BOMBAY HIGH COURT

Emperor

Vs

Babu Pandurang Mhaske

(John Beaumont, Kt.,C.J. Barlee, J.)

24.01.1934

JUDGMENT

John Beaumont, C.J.

1. This is an appeal by the accused against their conviction, No. 1 under Sections 342 and 376 of the Indian Penal Code, and No. 2 under Sections. 342 and 376 read with Section 114. In admitting the appeal we gave notice to accused No. 1 to show cause why the sentence should not be enhanced in the event of the appeal being dismissed, and I desire to say a word or two about the practice which should be adopted where the Court thinks that prima facie the sentence imposed was insufficient. In the case of *Emperor v. Mangal Naran*[1] the Court expressed the view that where it is thought right to give a notice to enhance the sentence, that notice should not be given until after the appeal has been disposed of. Sir Norman Macleod thought that there was something incongruous in admitting an appeal, and at the same time giving notice to enhance the sentence. I do not myself see any incongruity in adopting that course. In giving notice to enhance the sentence the Court does not in any way commit itself to the view that the conviction was right. In admitting the appeal the Court shows its willingness to consider that question on the evidence. All that the Court does by giving the notice is to indicate a view that if the judgment of the trial Court is upheld, there is prima facie reason for thinking that the sentence passed is inadequate. Mr. Justice Crump in the same case expressed the view that to give notice to enhance the sentence at the time when the appeal is admitted might cause an ignorant man to think that he was going to be further punished for having appealed. I do not think there is much force in that. To my mind it is rather a good thing that prisoners should realize that there is a certain danger involved in appealing in a bad case. I have known a good many cases in which appeals have been presented, which had no chance of success upon the merits, and in which the only result has been that the sentence imposed upon the accused has been increased. Mr. Justice Crump also suggested that the practice of giving notice to enhance at the time when, the appeal is admitted confuses two things, namely, the question of guilt, and the question of sentence. But it is, to my mind, a novelty to suggest that those two things are so divorced that they ought to be dealt with on separate occasions. Then in a case which came before a board consisting of Mr. Justice

Madgavkar and myself, *Emperor v. Koya Partab*[2] a jail appeal of an accused had been summarily dismissed, and the Court dismissing the appeal then gave notice to the accused to show cause why his sentence should not be enhanced. On the hearing of the rule counsel for the accused desired to challenge the conviction under the power conferred upon him by Sub-section (6) of Section 439, but Mr. Justice Madgavkar and I held that, as the appeal had already been dismissed by a Court of competent jurisdiction, it was not open to us to have the matter re-argued. But we felt that the result of that decision was in substance to deprive the accused of a right which the legislature plainly intended him to have, namely, the right of challenging his conviction before his sentence was increased, and we came to the conclusion that the proper course in such a case would be for the Court giving notice to enhance the sentence to admit the appeal so that the appeal and the notice could be dealt with together. In a later case of *Emperor v. Ramachandra*[3] a board consisting of Mr. Justice Nanavati and myself had followed the practice to which I have referred, and had admitted an appeal, giving notice to the accused to show cause why his sentence should not be enhanced. On the hearing of the appeal Mr. Justice Patkar referred to the case of Emperor v. Mangal Naran and expressed the view that the course adopted by Mr. Justice Nanavati and myself was not correct. I subsequently discussed the matter with Mr. Justice Patkar, and told him that the course which we had adopted was one which had been laid down after consideration by Mr. Justice Madgavkar and myself, and Mr. Justice Patkar agreed that that practice was the proper one. In my opinion, therefore, where the Court gives notice to show cause why the sentence should not be enhanced, it ought not to dispose of the appeal before the notice is heard. If the appeal is a jail appeal, it ought to be admitted. If the appeal has been argued, before the Court comes to the conclusion that there is a case for enhancing the sentence, then I think the Court should refrain from passing any order on the appeal until the notice to enhance can be dealt with. (The judgment next proceeded to deal with the case on its merits.)

2. With regard to the notice to enhance the sentence on accused No. 1, sentences for rape vary a good deal. According to my experience, Sessions Judges generally give sentences varying from two years to five years, and if there are any aggravating circumstances, I think that two years is an inadequate penalty, and if I thought it was proved in this case that accused No. 1 had infected the complainant with syphilis, I should say that that was certainly a circumstance of aggravation which would have required us to enhance the sentence of two years passed upon accused No. 1. But, as I have said, I think that the evidence on that point, though raising a case of serious suspicion, is not sufficiently definite to justify us in saying that this aggravating circumstance existed. I think, therefore, that there is no cause for enhancing the Sentence on accused No. 1.

Barlee, J.

3. On the point of law, I only wish to say that if we were to follow the practice" approved by the bench in Emperor v. Mangal Naran, we would, in my opinion, defeat the object of the legislature, which is that at the time when a man has to show cause why his sentence should not be enhanced, he shall be entitled to show cause against his conviction. It is clear that if his appeal

has already been dismissed, nothing he says at that time can alter the fact of his conviction. This point, probably, was not brought to the attention of the learned Judges who had formed the bench.

Cases Referred.

1(1924) 27 Bom. L. R. 355
2(1930) 32 Bom. L. R. 1286
3(1932) 35 Bom. L. R. 174