

Mulaim Singh Vs. State

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Court : Allahabad

Decided On : May-22-1974

Reported in : 1974CriLJ1397

Judge : K.N. Seth, ;H.L. Capoor and ;B.N. Katju, JJ.

Appellant : Mulaim Singh

Respondent : State

Judgement :

K.N. Sath, J.

1. The basis questions involved in the applications referred to this Bench are:

1. Whether it is open to the Judge who decided an appeal to pass an order under Section 397(1), Code of Criminal Procedure after he has delivered the judgment or he will be debarred from doing so because the order will amount to an alteration of the sentence already imposed?

2. Whether it would be competent for the High Court in exercise of its power under Section 561-A, Code of Criminal Procedure to direct that the sentence of a subsequent conviction to imprisonment shall run concurrently with the previous sentence if the stage for exercise of the discretion conferred under Section 397(1) of the Code is over?

3. The circumstances in which the sentence on a subsequent conviction should be made to run concurrently with the previous sentence?

2. In Mulaim Singh's case it appears that in Sessions Trial No. 149 of 1966 he was convicted under Sections 399, 402, 147, 307 and 149 of the Indian Penal Code and under Section 25 of the Arms Act and was sentenced to various terms of imprisonment under various counts. The sentences were, however, directed to run concurrently. His appeal was dismissed by a learned single Judge of this Court on 8.10.1969. Mulaim Singh was also prosecuted in Sessions Trial No. 127 of 1966 and was convicted under Section 395, I.P.C. and sentenced to seven years' rigorous imprisonment. An appeal filed by him against his conviction and sentence was dismissed by a learned single Judge of this Court on 9-10-1969. On March 2, 1971, an application was made in the appeal arising out of Sessions Trial No. 127 of 1966 praying that the sentences awarded in the two trials and upheld in the appeals therefrom may be made concurrent under the provisions of Section 397(1) of the Code of Criminal Procedure.

3. Sukh Bam was convicted in Sessions Trial No. 116 of 1968 and sentenced to ten years' rigorous imprisonment under Section 395, I. P. C., by an order dated 14.12. 1963. His appeal (Criminal Appeal No. 390 of 1969) was dismissed by this Court by an order dated 11-2-1971. Sukh Ram was also convicted in Sessions Trial No. 113 of 1968 and sentenced to seven years' rigorous imprisonment under Sections 395/397, I. P. C., by an order dated 11-6-1969. He did not prefer any appeal against his conviction and sentence. On 11-1-1974 an application was made under Section 561-A read with Section 397, Code of Criminal Procedure in Criminal Appeal No. 390 of 1969 praying that the sentence awarded in Criminal Appeal No 390 of 1969 may run concurrently with the sentence awarded in Sessions Trial No. 113 of 1968.

4. It was urged on behalf of the applicants in the first place that this Court was competent, to make the two sentences run concurrently under Section 397(1) of the Code and reliance was placed on the decision of a learned single Judge of this Court in *Ulfat v. State* 1967 All W R (HC) 757 : 1970 Ori LJ 767.

5. The relevant part of Section 397 of the Code provides:

When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

6. The legislative intent obviously appears to be that when a person already undergoing a sentence of imprisonment is subsequently convicted and sentenced for another offence the sentence awarded under the subsequent conviction shall not commence till after the expiry of the sentence which he is already undergoing. The general rule is that a sentence commences to run from the time it is imposed but Section 397(1) engrafts an exception to this general rule in the case of a person who is already undergoing a sentence of imprisonment. However, a discretion is given to the Court to direct that the subsequent sentence shall run concurrently with the previous sentence, A. similar discretion is provided by Section 35 of the Code where a person is convicted and sentenced for two or more offences at one trial, It provides that the sentences inflicted for various offences shall commence to run one after the other unless the Court directs that such punishments shall run concurrently. Obviously the stage for exercising the discretion is when the Court records the conviction and inflicts punishments on the accused. The discretion under Section 397(1) can also be exercised at the stage when the court records the subsequent conviction. The language employed in Section 397 does not indicate that the discretion to direct that the sentence under the subsequent conviction shall run concurrently with the previous sentence can be exercised at any subsequent stage.

