

In Re: Nattayyan

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SooperKanoon Citation : sooperkanoon.com/813032

Court : Chennai

Decided On : Apr-09-1970

Reported in : (1970)2MLJ668

Appellant : In Re: Nattayyan

Judgement :

ORDER

N. Krishnaswamy Reddy, J.

1. The point involved in this reference and revision is whether it is necessary to frame a charge under Section 75, Indian Penal Code, by the Magistrate in Warrant Cases for proving previous conviction for the purpose of awarding enhanced sentence to the accused convicted of offences punishable under Chapter XII or Chapter XVII of the Code with imprisonment of either description of a term of three years or upwards.

2. The brief facts leading to the reference by the learned District Magistrate, North Arcot are these : During the scrutiny of calendar and judgments of the Additional First Class Magistrate, Vellore, the learned District Magistrate noticed that the accused who was the same in C.C. Nos. 117 to 119 of 1968 on the file of the said Court was sentenced to undergo Rigorous Imprisonment for six months under each of the two counts viz., 457 (latter part) and 380, Indian Penal Code, the sentences to run concurrently, though he was previously convicted by the same

Court for a similar offences in C.C. No. 305 of 1965 on 11th December, 1965 and sentenced to undergo Rigorous Imprisonment for nine months. The learned District Magistrate felt that the Additional First Class Magistrate should have framed a charge under Section 75, Indian Penal Code, in respect of his previous conviction in C.G. No. 305 of 1965 and awarded a more severe sentence than what was imposed by him. He. therefore, called for remarks from the Additional First Class Magistrate for not having framed charge under Section 75, Indian Penal Code. The Additional First Class Magistrate submitted a report stating that it was not necessary to frame charge under Section 75, Indian Penal Code, unless he felt that the sentence to be imposed by him would not be adequate as provided for the offence and it was only necessary to do so in the Court of Sessions where a higher sentence than the ordinary maximum sentence has to be imposed. The Additional First Class Magistrate in his report relied upon a decision of a Division Bench of the Kerala High Court in State of Kerala v. Krishnan Kutti (1966) M.L.J. 296. The learned Additional First Class Magistrate further submitted that he had not framed supplemental charge under Section 75, Indian Penal Code, relying on the said decision. The learned District Magistrate in. his reference pointed out that under Rule 65 of the Criminal Rules of Practice, the charge under Section 75, Indian Penal Code, should be framed in all cases where the punishment of an accused person is affected. He also stated in his reference that under Rules 308 and 309 of the Criminal Rules of Practice, the previous convictions and sentences shall be stated at the end of the judgment in all cases where the rules require a judgment to be submitted and in other cases, the particulars of previous convictions and sentences shall be invariably entered in the column of remarks and that in all sessions calendars submitted to the High Court particulars of previous convictions and sentences should be given except in cases of acquittal and a note should be made as to whether any or all of those previous convictions have been admitted by or proved against the accused. These Rules have been referred to by the learned District Magistrate obviously for the reason that irrespective of the nature of the punishment awarded to the accused person, the previous conviction, if any, of the accused should be noted. The learned District Magistrate also-referred to the practice in vogue in the Courts of Magistrates that if the Magistrate finds an accused person guilty of an offence mentioned under

Section 75, Indian Penal Code, and convicts him, if there is a previous conviction against the said accused, he would frame a charge under Section 75, Indian Penal Code, invariably for awarding a more deterrent sentence than ordinarily given. The learned District Magistrate suggested that in the case of old offenders dealt with by the Magistrates that the existing practice prevailing in many of the Courts should be followed and that a supplemental charge under Section 75, Indian Penal Code, has to be framed where the Magistrate on conviction considers that the accused would be liable for enhanced punishment than that which was awarded in the previous case. He was therefore, of the opinion that the procedure followed by the Additional First Class Magistrate in the three cases without framing charges under Section 75, Indian Penal Code, and awarding sentence of six months less than the sentence imposed on the accused in the previous case, namely, nine months, was wrong. He requested in his reference to quash the conviction and sentence imposed on the accused and remand the case for fresh disposal according to law.

