BOMBAY HIGH COURT

Emperor

Vs

Jorabhai Kisanbhai

(Fawcett, C.J. Madgavkar, J.)

17.06.1926

JUDGMENT

Fawcett, J.

1. In this case a Sub-Inspector of Police was convicted of framing an incorrect record as a public servant under Section 218, fabricating false evidence under Section 193, using such fabricated evidence under Section 196, and forgery under Section 465, Indian Penal Code. He was sentenced to one year's rigorous imprisonment for each of those offences and to pay a fine of Rs. 500 also under Section 218, Indian Penal Code, in default to serve a further term of six months' rigorous imprisonment. The Sessions Judge of Surat ordered the sentences of imprisonment to run concurrently. An appeal was made to this Court, and a Division Bench, consisting of the Chief Justice and Shah J., confirmed the convictions and sentences and dismissed the appeal on April 7, 1926. After the judgment had been delivered, the Government Pleader applied orally to the Court to have notice issued to the accused to show cause why his sentences should not be enhanced, and this application was granted. We have now that application before us.

2. It is contended by Mr. Coyajee for the accused that this Court has, in the circumstances, no legal power to enhance the sentences under Section 439, Criminal Procedure Code. His main contention is that this would practically amount to this Court reviewing or revising the judgment already delivered by a Bench of this Court on April 7, and reliance is placed on the provisions of Section 430, Criminal Procedure Code, which says 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. He drew our attention also to the decision of this Court in Emperor v. Mangal Naran . In that case it was held that ordinarily it is not desirable, when an appeal is admitted, to issue a notice at the same time on the accused under Section 439, Criminal Procedure Code, asking him to show cause why the sentence passed upon him should not be enhanced. It was held that the Court should first of all deal with the appeal on its merits, and it is only after disposing of the appeal that it should consider whether a notice to enhance the sentence should issue. The

learned Counsel for the accused contends that that decision is erroneous, and that the only legal procedure is to issue a notice for enhancement before the appeal has been actually disposed of. Reference is also made to the provisions of Sub-section (6) of Section 439, Criminal Procedure Code, which were added by Act XVIII of 1923. The sub-section now allows a convicted person, to whom a notice has been given, to show cause why his sentence should not be enhanced, a right of showing cause also against his conviction. This, no doubt, supports the contention that the appeal shonld not have been disposed of prior to the issue of a notice.

3. In my opinion, however, importance attaches to the opening words of that sub-section, "notwithstanding anything contained in this section". It seems to me clear that the main reason for the introduction of this sub-section was the provision in Sub-section (5) that "where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed." In the case of an accused to whom a notice has been issued, and who has not appealed, or, if no appeal lay, has not applied for revision of his conviction, naturally it would be contended that he could not question the correctness of his conviction; and it was in fact decided by this Court *in Emperor v. Chinto*[1] that it had been the invariable practice of the Bombay High Court, in cases that came before it for enhancement of sentence, to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. It was presumably to overrule that view that the provisions of Sub-section (6) were inserted in 1923, And, that being so, it seems to me that the Sub-section (6) is primarily intended to operate as an exception to what is otherwise laid down or implied in Section 439 itself.

4. Then, coming to Section 430, it is to be noted, first of all, that that section was in the Code long before the amendment of Section 439 in 1923, and when, therefore, the section says that a judgment and order passed by an appellate Court shall be final, except in the cases provided for in Chapter XXXII, that merely referred to the liability of a judgment or order of an appellate Court to revision in accordance with the provisions of that Chapter. It would, in fact, be an exception only applicable to a judgment and order of a Court inferior to a High Court, which could act as a Court of revision under the provisions contained in that Chapter.

5. The Government Pleader has also drawn our attention to Section 369, which is a provision against alteration of a judgment once delivered except to correct a clerical error.

6. What the judgment of April 7 came to was that it confirmed the conviction, and that it rejected the appeal as to sentences in the sense that it saw no reason to reduce them. That in no way was a decision that the sentences should not be enhanced, if a proper procedure was taken, such as the Code allows for that purpose, and, therefore, so far as the judgment goes, there is nothing which in any way ties our hands.

