

CALCUTTA HIGH COURT

Superintendent

Vs

Jnanendra Nath Ghose

(Mukerji, J.)

08.02.1929

JUDGMENT

Mukerji, J.

1. Accused 1 Jnanendra Nath Ghosh alias Jnan Ghosh was convicted under Section 493, I.P.C., and sentenced to be detained till the rising of of the Court and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months and accused 2 was convicted under Sections 493/ 109, I. P.C., and sentenced to pay a fine of Rs. 50 or in default to undergo rigorous imprisonment for three months. They were convicted and sentenced as aforesaid by an Additional Sessions Judge of the 24-Parganas on 5th June 1928. The Superintendent and Remembrancer of Legal Affairs then moved this Court for enhancement of the sentences passed upon the said two accused persons and originally the rule was issued as against both of them to show cause why their sentences should not be enhanced. Subsequently it was mentioned to the Court that accused 2 could not be found and upon that the rule as against accused 1 only was allowed to be proceeded with. It has now been heard by us in so far as it concerns that accused person.

2. I do not consider it necessary to set out the facts alleged on behalf of the prosecution upon which the charges on which the accused persons were committed to the Court of Sessions were framed. It is sufficient to say that the sentences-passed on the accused persons are on the face of them far too lenient. At the same time I find it impossible to enhance the sentences upon the materials such as they are on the record. To explain what I mean I shall have to set out a few facts.

3. The order-sheet of the Court of the Judge shows that on the charges against the two accused being read out and explained to them they pleaded "guilty" and they were convicted on their own plea. As reason for the sentence that he passed the Judge has recorded:

In consideration of the inability of the Prosecution to produce the girl who according to the Public Prosecutor is the only important witness in the case and the circumstances of the case, I deal with them leniently.

4. One thing is clear beyond doubt and that is his that without the girl's evidence the case could not go on, but beyond that I am not at all clear as to what actually took place. It may be that though the girl was not available, the prosecution were ready to go on with the trial by adducing the deposition of the girl taken before the Committing Magistrate as evidence at the trial after proving the facts necessary to be established in order to bring the case under Section 33, Evidence Act, or it may be that the prosecution were not in a position to proceed with the trial at all, because the girl was absent. On this point there is no affidavit on either side, and I am not at all sure that it is not one of those cases in which the accused pleads guilty to the charge in the hope of being leniently dealt with, the Public Prosecutor not pressing for severe sentences. All this, however, is only of minor importance.

5. Now, as far as I could understand the arguments adduced on behalf of the Crown, they are to the effect that the plea of " guilty " should be taken to conclude the accused altogether so that taking the facts alleged against the accused by the prosecution we should consider what is the proper sentence to be passed. This, in my opinion, is a wholly mistaken view of the situation. The plea of " guilty " is a plea to the charge and does not necessarily amount to a confession of all the facts alleged. The Court is not bound to, but it may, convict the accused on his plea : vide Section 271(2), Criminal P.C. The plea operates as a bar, in certain cases, to the preferring of an appeal except as to the extent and legality of the sentence : vide Section 412, Criminal P.C. By analogy with and also as a necessary consequence of the bar as regards appeals, a plea of guilty will perhaps also stand in the accused's way in the matter of a revision which he may seek for. But when called upon to show cause why his sentence should not be enhanced, the accused has the right to show cause against his conviction : Section 439(6), Criminal P.C. This Sub-section does not make any exception as regards the case of a person who has been convicted on his own plea. I do not find anything in the words of this Sub-section which would warrant an interpretation that the accused while showing cause against his conviction is to be held down to his plea of " guilty." The same result would follow if we consider the true nature of a proceeding for enhancement of sentence. In such a proceeding the Crown takes up the position that the sentence originally] passed is to be vacated and a new and proper sentence is to be passed : it can not be that a second sentence in addition to the original one is to be passed; because for one offence the law can , punish the accused but once. When the Court in such a proceeding is considering what is the proper sentence to be passed the accused is in the position of a person who has pleaded guilty and convicted, but not yet sentenced. Under the English law at such a

stage the accused is entitled to withdraw his plea of "guilty" and enter a plea of "not guilty" though he cannot do so after sentence : *R. v. Selbe*¹ *R. v. Clouter*³ *R. v. Plummer*². The technicalities of plea under the English procedure may not apply in all their details to the system here, but this is a broad principle which, so long as there is nothing in our Code militating against it, is in my judgment applicable to this country as well. Accused 1 in the present case in showing cause through his advocate says that his conviction is not right which means that his client is not guilty.

