
(1978) 02 BOM CK 0023

In the Bombay High Court

Case No : Criminal Revision Application No. 233 of 1977

Murlidhar Yadav Patil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-02-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 229, 235, 236, 313
Penal Code, 1860 (IPC) — Section 408

Citation : (1978) 80 BOMLR 90 : (1978) MhLj 609

Hon'ble Judges : Naik, J

Bench : Single Bench

Judgement

Naik, J.—In this revision application at the stage of admission, rule has been granted only on the point of sentence.

2. The accused-revision petitioner was tried for an offence u/s 408 of the Indian Penal Code for having misappropriated an amount of Rs. 4,286 between February 4, 1971 and February 4, 1972, while serving as a Secretary of the Vivid Karyakari Seva Sahakari Society, Nagarsul. He was convicted for the said offence by the learned Magistrate and as observed by the learned Magistrate in spite of the old age of the accused as this was a second conviction of the accused for a similar offence, the learned Magistrate thought that leniency was not justified and he, therefore, sentenced the accused to suffer rigorous imprisonment for three years and to pay a fine of Rs. 500 in default to suffer further rigorous imprisonment for nine months.

3. The learned Additional Sessions Judge who heard the appeal against that conviction and sentence while maintaining the conviction and recording it as a fact that the accused was an old man aged about seventy and that the special and peculiar circumstances of the case did call for a lenient view was oppressed by the fact that he could not take a lenient view as this was the second conviction of the accused for a similar offence. However he reduced the substantive sentence to one year and maintained the sentence of fine.

4. The revision application being filed challenging this conviction and sentence a rule as I have stated earlier was granted only on the question of sentence. It would appear from the judgments of the Courts below that both of them have found that the accused is an old man aged seventy and that in the normal course in the peculiar circumstances of the case leniency could have been shown to him. It would further appear that both the Courts were, however, reluctant to show leniency on the sole ground that this was the second conviction of the accused for a similar offence. As the judgment is not clear about the previous conviction and the extent of the amount involved for the alleged offence, I requested the learned public prosecutor to take me through the record. To our surprise it was found that the learned Magistrate, disregarding the elementary principle of law that the question of previous conviction could not be considered till a conviction is recorded, evidently by relying on his own information in that he appears to have convicted the very accused for a similar offence on August 24, 1976, questioned the accused in his examination u/s 313 of the Code of Criminal Procedure, about that conviction on September 24, 1976. It was thereafter that the learned Magistrate proceeded to write a judgment whereby he convicted the accused and also sentenced him as stated at the outset by the self same judgment. It is needless to say that u/s 235(2) of the Code of Criminal Procedure, it is only after the accused is convicted that the Court could hear the accused on the question of sentence. Again, Section 236 provides that even if there is a charge of previous conviction that charge could not be read over to the accused till he has been actually convicted, and that it is only after the accused has been convicted u/s 229 or 235 that evidence can be taken in respect of the alleged previous conviction. In any event even according to the proviso to that section till the accused has been actually convicted of the offence with which he is charged he could not be questioned about his previous conviction. In the instant case, therefore, the learned Magistrate was clearly in error in questioning the accused about his previous conviction even before convicting the accused for the offence with which he was charged. Since the question put to the accused by the Magistrate on that point and the answer given by the accused to that question are irrelevant they must be left out of consideration. The Court cannot take any legal notice of the same. If that is done what we are left with is that, both the Courts below though inclined to take a lenient view having regard to the advanced age of the accused in the special and peculiar circumstances of the case, they did not do so, as they were evidently misled in taking into consideration the previous conviction of the accused. If that point is left out of consideration as it must be, it would appear that in the circumstances of this case, I do not think any useful purpose would be served by sending a man in his seventies to jail to serve any term of imprisonment. Therefore, having regard to the peculiar circumstances of this case which was also noticed by both the Courts below, I think that the order of substantive sentence is not called for and that the ends of justice could be met by increasing the amount of fine from Rs. 500 to Rs. 1,000.

5. In the result, the revision application is partly allowed. The conviction of the accused?revision petitioner is confirmed but the substantive sentence of imprisonment is set aside and instead of fine of Rs. 500 which is awarded by the Courts below, the fine is raised to Rs. 1,000 in default of which the revision petitioner shall suffer rigorous imprisonment for six months. The revision-petitioner is given one month's time to pay the fine as requested by the advocate Mr. Vaidya. Rule made absolute, to that extent.