Jangal Prasad vs The State on 20 December, 1951

Equivalent citations: AIR1953SC467, AIR 1953 SUPREME COURT 467

JUDGMENT

Fazl Ali, J.

1. The only question to be decided in this appeal relates to the sentence imposed on the appellant, and it arises in the following manner. The appellant was tried by a Magistrate of Jabalpur on the charge of having committed an offence under Section 377, Penal Code and was found guilty. While sentencing the appellant, the Magistrate observed as follows:

> "The accused is a first offender of 18 years of age. A deterrent sentence would be highly inappropriate in this case. I accordingly order that the accused shall receive 10 stripes under Section 4(b), Whipping Act in lieu of the sentence provided under Section 377, I. P. C."

The sentence imposed on the appellant was upheld by the Sessions Judge of Jabalpur, but, in revision, the Madhya Pradesh High Court pointed out that the sentence of whipping was illegal since the appellant was not a juvenile offender and the only other relevant provision of the Whipping Act was Section 4(b) which was not applicable to this case. Section 4(b) provides that a sentence of whipping can be passed only in those cases where a person compels or induces another by fear or bodily injury to submit to an unnatural offence, but that was not the case here. The High Court accordingly set aside the sentence of whipping and sentenced the appellant to nine months' rigorous imprisonment.

2. The sole point urged in this appeal is that the order of the High Court amounted to an enhancement of the original sentence, and it should not have been passed without giving notice to the appellant and hearing him in the matter, as is provided in Section 439, Criminal P. C. and settled by a long course of decisions. It was urged on behalf of the State that there is no question of enhancement of sentence in this case. Since all that has happened is that an illegal sentence which was a nullity has been set aside by the High Court, and the court of revision, which has all the powers of a court of appeal, has imposed a proper sentence on the appellant. The question is not free from difficulty, and is further complicated by the fact that the law does not indicate, except indirectly in Section 395, Criminal P. C., what sentence of imprisonment would be equivalent to a sentence of whipping. On the whole, however, we are inclined to think that the High Court should not have passed the order radically changing the mode of punishment and seriously affecting the accused, without giving him an opportunity to show cause against it.

3. There is a note dated 21-8-1951, in the Order sheet of the High Court, to the following effect:

> "Parties request for time to argue on the point of punishment. Granted. Put up tomorrow."

It appears that before the High Court, two main questions arose for consideration. They were:

> (1) whether on the merits the conviction of the appellant could be sustained; and.
>
> (2) whether the sentence of whipping imposed by the Magistrate was legal in the circumstances of the case.

Presumably, the adjournment was asked for to argue the Second question. There is nothing on record to show that the High Court either appreciated the necessity of issuing or did issue a notice to the accused to show cause why his sentence should not be enhanced or altered in the manner in which it has been done. If such a notice was intended to be issued, there would have been an express order to that effect in the Order sheet. There is nothing to show that the accused personally had any notice that the sentence of whipping was to be substituted by a sentence of imprisonment. In this view, we set aside the sentence under appeal, and remit the case to the High Court for its disposal according to law.