6. Nextly, as has been repeatedly said in numerous decisions in Indian Courts, enhancement of sentence is a very serious thing and so in considering the question whether a sentence should be enhanced or not the Court must know all the facts and circumstances of the case. Uncross. examined testimony of the prosecution witnesses given in the Court of the Committing Magistrate can hardly be taken to suffice for the purpose. Such evidence was not the evidence at the trial, and indeed the learned advocate for accused 1 has asked us to treat the depositions as evidence.

7. For all these reasons I am of opinion that the proper order to pass is to make the rule absolute in the following way, namely, to set aside the conviction of accused 1 and to direct that notwithstanding his plea he should be regularly tried, and if convicted properly sentenced.

Graham, J.

8. In this case a rule was issued upon the accused (now opposite party) to show cause why the sentence passed upon him should not be enhanced.

9. The facts are shortly these : The opposite party Jnan Ghose, and a Nepali woman named Padam Kumari were tried before the Additional Sessions Judge of the 24-Parganas and a jury on charges against the former under Section 493, I. P.C., and against the latter under Sections 493/109, I. P.C. Padam Kumari is, it is said, in Nepal and notice could not be served on her.

10. The case for the prosecution was that the accused Padam Kumari had brought from Nepal a girl named Chitra Kumari aged about 14 years on the representation that she would obtain for her a wealthy and suitable husband; that after keeping the girl with her for some time in Calcutta she introduced the accused Jnan Ghose as a wealthy suitor, and that thereafter these two persons took the girl to a house at Salkea where a sham marriage ceremony was gone through, that in fact there was no real ceremony of marriage, and that certain things were done, e. g., taking a photograph, exchange of garlands, and signing by the parties, so as to deceive the girl into the belief that marriage had been performed. Thereafter sexual intercourse is alleged to have taken place between Jnan Ghose and the girl Chitra.

11. At the Sessions trial both the accused pleaded guilty to the charges and the Additional Sessions Judge accordingly convicted them thereon and sentenced the accused Jnan Ghose to be detained till the rising of the Court and to pay a fine of Rs. 500 or in default to six months rigorous imprisonment, while the accused Padam Kumari was sentenced to be detained till the rising of the Court and to pay a fine of Rs. 50 or in default to rigorous imprisonment for three months. Thereafter the petitioner the Superintendent and Remembrancer of Legal Affairs, applied for and obtained this rule.

12. The question is whether any case has been made out for interference. There can be no doubt in my opinion that the sentences inflicted (we are concerned, how-ever, now with the case of Jnan Ghose only) are wholly inadequate for an offence of this description. There are one or two matters, however, which require consideration. The first of these is as to the effect of Sub-section 6, Section 439, I. P.C., where there is a plea of guilty. That Sub-section reads as follows: Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under Sub-section (2) of showing cause why his sentence should not be enhanced, shall in showing cause, be entitled to show cause against his conviction.

13. In my opinion this proviso, for it is in the nature of a proviso, can have no application where there is a plea of guilty, since that, as it seems to me, concludes the matter, and it is not possible to go behind such a plea. The only circumstance in which it would, I think, be open to an accused to go behind the plea and reopen the matter of his conviction would be where he would show that there was some mistake in recording the plea, and that he did not in fact plead guilty. No allegation of the kind is made here, That being so we must, I think, proceed on the basis that it was properly recorded, and means what it says, viz., that the accused acknowledged his guilt.

14. In this connexion reference may be made to Section 412 of the Code which lays down that where an accused person has pleaded guilty and has been convicted by a Court of Sessions, or any Presidency Magistrate or Magistrate of 1st Class on such plea, there shall be no appeal except as to the extent or legality of the sentence. In view of this section it cannot I think be held that an accused who has pleaded guilty is entitled under Sub-section 6, Section 439 to "show cause against his conviction." Those words are, as it seems to me, applicable only where the accused has been convicted on the evidence, and in that case and that case only he is entitled to 'show that the conviction is wrong either upon the facts, or through some error of law.

15. In the circumstances of the present case the petitioner having pleaded guilty the only question which in my judgment arises is whether the sentence is adequate or not. Speaking for myself I should not be disposed to interfere if the sentence inflicted could be considered to be in any way appropriate. It appears to me, however, to be altogether inadequate. In my opinion therefore the

rule should be made absolute and I would set aside the sentence and direct that in lieu thereof the accused Jhan Ghose should suffer rigorous imprisonment for three years while maintaining the sentence of fine. (On difference between Mukerji and Graham, JJ., the case was put up before Buckland, J., who delivered the following judgment.) Buckland, J.

16. This is a rule calling upon the two accused to show cause why the sentences passed upon them should not be enhanced. Janendra Nath Ghose has been convicted by the Additional Sessions Judge of the 24 Parganas upon his plea of guilty and sentenced under Section 493, I. P.C. to be detained till the rising of the Court and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months. The rule has not been proceeded with against the other accused as she could not be found. Owing to a difference of opinion between my learned brothers Mukerji and Graham, JJ., the case has been laid before me under Section 439, Criminal P.C.