7. The question may be considered from another angle. Section 369 of the Code lays down that no court when it has signed its judgment shall alter or review the same except to correct a clerical error unless permitted by the Code or by any other law for the time being in force. There is no provision in the Code of Criminal Procedure analogous to Order XLVII of the Code of Civil Procedure which empowers the Court to review or revise its judgment, except to correct a clerical error. Section 430 of the Code which applies to all appellate courts, including the High Court, provides that judgments and orders passed by an appellate court upon

appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII of the Code. Section 417 provides for appeal by the State Government to the High Court from an order of acquittal passed by any court other than a High Court Under Chapter XXXII provisions are made for reference and revision which are inapplicable to the order of the High Court itself. It is thus obvious that the judgments and orders passed by a High Court on Appeal are final. In this view of the matter also the High Court would not be competent to exercise the discretion conferred by Section 397(1) of the Code after the final judgment is passed.

8. It was contended that if the sentence under the subsequent conviction is made to run concurrently with the previous sentence even after the final judgment has been passed in the subsequent trial or in the appeal arising therefrom that would not amount to a review or alteration of the judgment within the meaning of Section 369 of the Code. Reliance for this argument was sought from Ulfat's case (supra) wherein it was observed that by making the subsequent sentence concurrent with the earlier sentence neither the subsequent sentence is reduced nor its nature changed and it retains its earlier characteristic. It was also observed that the power to make the subsequent sentence concurrent with the previous sentence is not an appellate power but is a separate and distinct power conferred by Section 397, Criminal Procedure Code. A reference in this connection was also made to the observation made by a learned single Judge of the Patna High Court in *Bajnath Kurmi v. The State* : AIR1961 Pat138 to the effect that 'an order made by a Court under Section 397(1) as to the commencement of the sentence need not be a part of its judgment, and may, therefore, be made by the Court passing the subsequent sentence after the judgment is signed.' With respect we find it difficult to endorse the aforesaid reasoning. It is not only the order of conviction but also the sentence awarded and the directions given in that behalf that constitute integral parts of the judgment and cannot be reviewed or altered after the judgment has been pronounced. The direction contained in a judgment with regard to the sentences imposed on the accused, i. e., whether they shall run concurrently or consecutively is as much an integral part of the judgment as his conviction consequent upon a finding regarding the guilt of the accused. In a case where there is no such specific direction the law would take its course and, as pointed out earlier, the general rule, embodied in the Code is that the sentences

would run consecutively. This principle is applicable both in the case of trial and appellate courts. The prohibition against reviewing or altering the judgment is equally applicable to both trial and appellate courts. The word 'alter' means 'to cause to become different in some particular characteristic (as measure, dimension course, arrangement, or inclination) without changing into something else'. A change in the 'course' or 'arrangement' of the sentence would certainly amount to an alteration of the sentence which forms a part of the judgment. We are of the opinion that neither the trial court nor the appellate court is competent to exercise the discretion conferred under Section 397(1) of the Code after the judgment has been signed.

9. The next question for consideration is whether it would be competent for the High Court in exercise of its power under Section 561-A, Criminal Procedure Code to direct that the sentence of a subsequent conviction to imprisonment shall run concurrently with the previous sentence. This section was introduced in the Code in 1923 to allay doubts expressed in some decisions regarding the existence of such inherent power in the High Court. It confers no new power on the High Court but merely safeguards all existing inherent powers necessary to do the right and to undo a wrong in the course of administration of justice. The expression in the section 'nothing in this Code shall be deemed to limit or affect the inherent power of High Court' makes it abundantly clear that the inherent power to the High Court is not controlled or circumscribed by the provisions of the Code.