7. Sub-section (6) of Section 439 does not suffice to show that an application for enhancement cannot be heard after a judgment on an appeal has been delivered by this Court, for the reasons which I have already given.

8. On the contrary, it seems to me that the provisions of Sections 369 and 430 show the clear intention of the Code as to the finality of a judgment such as that of April 7, 1926, and that the provisions of Sub-section (6) of Section 439, although they entitle the accused to show cause against his conviction, do not suffice to justify the contention that Mr. Coyajee has put before us that he is at liberty, on this application, to ask the Court to give a full rehearing of the appeal on the merits, and for this Bench to decide for itself whether the conviction was correct or not. Obviously, that whould be a proceeding which is against the ordinary principle of finality of judgments, such as has often been referred to by the Privy Council, for instance, in *Hook v. Administrator-General of Bengal*[2] F.C. Although, technically, the accused in a case like the present can say, "I have a right to show cause against my conviction", yet the moment the Court is cognizant of the fact that his appeal against that conviction has been dismissed by an appellate Bench of this Court, then, in my opinion, he is debarred from asking another Bench to go into the merits of the conviction. As I have already pointed out, Sub-section (6) of Section 439 is mainly intended to prevent a disability arising in consequence of the provisions of Section 439, and cannot be given the wide scope now sought to be put upon it. I am quite aware that in his judgment in Emperor v. Mangal Naran the learned Chief Justice said (p. 358) that-If, after an appeal baa been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right to show cause against his conviction, but any attempt to set aside the conviction would not have much chance of success.

9. That was not a point that was really before the Bench, It is not referred to in the judgment of Crump J., and, with due deference, I certainly protest against, that being taken as a correct view. It would be not only against the principle of finality of justice that I have mentioned, but it would also obviously lead to the very inconvenient position of one Bench possibly taking a different view to another, and, therefore, throwing doubt upon a previous judgment of this Court It would also lead to a considerable amount of time being spent in this manner, which would ordinarily be nothing but a waste of time. Therefore, I treat these remarks, so far as they may be said to be in favour of the accused having a right to go into the merits a second time, as obiter dicta not binding upon this Bench.

10. I think, therefore, that the application must be heard on the merits, treating the conviction as correct in view of the dismissal of the appeal. That being so, the only question is whether the reasons which the Sessions Judge gave for only passing a sentence of one year's rigorous imprisonment plus a fine of Rs. 500 should, or should not, be accepted by this Court. The learned

Sessions Judge says: "The offences are indeed serious and difficult to detect and consequently call for deterrent punishment." With that remark I fully agree. The offences were of very great seriousness, for the Sub-Inspector abused his powers of investigation of crime in a manner that strikes at the root of the proper administration of justice. But the Sessions Judge took into account the fact that he was an old public servant with about twenty-five years' service in the Police Department, and that the effect of this conviction would deprive him of the pension that he might otherwise have expected to. secure after a few more years of service. Due weight can, of coarse, be given to a consideration of that kind. But, still it seems to me that, having regard to the heinouaness of the offences proved against the Sub-Inspector, the sentences were unduly lenient. I think that the sentences of one year's rigorous imprisonment should be increased to at least two years' rigorous imprisonment, and the fine of Rs. 500 and imprisonment in default maintained. Therefore, in lieu of the sentences of one year's rigorous imprisonment paBsecl under Sections 193,196, 218 and 468, Indian Penal Code, I would substitute a sentence of two years rigorous imprisonment for each offence, maintaining the provision that the sentences should run concurrently. The other sentence of imprisonment in default of payment of the fine of Rs. 500 under Section 218, Indian Penal Code, is also maintained.

Madgavkar, J.

11. The accused Sub-Inspector was convicted by the Sessions Judge of Surat. His appeal to this Court against his conviction was dismissed and the conviction confirmed, and, on an oral application immediately afterwards by the Government Pleader, according to the instructions of Government, the appellate Bench issued notice on the accused to show cause why his sentence should not be enhanced. Objection is taken on his behalf either that the present application is incompetent, or that, at the least, he has a right to have his appeal re-heard on the merits in regard to the conviction.

