
(1975) 02 BOM CK 0022
In the Bombay High Court
Case No : Criminal A. No. 1195 of 1973

Enas Elish Sutari

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 11-02-1975

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386, 386(b)(iii), 397, 401
Railway Property (Unlawful Possession) Act, 1966 — Section 3(a)

Citation : (1975) MhLj 772

Hon'ble Judges : J. R. Vimadalal, J

Bench : Single Bench

Advocate : B. K. Kumbhar, for the Appellant; B. Y. Deshmukh, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

J. R. Vimadalal, J.—When this appeal came up for hearing before me on January 29, 1975, as soon as the facts were stated to me, it appeared to be clear that this is a case in which the sentence passed by Mr. N. S. Sarnaik, Presidency Magistrate, 35th Court, V. T. Bombay, is not merely inadequate, but is illegal. The accused who was himself a Railway employee was convicted by that learned Magistrate of the offence of being found in possession of certain brass articles suspected to be stolen and belonging to the Railways for which he could not give an explanation, which is an offence punishable u/s 3 (a) of the Railway Property (Unlawful Possession) Act, 1966. The said section 3 (a) lays down a minimum punishment of not less than one year's imprisonment and a fine of Rs. 1,000 in respect of a first offence, which the Court must award in the absence of special and adequate reasons to be mentioned in its judgment. Not only has the learned Magistrate not given any reason at all for awarding a sentence less than the minimum prescribed by law, but he has on the contrary rightly made a definite observation to the effect that the fact that the accused is a Railway servant shows that he does not deserve any leniency. The accused would, of course, be entitled to an acquittal in the present appeal, if he succeeds in it, and I am

therefore, expressing no opinion on the merits of the appeal itself. If, however, he fails in the appeal, in my opinion, the inadequacy and even the illegality of the sentence should certainly be open to question, which can only be done by the issue of a notice of enhancement.

2. On January 29, 1975 when the appeal was before me, at the request of the learned advocate appearing for the accused, I had adjourned the matter to February 3, 1975 in order to give him an opportunity to consider whether he should withdraw his appeal. The matter thereafter did not reach hearing till to-day, in view of the fact that I did not sit in Court due to indisposition during the last week. Nothing effective, however, appears to have been done by the learned advocate for the accused to contact his client and when he got up before me to-day he desired to proceed with the appeal. On my expressing my intention to issue a notice of enhancement, the learned advocate for the accused sought to contend as follows:

(1) That in view of the decision of a Division Bench of this Court in the case of Emperor v. Mangal Naran¹ a notice to enhance the sentence should not be issued until the appeal has been heard on merits and dismissed; 1. (1924) 27 Bom. L R 355 at p. 358.

(2) that I have no power to enhance the sentence in view of the provisions of section 386 (b) (iii) of the Code of Criminal Procedure, 1973, which correspond to section 423 (b) (3) of the Code of Criminal Procedure, 1898;

(3) that, as laid down by the Judicial Commissioner's Court at Peshawar in the case of Mianji Khan v. Emperor (1952) 55 Bom. L R 465, at p. 470, since the State has not moved in the matter of enhancement of sentence, it is not desirable that the Court should do so suo motu, which it should always be reluctant to do.

3. I will proceed to deal with each of these contentions of Mr. B. K. Kumbhar who appeared for the accused.

4. As far as the first contention of Mr. Kumbhar is concerned, the decision of the Division Bench in Mangal Naran's case on which he relies does not lay down any proposition of law for which that case could be considered to be an authority, but merely states what the "previous practice" was, and expresses a preference to retain "the old practice" (at pages 357-58). With all respect to the Division Bench, I do not approve of that practice and, indeed, the practice for many years since that decision, has been contrary and notices of enhancement of sentence have often been issued suo motu by this Court at the time of admitting appeals. I see nothing incongruous in this for the simple reason that the question of enhancement of sentence arises only if the conviction is upheld, and the question of conviction is quite distinct from the question of the sentence that should be passed in the event of the conviction being upheld. The observation of Macleod C. J. that a notice to enhance the sentence should be issued only after the appeal has been heard on merits and dismissed, and that though the accused would

have the right, in answer to the notice, to show cause against the conviction, itself, "any attempt to set aside the conviction would not have much chance of success" does not appeal to me at all, for the possibility of conflicting views being taken on the question of conviction itself by two Division Benches cannot be ruled out. In any event, the decision in Mangal Naran's case which relates to a point of "practice" prevailing at that time can no longer be said to represent either the law or the practice prevailing at present, in view of the decision of the Supreme Court in the case of Pilot Chopra v. Bombay State (1955) 58 Bom. L R 831 (S C) at pp. 837, 853 and 855 in which it has now been laid down by the highest Court of the country that the procedure for issuing a notice for enhancement of sentence after the appeal or revision application is disposed of by the High Court and the judgment pronounced thereupon is not correct and is contrary to the true legal position.

5. As far as the second contention of Mr. Kumbhar is concerned, the same is clearly misconceived in so far as in issuing a notice of enhancement the Court would not be acting under its appellate powers which are laid down in section 386 of the Code of Criminal Procedure, 1973, corresponding to section 423 of the Code of Criminal Procedure, 1898, but would be exercising its revisional powers u/s 401 of the new Code, corresponding to section 439 of the old Code. It is true that the words "and may enhance the sentence" which occurred in sub-section (1) of section 439 of the Code of Criminal Procedure, 1898 have been omitted from sub-section (1) of section 401 of the Code of Criminal Procedure, 1973, but whatever be the result of that omission in a matter in which the question of adequacy of sentence is purely discretionary on which I express no opinion, I have no doubt whatsoever that where the sentence passed by the lower Court is illegal, as in the present case, the High Court can certainly interfere in revision for the purpose of satisfying itself as to the "legality" of that sentence, as laid down in clear terms in sub-section (1) of section 397 of the new Code, corresponding to sub-section (1) of section 435 of the old Code. In the present case, the learned Magistrate has passed a sentence which is less than the minimum laid down by the relevant statutory provisions under which he has himself convicted the accused, without giving any reason for doing so as required by that statute and, in fact, indicating that the case is one in which the accused does not deserve any leniency. This is, therefore, clearly a case in which the legality of the sentence is open to question and, in my opinion, in such a case, this Court has the power to issue, suo motu, a notice of enhancement.

6. As far as the third contention of Mr. Kumbhar is concerned, I do not approve of the view taken by the Court of the Judicial Commissioner at Peshawar in the case of Mianji Khan v. Emperor. I am not prepared to take the view that merely because the State has not moved in the matter for enhancement of a sentence, the High Court cannot move to enhance the sentence suo motu. The revisional powers vested in the High Court are intended to ensure that justice is done. I need say nothing more about that decision, except to express my disapproval of the same.

7. In the result, I reject all the three contentions of Mr. Kumbhar and direct that a notice to show cause why the sentence passed upon the accused should not be enhanced should be issued and served upon him. I adjourn the hearing of this appeal which should be heard along with the hearing of the notice of enhancement of sentence.