10. The purposes for which that power may be exercised are to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The ambit of the inherent power under Section 561-A has been considered in the Full Bench case of Mahesh v. State 1971 All LJ 668 : 1971) Cri LJ 1674 (FB). After a review of judicial decisions on the point this Court held: the inherent power under Section 561. A. Cr.P.C., cannot be invoked in respect of any matter covered by the specific provision of the Code, not can it be exercised contrary to or inconsistent with such provisions. It is only when the matter is not covered by the provisions of the Code that the inherent power under Section 501-A can be availed of for doing justice in the case or for preventing the abuse of the process of the Court. The inherent power cannot be exercised to do

what the Code prohibits, expressly or by implication, the Court from doing. Prohibitions cannot be presumed. Where there exists no express prohibition the Court shall have to see whether prohibition can be implied from the various provisions of the Code. Further, when no provision exists in the Code to govern certain matter, it shall have to be considered whether the omission is deliberate or is by oversight or inadvertence. The inherent power cannot affect the substantive rights. It can be invoked only to lay down the procedure in cases not covered by the provisions of the Code. The inherent power is to be exercised in exceptional cases, and even then carefully and with caution, when there is no other remedy which can be effectively availed of. The High Court will also be justified to exercise its inherent power in those exceptional cases which could not be in the mind of the legislature at the time of enacting the Code even though for usual cases a provision was made therein. Whenever the inherent power is exercised, it shall be for one of the three purposes mentioned in Section 561-A, Cr.P.C., that is, to give effect to an order under the Code, or to prevent the abuse of the process of the Court or to secure the ends of justice.

The Court then proceeded to examine the question whether the High Court is possessed of the power to review, revise or reconsider the judgment or order duly pronounced in Criminal Appeals and Criminal Revisions and arrived at the conclusion that under its inherent power the High Court is competent to alter i.e. review, revise or reconsider a judgment or order passed or made in a Criminal Appeal or Revision when necessary to give effect to any order under the Code or to prevent the abuse of the process of the Court or otherwise to secure the ends of justice but the inherent power shall be exercised in exceptional circumstances only without in any way acting contrary to the intention of the legislature. The inherent power is not meant to reassess the evidence or to introduce fresh materials on the record for the purpose of deciding the matter afresh but it would be a proper exercise of the inherent power where the trial has been a mockery or the code of conviction, if allowed to stand, would amount to abuse of the process of the Court.

11. Applying the principles enunciated in *Mihash's case*, 1971 All LJ G68 : (1971) Cri LJ 1674 (FB) (Supra) to the question for consideration before us we feel that it would be competent for the High Court in exercise of its inherent power to direct

that the sentence under a subsequent conviction, to imprisonment may run concurrently with the previous sentence even if the stage for exercise of discretion under Section 397(1) of the Code is over in circumstances, where it would serve any of the three purposes mentioned in the section i.e. to give effect to any order under the Code or to prevent the abuse of the process of the Court or otherwise to secure the ends of justice.

12. The discretion to make the sentence on subsequent conviction run concurrently with the previous sentence must be based on some sound principle and is not meant to be exercised in an arbitrary manner. It would be proper exercise of discretion to make the sentence on a subsequent conviction to run concurrently with the previous sentence where separate trials are held for offences which while constituting distinct offences, are inherently or intimately connected with each other. A person employed to realise money for his master from persons who owe to him in connection with business dealings may misappropriate money realised from some debtors during the course of a certain period and may be tried separately for each item of money misappropriated and may consequently be sentenced to separate terms of imprisonment. It would be a proper exercise of discretion to make the sentence run concurrently in the exercise of the discretion conferred by Section 397(1) of the Criminal Procedure Code and, if that stage is over, by the High Court under Section 561 A of the Code. A person may be put up for trial for offences punishable under Sections 399/402, I.P.C. He may be separately tried for an offence punishable under Section 25, Arms Act in respect of a weapon recovered from his possession at the time of his arrest. It would be a proper exercise of discretion if the sentences on subsequent conviction is made to run concurrently with the previous sentence. There may be a case where although it is brought to the notice of the Court holding the subsequent trial or to the appellate court hearing appeal from the subsequent conviction that the accused was already undergoing a sentence of imprisonment as a result of his conviction in an earlier criminal trial but due to an oversight the Court omits to exercise its discretion of making the sentence on subsequent conviction run concurrently with the previous sentence, it would be a fit case for exercise of the inherent power of the Court under Section 561-A of the Code to make the two sentences run concurrently on the principle that the accused should not be made

to suffer on account of the omission of the Court to apply its mind to the discretionary power vested in it under the Code. If the fact of the previous conviction and sentence is brought to the notice of the Court dealing with the subsequent trial, whether as an original court or as an appellate court, it is the duty of the Court dealing with the subsequent trial to apply its mind to the question whether the sentence on subsequent conviction should be made concurrent with the previous sentence and if the Court for one reason or the other fails to apply its mind to that question, it would be in the interest of justice that the High Court rectifies that mistake under its inherent power. In such a situation the Court would not be acting contrary to any provision of the Code or against any express or implied prohibition contained in it.