12. The argument is based in the main on a 439, Clause (6), Criminal Procedure Code, which gives the accused such a right "notwithstanding anything contained in the previous clauses of that section " ; and reference was also made to Section 430 with regard to the finality of appellate judgments. The learned Government Pleader relies on the case of Emperor v. Mangal Naran and Section 369. Criminal Procedure Code.

13. The important Section 439, to which the last clause was added in 1923 read as a whole, defines the powers of revision of this Court, and is, in my opinion, clear on the point now in question, Clause (1) gives this Court wide and unfettered powers to enhance a sentence, as is now sought, subject to Clause (2), namely, notice to the accused person with opportunity of being heard, and to Clause (3) in regard to the maximum of enhancement in certain cases. Clause (4) prevents a complete finding of acquittal being converted into a conviction. Clause (5) prevents a

revision application ordinarily being treated as an appeal where no appeal has been brought, and then comes the added Clause (6), which, as pointed out by my learned brother, overrules the previous view of this Court in *Emperor v. Chinto*[3]

14. The last Clause (6), which is all important from the point of view of the petitioner, gives him not an unrestricted right of hearing on the merits against his conviction, but is especially subjected to the initial six words " notwithstanding anything contained in this section," particularly Clause (5) preceding. Clearly, therefore, the present case, namely, that he had appealed and that this appeal has already been heard on the merits and his conviction confirmed, is not provided in Clause (6), and is outside the purview of that clause. On these grounds, I would bold that the present application is competent.

15. The only other point, namely, whether the accused has nevertheless a right to a second hearing on the merits, has already been dealt with in the main, Sections 369 and 430 of the Code are decisive.

16. The observations of Macleod C.J. in the case referred to above, p 357, as my learned brother has pointed out, are obiter dicta, and were not necessary for the decision of the case before the learned Chief Justice. That case also contains observations in regard to the practice as to the issue of notice in such cases.

16. In regard to the practice as to the proper time for issuing of such notice, speaking for myself, I should say that the question of adequacy of punishment is, in the first instance, a matter for Government and for the District Magistrate. From the time when the sentence is passed, and at all events up to the time when an appeal is admitted and notice is received, it is open to Government to consider the sufficiency of a sentence and, before hearing of the appeal, to apply to this Court for enhancement of sentence, if they are so advised. The appeal would then be heard on the merits as to the convictions and disposed of first, and, if the conviction was confirmed, the question of enhancement would be considered by the same Bench immediately afterwards. This, I think, would be the ordinary and the proper procedure. It is only in rare instances that this Court considers for itself the question of enhancement of sentence, and only if no action has been taken by Government, and if this Court thinks that the interests of justice imperatively demand it. In such a case it would be a matter for consideration by this Court, in view of all the circumstances, whether this Court should issue notice at the very time of the admission, or whether it should do so after the disposal of the appeal on the merits as to the conviction In considering these circumstances, the point referred to by Crump J. on p. 359 of the case, namely, the extreme undesirability that an accused should ever be deterred from appealing from a fear that an appeal mights lead to such a notice of enhancement, would doubtless, always be present to the mind of the Court. But it may be that in extreme cases, such as, for instance, the very case referred to, ,

where a sentence of capital punishment for murdering a girl for the sake of her gold and silver ornaments appeared to the admitting Bench be imperatively called for, the latter consideration might override the former consideration. Therefore, speaking for myself, I am not prepared to lay down any hard and fast rule for this Court as to the appropriate time for issue by it of notice of enhancement, As to the undesirability of one Judge attempting to fetter the judicial discretion which the legislature has given, I respectfully adopt and may refer to the remarks of Jenkins C.J. in *Emperor v. Bankatram Lachiram*[4]

17. On the merits, I agree that the sentence should be enhanced as proposed by my learned brother.

Cases Referred.

1(1908) I.L.R. 32 Bom. 182, s.c. : 10 Bom. L.R. 93
2(1921) I.L.R. 48 Cal. 499, 508, s.c. : 23 Bom. L.R. 648
3(1908) I.L.R. 32 Bom. 162 s.c. : 10 Bom. L.R. 83
4(1954) I.L.R. 28 Bom. 533, 566 s.c. : 6 Bom. L.R. 379