

(1983) 07 KL CK 0004
In the High Court Of Kerala
In re. An Accused

Date of Decision : 06-07-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386, 395, 423, 438
Penal Code, 1860 (IPC) — Section 34, 392

Citation : (1984) CriLJ 743

Hon'ble Judges : K. Sukumaran, J;G. Balagangadharan Nair, J

Bench : Division Bench

Judgement

G. Balagangadharan Nair, J.—This reference made by the Sessions Judge, Kozhikode u/s 395(2), Cr. P. C. raises a short question, though the arguments before us were more directed to the validity of the reference that the point referred. In C.C No. 74 of 1979 the Chief Judicial Magistrate, Kozhikode convicted the accused u/s 392 read with Section 34, I. P. C. and sentenced them to imprisonment till the rising of the Court and a fine of Rs. 300/-, each, with a default, sentence of rigorous imprisonment of one month. They appealed to the Sessions Court. The Sessions Judge confirmed the conviction but found that on the terms of Section 392, I. P. C. the offence was punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine and that as imprisonment till the rising of the Court was no rigorous imprisonment the sentence was illegal. While confirming the conviction the learned Judge ordered that the question of sentence would be referred to this Court.

2. We heard counsel for the accused and the learned Public Prosecutor.

3. Counsel for the accused agreed that in view of the terms of Section 392, I. P. C. the sentence awarded by the Chief Judicial Magistrate was illegal and that the learned Sessions Judge's opinion in this regard was correct. He however urged that Section 395(2), CrL. P. C. under which the reference has been made permits a reference to this Court only in original proceedings and that a Sessions Judge has no power to make a reference in an appeal to decide a question of law. Counsel based this contention on the authority of Emperor v. Sulaiman (1914)

Cri LJ 667(a) : AIR 1914 LB 226(1) the decision of a learned Judge of the Lower Burma Chief Court. He pointed out that the Sessions Judge could have set aside the sentence if he felt it to be illegal and made appropriate consequent directions but contended that he could not make the reference. We agree that the Sessions Judge could have set aside the sentence but as the contention involves the power of a Sessions Court in an appeal we thought it appropriate to consider it.

4. Section 395(1) deals with references in cases that concern the validity of statutory provisions which it is necessary for the Court to decide but which have not been declared to be invalid by the High Court or Supreme Court and provides that "the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court". Sub-section (2) which governs the present case reads:

A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it, or him to which the provisions of Sub-section (1) do not apply, refer for "the decision of the High Court any question of law arising in the hearing of such case.

The two Sub-sections differ in the following relevant points:

(i) Sub-section (1) is general in its application in the sense that it applies to every subordinate Court whereas Sub-section (2) is limited to Court of Session and Metropolitan Magistrate and (ii) Sub-section (1) is mandatory for when the conditions which it lays down are present the Court has to make a reference to the High Court. Sub-section (2) on the other hand is not mandatory for the Sessions Judge or the Metropolitan Magistrate has a discretion to make reference to the High Court or not. What counsel for the accused contends on the strength of Sulaiman's case 1914Cri LJ 667(a) (Lower Burma), is that a Sessions Court cannot exercise the power under Sub-section (2) when the "case" is an appeal for it is bound to hear and dispose of the appeal u/s 386 of the CrI. P. C.

5. In Sulaiman's case a Sessions Judge made a reference to the Lower Burma Chief Court in the view that the construction of Section 57, Excise Act which was involved in the appeal pending before him was an important question of law on which there should be authoritative ruling. In refusing the reference the Chief Court held:

When an Appellate Court does not dismiss an appeal summarily, it is bound by the provisions of Section 423 of the Cr. P. C, which define its powers - these powers do not authorise the Court to refer to the High Court for decision a question of law arising in the appeal. Nor does Section 438 confer any such authority, that section permits the Sessions Judge to report for orders the result of his examination of any proceeding before an inferior Criminal Court, but does not apply to appellate proceedings pending before the Sessions Judge himself. It is clearly the intention of the law that all questions arising in a criminal appeal should be determined by the Appellate Court itself.

Since the question referred by the Sessions Judge is not properly before the Court no decision can be given on it. The learned Judge will have to decide it according to his own judgment. If either party should be aggrieved at the Sessions Court's orders in appeal, it will be open to that party to move this Court in revision if he thinks fit." In substance the reasoning of the Court was that the Sessions Judge had no power to refer the question of law involved in the appeal pending before him as no such power has been conferred on him by the provisions which deal with appeals and that he was bound to dispose of the appeal of course with the question of law. With respect we find it unable to agree. In the context the power to make a reference is governed by Section 395 and in this case by Sub-section (2) and the power must have its full play unless it is restricted by some other provision. Sub-section (2) is general in the sense that it is not limited to cases where the Sessions Court is acting in its original capacity excluding its appellate or revisional capacities. The Court is bound to dispose of every work, original, appellate or revisional according to the prescribed procedure and subject to the prescribed powers. The reasoning in Sulaiman's case 1914 Cri LJ 667(a) (Lower Burma) if valid, must apply to the original or revisional capacities also; there is nothing compelling in it to restrict the decision to appeals alone. It is the Sessions Court that is given the power to make the reference, it does not cease to be the Court of Session when it hears the appeal; indeed the appropriate appellate Court for the cases specified in the "Chapter on Appeals" - Chapter XXIX is the Court of Session. We could find no special reason to think that the Sessions Court in its appellate capacity is outside the provisions of Sub-section (2). it is still a Court of Session and therefore competent to make a reference. The expression "hearing" and "case" in the Sub-section are also general in scope; far from supporting the opinion in Sulaiman they go against it. A Court of Session is therefore competent, in its original or appellate jurisdiction, to make a reference under Sub-section (2) provided of course the prescribed conditions exist.

6. In the present case there is hardly any question of law as the sentence awarded by the Magistrate is illegal and the only question was as to the proper disposal of the case. At the hearing of the appeal, the Sessions Judge could have set aside the illegal sentence and ordered a retrial; what he did was to confirm the conviction and make this reference, hanging the sentence awarded by the Magistrate in the air. In this situation we think we ought to exercise our revisional power we could set aside the sentence and leave it to the Sessions Judge to pass a proper sentence or we could set aside the conviction and sentence and send back the entire case to the Magistrate. After considering all aspects we think that the latter course would be in the interests of justice.

While we held that the sentence imposed on the accused was illegal, we set aside the sentence and conviction and direct that the case will be disposed of afresh by the Chief Judicial Magistrate after hearing the accused.