3. To appreciate the point involved in this reference, the following provisions of the Indian Penal Code and the Criminal Procedure Code have to be considered:

Section 75, Indian Penal Code, runs thus:

Whoever, having been convicted:

(a) by a Court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life or to imprisonment of either description for a term which may extend to ten years.

The head note to Section 75 is as follows:

Enhanced punishment for certain offences under Chapter XII or XVII after previous conviction.

This section enables the Court to impose enhanced sentence upto the maximum of Imprisonment for life or to imprisonment of ten years of either description for any

offence committed by a person mentioned therein if he had been previously convicted for the like offence irrespective of the maximum sentence provided for such offence. No minimum sentence is provided under this section

4. Section 221 (7), Criminal Procedure Code, in respect of framing of charges lays down as follows:

If the accused having been previously convicted of any offence is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed.

This clause deals with the manner of framing a charge where enhanced punishment is to be awarded by reason of previous conviction. Section 511 Criminal Procedure Code provides as to the mode of proof of previous conviction in any enquiry. trial or other proceeding under the Criminal Procedure Code Section 348 (1) Criminal Procedure Code, provides in respect of trial of persons previously convicted of offences against property and it runs thus:

Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Sessions or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

Similarly, Section 349 (1), Criminal Procedure Code, is as follows:

(1) Whenever a Magistrate of the second or third class, having jurisdiction is of opinion after hearing the evidence for the prosecution and the accused that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate.

The other clauses are omitted as not relevant.

5. Under Section 310, Criminal Procedure Code, the procedure is laid down for framing charge by a Sessions Judge in cases of previous conviction for awarding enhanced punishment.

6. From the foregoing provisions, the following points relevant for discussion in this case can be deduced (1) An accused who has got previous conviction for offences punishable under Chapter XII or Chapter XVII of the Code by virtue of Section 75, Indian Penal Code, if convicted can be punished to the maximum of imprisonment for life or ten years. (2) If the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused to take his trial on the ground that the punishment which can be awarded by him after conviction will not be adequate by reason of the previous conviction of the accused, he can commit the accused to the Court of Session (3) Whenever Magistrate of the second or third Class after hearing the evidence of the prosecution and the accused is of the opinion that the accused is guilty and ought to receive a deterrent punishment, may record his opinion and submit his proceedings to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate irrespective of the fact whether the accused has previous conviction or not (4) In cases where enhanced sentence has to be imposed, a charge under Section 75, Indian Penal Code, has to be framed and put to the accused.

7. It appears at the outset from the reading of the above provisions that where a Court can award the maximum sentence, which it is competent to award the aid of Section 75. Indian Penal Code, is unnecessary for imposing such maximum sentence by the Court. It also appears that a Magistrate when he feels by virtue of

previous conviction of an accused, he should be committed to sessions for receiving enhanced sentence, he can do so. It is significant that where the Magistrate commits an accused to take his trial in sessions by virtue of his previous conviction it is not necessary for him to frame a charge under Section 75, Indian Penal Code, and commit the accused to sessions. It is clear that the Sessions Court has to frame a charge under Section 75, Indian Penal Code for the purpose of proving previous conviction. So far as the Magistrates are concerned, the First Class Magistrates are competent to impose sentence of imprisonment not exceeding two years and the Magistrates of Second Class to imprisonment not exceeding six months. It would appear that a Second Class Magistrate can impose a maximum sentence of six months and the First Class Magistrate can impose a maximum sentence of two years and that therefore, without proof of previous conviction, the Magistrates can impose the maximum sentence as they desire in each case. It is contended that the Magistrates trying persons who have got previous convictions, need not frame charge under Section 75, Indian Penal Code as they are competent to impose the maximum sentence provided under the law. In other words, it is stated that a charge has to be framed only by Sessions Court on a committal by the Magistrate under Section 348 (1), Criminal Procedure Code. It is also submitted that an enhanced sentence provided under Section 75, Indian Penal Code, cannot be equated with a deterrent sentence that a Magistrate can give in a particular case depending upon the circumstances of that case, but that will mean only the sentence to be imposed more and above the maximum sentence provided for the particular offence. If we are left with the provisions mentioned above alone, it can be said that there is some substance in this contention, but Section 255-A, Criminal Procedure Code, which has been introduced by an amendment in 1917 confers power on the Magistrates to frame charges under Section 75, Indian Penal Code, in respect of a person who is found guilty of offences under Chapter XII or XVII, Indian Penal Code,

