

**Balya Vs. State**

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**Court :** Rajasthan

**Decided On :** Feb-26-1959

**Reported in :** AIR1959Raj278; 1959CriLJ1366

**Judge :** J.S. Ranawat, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 221(7), 251A(13) and 537; Indian Penal Code (IPC) - Sections 75

**Appeal No. :** Criminal Revn. No. 189 of 1958

**Appellant :** Balya

**Respondent :** State

**Advocate for Def. :** Rajnarain, Asst. Govt. Adv.

**Advocate for Pet/Ap. :** Lal Singh, Adv.

**Disposition :** Revision dismissed

**Judgement :**

ORDER

**J.S. Ranawat, J.**

1. This is a revision petition on behalf of Balya against the judgment of the Additional Sessions Judge of Jhalawar of 18-7-1958 confirming on appeal the

judgment of the Magistrate First Class, Jhalawar, convicting him under Section 379 read with, Section 75 of the Indian Penal Code and sentencing him to one year's rigorous imprisonment and a fine of Rs. 300/- or in default three months further rigorous imprisonment.

2. Briefly put, the prosecution case was that on 16-5-1957 at about 7 or 8 a. m. Harisingh, while he was purchasing a ticket for going to his village in a bus, saw a hundred rupee note falling down from his pocket in two parts. He picked up the pieces of the currency note and felt his pocket in which he had put currency notes of the value of Rs. 1,000/-. To his surprise, he found his pocket cut underneath, with the result that all his money was found missing. He raised a hue and cry and the accused was instantly caught by Kalia, a bystander. The accused at that time was carrying currency notes in his hand. He was taken to the Police Station, Patna by Bherusingh, a police constable and Kalia.

The complainant Harisingh also followed them. A report was lodged of the occurrence and the police recovered currency notes of the value of Rs. 900/- from the possession of the accused. The accused was challaned by the police to the court of the Magistrate First Class, Jhalawar. The accused did not admit his liability and stated that the currency notes were put in his hand along with a blade of safety razor and he was thus implicated in this case. The Magistrate, after holding a trial, found the accused guilty on the basis of the evidence of Harisingh, Kalu-ram, Kallan and Bhanwarsingh, and the circumstance of there being cuts on some of the notes recovered from the possession of the accused similar to the one found on the two pieces of the currency note produced by Harisingh. The learned Magistrate held the accused guilty, as noted above.

3. On appeal, the finding of the first court was upheld by the learned Additional Sessions Judge, Jhalawar. The accused has come in revision to this Court.

4. It is urged by the learned counsel of the accused that the Magistrate, who tried the case, disregarded the provisions of Section 251A (13) in recording evidence regarding previous conviction of the accused in course of the trial before he recorded an order of conviction. It was pointed out that the Magistrate recorded the statements of Harcharan and Manjoor Ahmad on 18-3-1957, when the order of

conviction was passed on 13-5-1958. It was also urged that the Magistrate was in error in convicting the accused under Section 75 of the Indian Penal Code for the reason that there was no evidence on record of the case to establish the identity of the accused to be the same person who had suffered previous convictions.

5. Mr. Rajnarain for the State has urged that though the Magistrate was wrong in taking evidence regarding previous conviction of the accused before convicting him, yet the irregularity, under the circumstances of this case, is not such as to vitiate the trial.

6. Section 251A(13) provides as follows: 'In a case where a previous conviction is charged under the provisions of Section 221, Sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under Sub-section (5) or Sub-section (12), take evidence in respect of the alleged previous conviction, and shall record a finding thereon'.

7. In the instant case, the Magistrate failed to comply with the provisions of Section 251A(13) inasmuch as he recorded the statements of two witnesses, namely Manjoor Ahmad and Harcharansingh regarding previous convictions suffered by the accused before passing an order convicting the accused. The question is whether the non-compliance of the provisions of Section 251A referred to above is fatal for the prosecution. Section 54 of the Indian Evidence Act lays down that in criminal proceedings the fact that the accused person has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant.

In Explanation 2 of Section 54, it is provided that a previous conviction is relevant as evidence of bad character. In order to safeguard the correct application of Section 54 of the Evidence Act at the criminal trial, the legislature made the provision of Section 251A Sub-section (13). Where a charge under Section 75 of the Indian Penal Code was also framed against an accused, the evidence of previous conviction could be taken only after an order of conviction was passed against the accused. In trials by jury or assessors, a further object may also be read into the provisions of Section 251A(13) referred to above of not prejudicing

the mind of the jury or the assessors by bringing to their notice the fact of the previous conviction of the accused.

