

Insolvency Act before me, I have no doubt that a remission of a debt without consideration is as much a "voluntary transfer" in India as in England and as such against the Insolvency law. The cases to which I have referred seem to lead to this conclusion.

For these reasons I think that the Official Assignee succeeds and that there should be a decree in terms of this notice of motion with taxed costs.

G.R.

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ASSIGNEE  
v.  
KANNIAH  
NAIDU.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Pandrang Row.*

THE CROWN PROSECUTOR, PETITIONER,

1934,  
October 29.

v.

MUTHUSAMY (ACCUSED), RESPONDENT.\*

*Indian Penal Code (Act XLV of 1860), sec. 75—Convictions outside British India—Court not bound to consider in determining sentence—Admissibility in evidence of.*

The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only by the facts and circumstances of each case unless there is a liability to enhanced punishment by reason of any specific provision of law such as section 75, Indian Penal Code (Act XLV of 1860). Convictions outside British India cannot be made the basis of any charge under section 75, and therefore the Court is not bound to consider such convictions in determining the sentence. Evidence of such convictions is however admissible as proof of bad character. But, as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the sentence to be imposed upon him, the Magistrate cannot be held to have acted

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\* Criminal Revision Case No. 492 of 1934.

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illegally in the exercise of his discretion if he declines to consider such previous convictions.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, dated the 21st day of February 1934 and passed in Calendar Case No. 246 of 1934.

*Crown Prosecutor (T. S. Anantaraman)* for petitioner.

Respondent-Accused was not represented by Counsel.

*Cur. adv. vult.*

#### ORDER.

This is an application by the Crown Prosecutor, Madras, to enhance the sentence passed on the accused in Calendar Case No. 246 of 1934 on the file of the Chief Presidency Magistrate of Madras. The accused in the case was found guilty of having stolen some cash and cloth, worth in all about twelve rupees, belonging to Prosecution Witness 1 in the case while the latter was bathing at a bathing ghat in Madras. The Magistrate found the accused guilty of an offence punishable under section 379, Indian Penal Code, and sentenced him to pay a fine of Rupees thirty, and in default of payment thereof to undergo rigorous imprisonment for three months, and directed twelve rupees out of the fine, if collected, to be paid as compensation to Prosecution Witness 1. It would appear that the fine has not been paid. The conviction and sentence are dated the 21st February 1934 and it is clear that the accused in the case must have undergone the entire sentence of imprisonment.

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The only ground on which it is contended before me that the sentence imposed by the learned Chief Presidency Magistrate is inadequate is that he failed to consider the antecedents of the accused which were mentioned to him orally by the Prosecuting Inspector of Police who conducted the prosecution. It would appear that the Prosecuting Inspector of Police, in reply to a question put by the Court about the previous record of the accused for the purpose of determining the sentence, stated that the accused had four previous convictions in the Police Courts of Colombo, three for theft and one for cheating, the last of them being on 24th September 1932 for which he had been awarded six months' rigorous imprisonment. It is stated that the accused admitted these convictions but that the learned Chief Presidency Magistrate declined to take these convictions into consideration for the purpose of determining the sentence on the ground that these convictions were not convictions pronounced in British India. It is contended that this view of the Magistrate, viz., that convictions had out of British India should not be taken into consideration in determining the punishment, is wrong. If at all it was open to the Magistrate to take into consideration the previous antecedents of the accused, the convictions outside British India were relevant. But in view of the fact that these convictions could not be made the basis of any charge under section 75, Indian Penal Code, evidence of these convictions could be admissible only as evidence of bad character, and, as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the

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sentence to be imposed upon him, I am unable to say that the learned Chief Presidency Magistrate acted illegally in the exercise of his discretion in declining to consider the previous convictions in this case. The attempt of the prosecution was really to give these convictions outside British India the same effect for practical purposes as convictions within British India, that is to say, to induce the Magistrate to give a higher punishment than he would otherwise award. It may be that the Magistrate is not disentitled, if he thinks fit, to make such enquiries as he thinks proper, and as are not prohibited by the law, about the previous antecedents of the accused. But if he declines to look into these antecedents he cannot be said to act illegally in the exercise of his discretion. The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only with regard to the facts and circumstances of each case unless indeed there is a liability to enhanced punishment by reason of any specific provision of law such as section 75, Indian Penal Code. Apart from these convictions outside British India, it is not contended that the sentence is inadequate. The learned Chief Presidency Magistrate was not bound to consider these convictions in determining the sentence ; even though it might have been open to him to have considered them, I am not prepared to interfere in revision and enhance the sentence in this case.

The criminal revision petition is therefore dismissed.

K. W. R.