8. Section 255-A Criminal Procedure Code, runs thus:

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 Section 255, Sub-section (2) or Section 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

This provision has been introduced as the Legislature thought that the Magistrates also should be empowered to frame a charge under Section 75, Indian Penal Code, as Sessions Judges are empowered to frame a charge under Section 310, Criminal Procedure Code. If the Magistrate is empowered to frame a charge under Section 75, Indian Penal Code, the question now arises as to under what circumstances he can frame charge. It is clear from this provision that the Magistrate after convicting the accused may frame a charge under Section 75, Indian Penal Code, obviously for the purpose of imposing enhanced sentence. If the Magistrate can give the maximum sentence in all cases that he is competent to give, there is no necessity of introducing Section 255-A, Criminal Procedure Code, empowering a Magistrate for the purpose of giving enhanced sentence. It is clear from this section that whenever a deterrent sentence has to be given to the accused than ordinarily given for a first offender, the previous conviction of the said person has to be considered, and if that is taken into consideration, a charge under Section 75, Indian Penal Code, must be framed and proved. The quantum of sentence to be imposed on a convicted person cannot be arbitrary. It must be judicious. Though the Magistrate is competent to give any sentence ranging from the minimum to the maximum that he is competent to impose, he has to take the circumstances of each case including the character, antecedents and similar other things of the accused convicted for imposing a proper sentence. That is why the Legislature thought that the same power given to a Sessions Judge for imposing enhanced sentence which he is competent to impose in consequence of a previous conviction, should be conferred on the Magistrates also in warrant cases under Section 255-A, Criminal Procedure Code, for taking into consideration the previous conviction for imposing enhanced sentence. Enhanced sentence must be taken to mean not merely the sentence more and above than the sentence provided for a particular offence but also a deterrent sentence even within the range of the maximum sentence that the Court is competent to impose. Otherwise, the imposing of sentence will be left to the whims and fancies of the Court. The previous conviction is evidence of the antecedents of the person accused of the offence which will be a guiding factor for giving proper sentence. The evidence of

bad character is relevant for imposing enhanced sentence. It is significant to note in this context that under Section 54 of the Evidence Act, a previous conviction is made relevant as evidence of bad character. It is, therefore, necessary in all cases where it is brought to the notice of the Magistrate that there is a previous conviction in respect of a person who is convicted that he should take the previous conviction into consideration for the purpose of imposing a deterrent sentence. It is of course true that while giving enhanced sentence, the Magistrate should also take into consideration the nature of the offence and the circumstances under which the offence is committed, of which the accused is convicted even while considering the previous conviction of the said person. The practice in the Courts of the Magistrates is that after the accused is found guilty and convicted, the previous conviction, if any, is taken note of and put to the accused, and if the accused denies, to prove the charge under Section 75, Indian Penal Code, for the purpose of imposing deterrent sentence.

9. In an earlier decision of this Court in *Queen-Empress v. Doraiswami* I.L.R.(1386) Mad 284, which was rendered by Kernan and Muttuswami Ayyar, JJ., even before the introduction of Section 255-A, Criminal Procedure Code, the practice prevailing in Madras is stated in the following terms:

The practice appears to be to charge the prisoner, say, of theft, No charge under Section 75 of the Indian Penal Code, is placed on the record, but if the prisoner is convicted the Magistrate questions the prisoner whether he was convicted of the prior offence whatever it is. To this inquiry the prisoner replies either admitting or denying the fact; and if he denies, the Magistrate without framing a charge tries him. If convicted then the Magistrate in his judgment ... refers to the prior conviction as a ground for increasing the punishment beyond what would be given for a first offence.