This, however, may not be a consideration in cases where the trial is not with the aid of jury or assessors. In cases tried by a Magistrate, the fact of previous conviction cannot escape the notice of the Magistrate, for the fact of previous conviction is stated in the charge under the provisions of Section 221(7) of the Criminal Procedure Code. The mischief that may be deemed to have been caused by disregard of the provision of Section 251A(13) in the instant case is to the effect that inadmissible evidence may be placed on the record and could be taken into account for recording conviction of the accused.

If the Magistrate makes use of inadmissible evidence in convicting the accused, his order of conviction would become perverse and liable to be interfered with for the reason of disregard of the provision of Section 251A (13). But where the evidence of previous conviction is not made use of in convicting an accused person, the mere recording of such evidence before passing an order of conviction may not by itself cause any prejudice to the accused, in which case, the irregularity may be deemed to be curable under Section 537 of the Criminal P. C.

8. In the instant case, a perusal of the judgment of the Magistrate as well as that of the Additional Sessions Judge makes it evident that the fact of the previous conviction was not taken into account in convicting the accused. The order of conviction was passed on the evidence regarding, the fact of the accused stealing money from the pocket of the complainant Harisingh. Thus, though evidence regarding previous conviction of the accused was placed on the record before the accused was convicted, yet the fact of the evidence having come on the record by itself did not cause any prejudice to the defence for the reasons that the evidence regarding previous conviction was not at all considered in convicting the accused.

9. Harisingh, the complainant stated that when he was busy purchasing a ticket, he saw two pieces of hundred rupee currency note dropping down on the ground. He felt his pocket and found it cut at the bottom. He also stated that he had currency notes of the value of Rs. 1,000/- in his pocket which were found missing except that two pieces of hundred rupee note out of the contents of his pocket

were picked up by him from the floor and it was at this stage that the witness raised a hue and cry and Kalian caught the accused with currency notes in his hand.

The man who caught the accused immediately, has also supported the evidence of Harisingh. Kalu-ram has stated that a day previous to the occurrence, he gave seven currency notes of the value of Rs. 100/- each and thirty currency notes of the value of Rs. 10/- each to Harisingh as price of a pair of bullocks purchased by him from the complainant. Bhanwarsingh, who was with Harisingh at the time, has also supported the testimony of Harisingh. The currency notes, that were recovered from the person of the accused soon after, were taken into the custody of the police.

The cuts on the currency notes that were recovered from the accused and the two pieces of the currency note that were handed over to the police by Harisingh when he filed the first information report were observed by the learned Magistrate who found that the size, shape, direction and the place of the cuts on the pieces of currency notes produced by the complainant and on the currency notes found in the possession of the accused corresponded with each other. A sharp blade of a safety razor was also recovered from the pocket of the accused when he was caught by Kalian.

The evidence noted above by itself was considered sufficient to justify the finding against the accused that he was responsible for cutting the pocket of Harisingh and for stealing currency notes of the value of Rs. 900/-. The order of conviction was not based on the fact of the accused having previous convictions to his credit. Thus, it may be held that the fact of the evidence of Manjoor Ahmad and Harcharan having been placed on the record before the stage of recording of the conviction of the accused cannot be deemed to have caused prejudice to the accused under the circumstances of this case and for this reason, the irregularity cannot be taken to be fatal to the prosecution,

10. The learned Magistrate in convicting the accused under Section 75 of the Indian Penal Code acted on the basis of the evidence of the Superintendent, Kotah Jail Shri Harcharansingh who stated that the accused suffered rigorous

imprisonment of six months in a theft case under the orders of the City Magistrate, Kotah and he was released from jail on 1-10-1949. The witness did not identify the accused, but he stated that Balya Bagri son of Deva of village Richhariya was convicted by the City Magistrate, Kotah, and he suffered six months imprisonment.

The witness gave the evidence on the basis of the records of the jail which he brought with him in the court and a copy thereof was placed on the record. Manjoor Ahmad Sub-Inspector of Police In-charge of Police Station Ramganjmandi also stated that the accused Balya Bagri son of Deva of village Richhariya was a previous convict. The argument of the learned counsel is that the finger prints of the accused were not compared with the fingerprints of the person who suffered jail and for this reason, the identity of the accused should not be taken to have been established strictly. The parentage and the residence of the accused specified in the jail register agree with the particulars of the accused.

Had thumb-marks also been compared, that would have been all the more proper. But the evidence that has come on the record cannot be regarded to be insufficient to prove the identity of the accused as regards the point of his having suffered previous conviction under Section 379. The sentence of one year's rigorous imprisonment and a fine of Rs. 300/- or in default three months further rigorous imprisonment could be passed under Section 379 of the Indian Penal Code even without taking the aid of Section 75 of the Indian Penal Code. As such, the contention of the learned counsel against the conviction of the accused under Section 75 lose their force. The revision fails and is dismissed.

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