13. It would be an exercise in futility to lay down exhaustively the situations and circumstances in which the exercise of inherent power would be justified. However, it must be borne in mind that the general scheme of the Code is that the sentence awarded at a subsequent trial shall commence at the expiration of the imprisonment to which the accused has been previously sentenced. The discretion conferred on the Court under Section 397(1) has to be exercised on some judicial principle. If a situation arises, for invoking the inherent power of the Court under Section 561-A of the Code, the Court has to see whether the circumstances and the object for which the inherent power is to be exercised are in existence and can be achieved. It is equally well established that the inherent power is to be exercised to do the right and to undo a wrong in the course of administration of justice and this power ought to be exercised sparingly only when the Court feels that the ends of justice require it and not as a matter of routine.

14. The question whether the facts and circumstances existing in the present cases justify the exercise of inherent power of the Court may now be considered. Mulaim Singh was convicted under Sections 399, 402, 147, 307 and 149, I.P.C. and under Section 25 of the Arms Act and was sentenced to various-terms of imprisonment and the sentences were directed to run concurrently. His appeal was dismissed by this Court on 8-10-1969. He was thereafter convicted and sentenced to seven years' rigorous imprisonment under Section 395, I.P.C. in a separate Sessions Trial and his appeal was dismissed by this Court on 9-10-1969.

The present application was made on 2-3-1971. The record discloses that the two trials were for separate and distinct offences unconnected with each other. Sukh Ram was convicted in Sessions Trial No. 116 of 1968 and sentenced to ten years' rigorous imprisonment under Section 395, I.P.C. His appeal was dismissed by this Court by an order dated 11.2.1971. He was also convicted in Sessions Trial No. 113 of 1968 and sentenced to seven years' rigorous imprisonment under Sections 395/397, I.P.C. against which he did not prefer any appeal. The present application was made on 11-1-1974 for making the sentences awarded under the aforesaid trials run concurrently. The record does not disclose that the incidents leading to the aforesaid trials were in any sense connected. In normal Bourse the sentence awarded to the applicants in the subsequent convictions would commence after the expiry of the imprisonment to which they have been previously sentenced. In these circumstances we find no justification for exercise of our inherent power under Section 581-A of the Code. The applicants appear to be hardened criminals. We do not feel that the ends of justice require that the sentences should be made to run concurrently. No question of giving effect to any order under the Code or to prevent the abuse of the process of any court is involved in these cases.

15. Learned Counsel for the applicants referred to us certain cases in which this court in exercise of its inherent powers directed that the sentence on subsequent conviction should run concurrently with the previous sentence. In Ulfat's case 1967 All WR (HC) 757 : 1970 Cri LJ 767 (supra) it was observed that the conviction of the applicants was based on identification and there was no allegation against them of any rapacity or undue violence while committing the dacoity. The same reasoning was applied in Shamley v. State 1969 All W R (HC) 200. In Mohammad Ali v. State 1969 All W R (HC) 496, the only ground for making the sentence run concurrently was that the conviction in both the cases rested on evidence of identification, The fact that the conviction of the accused persons was based on identification could not be a relevant consideration in making the sentence under the subsequent conviction run concurrently with the previous sentence in exercise of the inherent power under Section 561-4, of the Code. The fact that there was no allegation of any rapacity or undue violence while committing the dacoity could also not furnish a valid consideration for exercisa of the inherent power of the

Court. A dacoit may not indulge in baating or terrorising the victims because no resistance is offered during the commission of the crime and not because of any humane or noble trait in his own character. Where offences giving rise to separate trials and convictions are distinct and are not intimately connected, the sentences should be made to take the normal course and it would not be a proper exercise of judicial discretion more so in the exercise of the inherent power of the court, to make them run concurrently. The applications of Mulaim Singh and Sukh Ram do not make out any case for making their sentences concurrent.

16. The applications are accordingly dismissed.

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