17. The case for the prosecution was that a girl of about 14 years of age named Chitra Kumari was brought from Nepal by the accused Padam Kumari on the representation that she would obtain a suitable husband for her. After keeping the girl for sometime Padam Kumari introduced Janendra Nath Ghose. By a ceremony of mock marriage which was gone through at Salkea the girl was led to believe that she was married to Janendra Nath Ghose and sexual intercourse is said to have followed.

18. Section 439(6), Criminal P.C. provides that any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction. The accused has appeared through his advocate both before my learned brothers and at the hearing before my self for the purpose of so showing cause, and it is claimed that by virtue of the right which the section gives him he may withdraw his plea of guilty notwithstanding that on an appeal by himself he would, by reason of Section 412, only be permitted to question the extent or legality of the sentence.

19. It does not suffice, in my opinion, in order to ascertain what are the rights under Section 439(6) of a convicted person who has pleaded guilty, to refer to Section 412 and to contend that by virtue of the section he has rights which are denied him by the earlier section. A more correct way to arrive at a solution of the question is to determine the meaning of the word "conviction" in its application to the circumstances of the case.

20. It has been said that at common law in strictness a conviction consists of verdict, judgment, and sentence: Archbold's Criminal Pleadings 27, Edn. 237 The word is undoubtedly *verbum aequivocum*. It is sometimes used as meaning the verdict of a jury and at other times in its more

strictly legal sense for the sentence of the Court: *Burgess v. Boetfeur*⁴. Thus, though a prisoner may be said to have been convicted by the jury, a more correct legal phraseology requires this to be expressed by saying that he has been convicted by the Court upon the verdict of the jury. Also he may be convicted by the Court upon his own plea of guilty.

21. The Criminal Procedure Code uses the word in both senses. For instance in Section 307(3) it refers to an "offence of which the jury could have convicted him upon the charge framed and placed before it," while Section 271(2) provides that if the accused pleads guilty the plea shall be recorded and he may be convicted thereon. It is unnecessary to multiply instances of which many can be found in the statute.

22. In order to know the sense in which the word is used in Section 439(6) in its application to any particular case it is necessary to enquire what has happened. In this case the accused was convicted under Section 271(2) on his own plea of guilty and that being so the conviction against which he may show cause is the conviction by the Court, that is to say, the judgment of the Court which sentenced him. Against that conviction he may show cause, I apprehend by, for instance, contending that there was some defect in the proceedings or that the acts to which he confessed by his plea of guilty do not amount to an offence or the offence of which he has been convicted: *Reg v. Brown*⁵ That, however, is not the case here and I make no attempt to say what might be allowed in other circumstances. I am however clear that he cannot go behind his plea of guilty as a confession of the facts charged. Nor is he entitled to withdraw his plea. As I have endeavoured to show, the meaning of the word "conviction" in the section in its relation to this case limits the accused to impugning the judgment of the Court. Indeed, the withdrawal of a plea of guilty is a totally different matter. Actually there is no provision in the Criminal Procedure Code which allows that to be done though I have no doubt that the Court would permit it in a proper case. The English authorities moreover agree that the leave of the Court is required and that such leave cannot be given after sentence, that is judgment has been pronounced. *Reg v. Clouter and Health*⁶ *Reg v. Seth*⁷ and *Reg v. Phunoner*⁸

23. In this case the accused has been sentenced and the sole question to be considered is the propriety of the judgment of the Court which sentenced him. From the accused's standpoint that may involve consideration of the question whether the Court was entitled in law to pass such sentence upon him, but no such point has been taken on his behalf. From the standpoint of the Crown the question is whether the sentence is sufficient.

24. My learned brothers, though they have had the misfortune to differ, are at one in their view of the sentence passed, which they describe as far too lenient and as altogether inadequate. This view I share. The learned Sessions Judge has said that in consideration of, in addition to the

circumstances of the case, the inability of the prosecution to produce the girl, who, according to the Public Prosecutor, was the only important witness in the case, he dealt leniently with the accused. I am unable to understand that this can affect the quantum of sentence though a plea of guilty will generally influence the Court.

25. The rule will be made absolute: the sentence will be set aside and I order that Jnanendra Nath Ghose alias Jnan Ghose, do undergo 18 months' rigorous imprisonment and pay a fine of Rs. 500 and in default of payment that he shall undergo rigorous imprisonment for a further term of six months.

Cases Referred.

1 9 C. & P. 346

2[1902] 2 K.B. 339

38 Cox. C.C. 237

47 M. & G. 481

5[1889] 24 Q.B.D. 351

6[1859] 8 Cox. C.C. 237

7[1840] 9 C. & P. 346

8[1922] 2 K.B. 339