No doubt the sentence pronounced may be...within the competence of the Magistrate to inflict for the first offence.

But the object and direction of the Code are that for each offence there must in warrant cases be a separate charge.

The Division Bench directed the Magistrate to follow the views expressed by it and in such cases frame a charge under Section 75 and try on that charge.

10. A Full Bench of the Lahore High Court in *King Emperor v. Dalip Singh* I.L.R. (1943) Lah. 477 : 211 Ind.Cas. 283 : 45 PLR 414 : A.I.R. 1944 Lah. 25, endorsed the views of the Division Bench of that Court in respect of the correct procedure in framing charges under Section 75, Indian Penal Code, by the Magistrate while giving enhanced sentence within the competence of such Magistrates. The correct procedure stated in the said decision is in the following terms: When, however, the Magistrate considers it fit to frame a charge under Section 254 in respect of the substantive offence, he should then have recourse to Section 221 (7) and in that charge should include the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous convictions distinctly from the original offence. Then comes Section 255-A and under that section if the accused admits his previous conviction or convictions, they do not have to be proved separately and the Magistrate can take them into consideration in convicting and sentencing him for the main offence. If, however, the accused does not admit his previous convictions, the Magistrate has to proceed to judgment on the substantive charge and if that is a judgment of conviction, he has then to take evidence according to law, i.e., under Section 511 of the Code as to the previous convictions and then come to a separate finding upon them after which he will pass the proper sentence under the substantive section read with Section 75 of the Indian Penal Code.

This decision makes it clear that the Magistrates on a convictions in appropriate cases of the substantive offence, for the purpose of giving appropriate sentence, must take into consideration previous conviction, if any, of such accused and prove such previous conviction after framing a charge according to Section 511, Criminal Procedure Code.

11. But unfortunately, in the decision of the Division Bench of the Kerala High Court, in *State of Kerala v. Krishnan Kutty* (1966) M.L.J. 296, Section 255-A Criminal Procedure Code, was not brought to its notice. Without reference to Section 255-A, Criminal Procedure Code, a wide proposition has been laid down

in the following terms: Although Magistrates frequently frame charges under Section 75, it is only necessary to do so in the Court of Session where a higher sentence than the ordinary maximum sentence has to be imposed.

In cases where the Magistrate does not find that the sentence which he is competent to award will not be sufficient, no charge under Section 75 need be framed.

Section 75 comes into operation only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence. So long as the maximum punishment provided for the offence is not to be exceeded there is no need to resort to its provisions and any reference to them would be irrelevant.

With great respect, I am unable to agree with such a wide proposition laid in the said decision. Obviously, Section 255-A, Criminal Procedure Code, as already stated by me, was not considered in that decision. The Division Bench of course relied upon a decision of the Allahabad High Court in *Mohammadi v. State* (1956) A.L.J. 611, where it is stated that Section 75, Indian Penal Code, comes into application only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence. It is significant to note that even in the said decision, the implication of Section 255-A, Criminal Procedure Code, was not considered.

12. In a subsequent decision of the Kerala High Court in *In re, Narayana Panicker* (1967) M.L.J. 424, it is observed that in fixing the punishment it is open to the Magistrate to take the previous conviction also into consideration. This decision contributes to the view that a previous conviction is at least relevant for the purpose of giving deterrent sentence.

13. In the result, I find that the evidence of previous conviction is always relevant for the purpose of imposing a deterrent sentence and the Magistrates shall take the previous conviction into consideration when an accused is convicted under Chapters XII and XVII of the Code. It may be that in a particular case where a person is convicted, the offence may be trivial and in such a case, it may not be

necessary that the previous conviction should necessarily be taken into consideration for the purpose of imposing enhanced sentence as the substantive offence under which he is convicted may not warrant such a view. In the circumstances of the case, it is not necessary to quash the sentence imposed by the Magistrate, though the view taken by him that it was not necessary to take the previous conviction of the accused into consideration is obviously incorrect. The reference is ordered accordingly. The valuable assistance rendered by T. P. Radhakrishnan Counsel appointed amicus curiae, is recorded.

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