
(1982) 09 MP CK 0003

Madhya Pradesh High Court

Case No: Criminal Revision No. 241 of 1982

Prakash

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision: Sept. 1, 1982

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 248, 313, 324(1)
- Penal Code, 1860 (IPC) - Section 379

Citation: (1983) LJ 448

Hon'ble Judges: Chandra Pal Singh, J

Bench: Single Bench

Advocate: S.K. Vyas, for the Appellant; Surjeetsingh, Government Advocate for State, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Chandra Pal Singh, J.

The prisoner Prakah alias Badda by this petition seeks interference with the judgment of the Fourth Additional Sessions Judge, Indore, in Criminal Appeal No. 115 of 1982, maintaining the judgment of the Judicial Magistrate First Class, Indore, in Criminal Trial No. 1532 of 1981, finding the petitioner guilty of offence punishable u/s 379 of the Indian Penal Code and considering his being a previous convict sentencing him to rigorous imprisonment for 2 (two) years.

2. On 25th July, 1981, Mangilal (PW-1), at Sarafa, Indore, was buying some fruits, when the fruit-seller, noticing that the petitioner was running away with Mangilal-PW-1's bag containing three clothes kept on the earlier of his cycle, told Mangilal (PW-1) so. The petitioner was chased and soon caught hold of, with the bag containing clothes. He was taken to the Police Station where Mangilal (PW-1) lodged the First Information Report.

3. On these facts, when the petitioner was charged with and tried for the offence punishable u/s 379 of the Indian Penal Code, he denied his guilt. At the conclusion of the trial including the examination of the petitioner u/s 313 of the Code of Criminal Procedure, the learned Magistrate finding him guilty of the offence charged purporting to act u/s 248 of the Code of Criminal Procedure, for the purpose of sentencing him, put further three questions to him, which he answered in the affirmative regarding his previous convictions in Criminal Trial Nos. 571/77 and 967/78 on 10-8-77 and 2-6-80 respectively in both of which he had been let off after due admonition.

4. The learned Magistrate taking these previous convictions into account, sentenced the accused-petitioner to rigorous imprisonment for two years. The petitioner thereupon, appealed to the Additional Sessions Judge but to no avail.

5. The contention of the learned counsel for the petitioner is that the procedure adopted by the learned Magistrate was not in accordance with law.

6. Admittedly, no charge u/s 75 of the Indian Penal Code had been framed. Section 75 of the IPC lays down that "whoever, having been convicted, by a Court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards shall be guilty of any offence punishable under either of those Chapters with like imprisonment for a term which may extend to ten years." Chapter XVII of these two specified chapters does include the offence punishable u/s 379 of the IPC; but it is clear that a formal charge u/s 75 IPC has to be framed only when the trying Magistrate feels that he himself is incompetent to award adequate sentence which goes beyond the maximum sentence awardable under the section. In that event he has to commit the accused to the Court competent to pass the adequate sentence. (See: [Mohammadi Vs. The State](#), and also section 324(1) of the Code of Criminal Procedure.

7. If on the other hand, the Magistrate finds that he himself is competent to pass the adequate sentence and that sentence does not exceed the maximum awardable under the section, the recourse to framing a charge u/s 75 of the IPC is not necessary. (See: [Haramohan Deb Nath Vs. Jaha Baksha Patwari](#), .

8. Since in the instant case only a rigorous imprisonment for two years has been awarded which does not exceed the maximum awardable u/s 379 of the IPC and which is within the competence of the Magistrate, there was no necessity of any charge being framed u/s 75 of the IPC as such; and the learned Magistrate was right in not framing a charge under that section.

9. But it cannot be denied that for the petty theft of a bag containing clothes, the learned Magistrate could not have awarded the accused-petitioner sentence of rigorous imprisonment for two years. It, therefore, appears to me that the learned Magistrate took into account the admitted previous convictions of the

accused-petitioner in the two cases to award him punishment of rigorous imprisonment for two years.

10. Clause (7) of section 211 of the Code of Criminal Procedure

requires that:

If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous convict, on shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

Clearly, the learned Magistrate had not complied with the requirements of clause (7) of section 211 of the Cr. P. C. He had merely proceeded to further examine the accused-petitioner u/s 313 of the Cr. P. C. regarding his previous convictions (which incidentally remained admitted by the accused-petitioner). This amounts to patting the cart before the horse. Section 212 (1) of the Cr. P. C. requires that "the charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any).....is reasonably sufficient to give the accused notice of the matter with which he is charged." It was therefore, necessary for the Magistrate to specify in the charge the particulars regarding the previous convictions of the accused-petitioner. This, the Magistrate could certainly not have done at the commencement of the trial, but only after he had found him guilty and was proceeding to sentence him. The relevant provisions are contained in section 248(3) of the Code of Criminal Procedure running as follows :

Where, in any case under this Chapter, a previous conviction is charged under the provisions of sub-section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon :

Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or any evidence adduced by it, unless and until the accused has been convicted under sub-section (2).

11. Section 298 of the Cr. P. C. lays down the mode of proving a previous conviction (or acquittal). It could be proved either :

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or.

(b) in case of a conviction either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone or by production of the warrant of commitment under which the punishment was suffered.

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

But these provisions do not dispense with either the framing of a charge or the additions to the already existing charge regarding previous conviction of the accused. The framing of a charge aims at informing the accused, of the case he has to meet.

12. In this case, there was no charge regarding the previous convictions of the accused-petitioner having been framed. Section 216 of the Criminal Procedure Code empowers a Court to alter or add to any charge at any time before the judgment is pronounced. The Magistrate, therefore, was competent to frame a charge or add to the charge already framed which in this case could have been done before the Magistrate had proceeded to examine the accused-petitioner regarding his previous conviction.

13. Section 313 of the Cr. P. C. lays down as follows :--

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstance appearing in the evidence against him, the Court--

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case;

provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answer to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into or trial for any other offence which answers may tend to show he has committed.

14. These terms also pre-suppose the existence of circumstances which the accused is being called upon to explain. Those circumstances cannot appear unless they have been proved either by oral or documentary evidence by the prosecution. The question of their proof does not come into play unless there is first in existence an

allegation about them against the accused.

15. To conclude, even though a formal charge u/s 75 of the IPC was not necessary in this case, as the Magistrate has awarded a punishment of rigorous imprisonment for two years which was not beyond the maximum awardable for offence punishable u/s 379 of the Indian Penal Code of which, the accused-petitioner had been found guilty; none the less as the two previous convictions of the accused-petitioner had influenced the learned Magistrate to award the accused-petitioner punishment of rigorous imprisonment for two years, he could not have done so without first amending the charge which he was competent to do u/s 216 of the Cr. P. C. regarding his (the accused-petitioner"s) previous convictions.

16. Ordinarily I would have remanded the case to the learned Magistrate sentencing the accused-petitioner but the accused-petitioner has already undergone imprisonment for about seven months and twenty one days (between 21-7-81 and 27-7-81 and 12-1-81 till to date) which I feel is sufficient punishment for the theft of the articles worth about Rs. 239.

17. The revision petition, in consequence, is partly allowed. His conviction for offence punishable u/s 379 of the Indian Penal Code inasmuch as he stole a bag containing clothes worth about Rs. 239 is maintained, but he is not liable to any enhanced punishment and his sentence is reduced to the term of imprisonment already undergone by him.