal Procedure Code,

6. The argument on behalf of the State was that this Court having finally dismissed the appeals against conviction and sentence, could not reconsider the matter and reduce or change the nature of the sentence by taking recourse to its powers under the provisions of Section 561-A of the Criminal Procedure Code. The submission was that it was open to the High Court in exercise of its appellate power to make the subsequent sentence concurrent with the earlier sentence when passing orders on the jail appeals from the subsequent conviction and sentence in the subsequent trial and since it did not do so, it would be deemed that the sentences were ordered to run consecutively and any interference now would amount to reviewing its previous order which was not permissible under the law.

7. I do not agree with the above submission of the learned Assistant Government Advocate. In my judgment it proceeds on a fallacy. The learned Assistant Government Advocate thinks that making a subsequent sentence concurrent would amount to changing the nature of the sentence. The other approach

involved in the argument is that the two sentences being consecutive if the subsequent one was made concurrent, it would amount to the reduction of the sentence. By making the subsequent sentence concurrent with the earlier sentence the Court would not be reducing the subsequent sentence. In the eye of law the subsequent sentence will also run for the full length of time fixed for it and will not cease to run. Likewise, in making the subsequent sentence concurrent with an earlier sentence, the nature of the subsequent sentence would not be changed. The alteration contemplated under the provisions of Section 423(1)(b) Criminal Procedure Code, takes place when the sentence of rigorous imprisonment is converted into simple imprisonment or into fine or vice versa. When the subsequent sentence is ordered to run concurrently with the earlier sentence, the nature of the subsequent sentence does not undergo any change or alteration. If it were a sentence of rigorous imprisonment, as it is in the instant case, it retains that characteristic.

8. The power to make the subsequent sentence concurrent with the earlier sentence is not an appellate power but is a separate and distinct power conferred by Section 397 of the Criminal Procedure Code. It is well established what the trial Court could do an appellate Court could also do. If the learned Sessions Judge could pass orders under Section 397, Criminal Procedure Code, the High Court in appeal also could pass an order under that section. As the High Court at the time when the jail appeals of the prisoners against the subsequent conviction and sentence were placed before the Judge in chambers, did not pass any order on the question of the subsequent sentences being made concurrent with the earlier sentence, it is sought to be argued that the High Court now in the instant cases cannot review its previous order.

9. The question that now remains to be considered is whether the three prisoners can now ask this Court to pass the necessary orders under Section 397(1) of the Criminal Procedure Code. It was urged on behalf of the State that if at the trial the prisoners did not bring to the notice of the Court that they were already undergoing a sentence of imprisonment for a previous conviction as that fact was specially within their knowledge, they cannot now have their subsequent sentence ordered to run concurrently with the previous sentence. I do not think the law throws a

burden on the undertrial to place before the Court the facts relating to his previous conviction and sentence. I think it is the duty of the prosecutor to bring it to the notice of the Judge presiding over the subsequent trial all the facts relating to previous conviction and sentence based thereon which the undertrial was already undergoing for the previous conviction as by its Section 397 the Criminal Procedure Code casts a duty on the Court to consider the question of the subsequent sentence being made concurrent when the offender had already been sentenced for another offence earlier and he was undergoing imprisonment. This approach which I have indicated is supported by the relevant provisions of the Jail Manual of Uttar Pradesh. Every offender who is sentenced to undergo imprisonment is sent to jail with a duly filled warrant for the purpose.

A duty has been cast on the Superintendent of Jail to which the prisoner is sent to examine the warrant of every convicted prisoner and satisfy himself as to the particulars mentioned in paragraph 23 of Chapter 3 of the Manual. One of such particulars is that the warrant ought to show that the orders of the Court were clearly stated in the warrant, as for example, in the case of a convict already undergoing a sentence whether the sentence or sentences passed subsequently shall take effect at once or after the expiry of the current sentence and in case of prisoners previously convicted a statement of their previous convictions giving the date, the nature of offence and the term of the sentence. Paragraph 36 of Chapter 3 of the Jail Manual then provides that the Superintendent will make a special examination of the warrant when a prisoner already undergoing a sentence of imprisonment is sentenced to imprisonment and find out if the previsions of Section 397 of the Criminal Procedure Code, 1898, have been followed. The Jail Manual thus contemplates that the warrant which is forwarded with the convicted prisoner will contain the facts about his previous conviction and the sentence passed thereon and also the action taken under Section 397 of the Criminal Procedure Code in the case of such a prisoner. Paragraph 28 of the Jail Manual empowers the Superintendent to return the warrant for correction to the officer who issued it if by any error or omission the warrant is defective in form or otherwise irregular.

It clearly follows from this that in case of a prisoner who has already been previously convicted for an offence and was undergoing sentence of imprisonment, the Superintendent is under a duty to examine the warrant to see if the provisions of Section 397 of the Criminal Procedure Code have been followed and if he finds that it is not so, he is under a further duty to return the warrant as it would be defective on account of an omission. I have referred to the provisions of the Jail Manual to show that the exercise of power by a Court under Section 397 of the Criminal Procedure Code has not been treated as a matter of pleading by the accused, but it is a provision which has been enacted for due administration of criminal justice and the Courts who convict and pass sentence of imprisonment on the accused are bound to consider whether the sentence passed by them is to run concurrently with the sentence of imprisonment inflicted on the accused under some previous conviction. Once I am correct in that approach, in my judgment, there has arisen a clear case of omission on the part of the learned Judges who held the respective trials of these three prisoners. Now it has been brought to the notice of this Court that all these three prisoners were undergoing sentence of imprisonment under previous convictions, I think the ends of justice require that this Court should take recourse to powers under Section 561-A of the Criminal Procedure Code and consider whether the subsequent sentence be ordered to run concurrently with the earlier sentence as provided by Section 397(1) of the Criminal Procedure Code. I, therefore, come to the conclusion that this Court has jurisdiction in the instant cases to consider the question whether the sentences awarded against the three prisoners in the subsequent trial should be made concurrent with their previous sentences.

10, On the merits the learned Assistant Government Advocate submitted that all these three prisoners have been convicted for serious offences in the earlier trial and the subsequent trial and since they appear to be habitual dacoits there would be no justification to make their sentences run concurrently. I have perused the judgment of the Sessions Judge in respect of the three prisoners and I find that their conviction is substantially based on identification and there is no allegation against them of any rapacity or undue violence while committing the offence. The sentences passed against them in the previous trial are substantially long, for example, ten years' rigorous imprisonment in the case of Ulfat.

11. I think the ends of justice would be met if the sentences passed against these prisoners in the subsequent trial are made to run concurrently. I accordingly order so.