

## CRIMINAL APPELLATE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR v. ISMAIL ALI BHAI.\*

1914.

September 14.

*Practice—Sentence—Previous conviction—Relevancy of previous conviction for the purpose of determining extent of sentence—Indian Penal Code (Act XLV of 1860), section 75—Indian Evidence Act (I of 1872), sections 54, 165.*

The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced after the accused is found guilty, as an element to be taken into consideration in awarding punishment.

*Per* SHAH, J. :—The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment.

APPEAL from conviction and sentence recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was tried for an offence punishable under section 353 of the Indian Penal Code, in that he assaulted an Abkari sepoy.

There was a previous conviction against him for assaulting an Abkari sepoy in 1905.

The trying Magistrate heard the evidence and came to the conclusion that the accused had committed the offence. He then let in proof of the previous conviction against the accused and sentenced the accused to suffer rigorous imprisonment for nine months.

The accused appealed to the High Court.

*Velinkar*, with *B. T. Desai*, for the accused :—Section 54 of the Indian Evidence Act, before its amendment by section 6 of Act III of 1891, ran as follows : “ In Criminal

\* Criminal Appeal No. 354 of 1914.

proceedings, the fact that the accused has been previously convicted of any offence is relevant ; but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant". In *Queen-Empress v. Kartick Chunder Das*<sup>(1)</sup>, which was decided under the old section 54, a Full Bench of the Calcutta High Court held that a previous conviction was in all cases admissible in evidence against an accused person. This led to an amendment of the section ; and the Legislature excluded evidence of previous convictions except in certain cases mentioned in the section. In the section as it stands now the terms "previous conviction" and "the fact that the accused has a bad character" are treated as synonymous. Hence proof of previous conviction can now be given only under certain circumstances.

Section 75 of the Indian Penal Code does not apply to the present case. Section 310 of the Criminal Procedure Code has reference where a charge under section 75 of the Indian Penal Code is one of the charges in the indictment. My contention derives support from the terms of section 311 of the Criminal Procedure Code, which provides that evidence of previous conviction may be given if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act. See also *Emperor v. Duming*<sup>(2)</sup>.

*S. S. Patkar*, Government Pleader, for the Crown :— There is no illegality in allowing the conviction to be proved. Section 54 of the Indian Evidence Act has no application. The Magistrate has to decide for himself what punishment he will inflict. One of the circumstances to guide him is the antecedents of the accused.

*HEATON, J.*:—This is an appeal against a conviction for using criminal force to deter a public servant from

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the discharge of his duties. The offence consists in this that the two accused succeeded in preventing the arrest of a person who was believed to be taking part in traffic in cocaine. The two accused were sentenced and we are dealing with the appeal of one of them.

On the evidence, I think, the Magistrate was right in holding that the offence was committed. The chief question argued is this: is a previous conviction one of the matters which a Court is permitted to consider in imposing sentence? The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere not of evidence but of penology. Section 54 of the Indian Evidence Act is a part of the Law of Evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the enquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction, is irrelevant to help to establish an accused person's guilt. But the Law of Evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be, is largely left to practice and to the common sense and knowledge of the world of the Court. Where they are definitely indicated, this is done in the Indian Penal Code and the law of Criminal Procedure, the Whipping Act and so forth; most emphatically not in the Law of Evidence. One might as reasonably, I think, look to the Law of Evidence for information as to the maximum sentence to be imposed. In my judgment, therefore, to apply section 54 of the Indian Evidence Act to the matter now before us is as much out of place as to apply, say, the Hindu Law to an

European's will. Of course, the previous conviction, if it is to be taken into account, must be proved to the satisfaction of the Court, and in the matter of proving it, it may be that the provisions of the Indian Evidence Act apply. I do not wish to express any opinion on that point.

Having regard to the previous conviction, I think that the sentence imposed in this case is appropriate to the offence and I would dismiss the appeal and confirm the conviction and sentence.

SHAH, J.:—I agree that the conviction and sentence must be confirmed in this case. The conviction is undoubtedly right. We took time to consider the question of sentence. It is argued by Mr. Velinkar that the sentence must be based upon materials which are relevant under the Indian Evidence Act, and that the previous conviction which is taken into consideration by the lower Court is irrelevant under section 54 of that Act.

The previous conviction is used in this case not for the purpose of affecting the punishment to which the accused is legally liable, but merely to influence the Court in determining the amount of punishment, which it should award. The conviction in this case is under section 353 of the Indian Penal Code, and the previous conviction in question was for assaulting an Abkari sepoy on the 5th August 1905,—apparently under section 353 of the Indian Penal Code. I think that under section 165 of the Indian Evidence Act the judgment must be based upon facts declared by the Act to be relevant and duly proved. Under the Criminal Procedure Code the judgment or the particulars to be recorded by a Presidency Magistrate would include the punishment, to which the accused is sentenced. It is clear that the sentence must be based upon facts which are relevant under the Indian Evidence Act. I

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am, however, unable to accept Mr. Velinkar's argument that under section 54 a previous conviction is irrelevant just as the fact that the accused person has a bad character is irrelevant. His contention in effect is that the expressions "bad character" and "previous conviction" are mutually convertible terms within the meaning of section 54. If the section, as it is now and as it was before the Amending Act III of 1891, be carefully read, it seems to me clear that these expressions cannot be treated as having exactly the same meaning and scope. Though the fact of bad character is irrelevant except as provided in the section itself, it does not follow that a previous conviction is similarly irrelevant.

The case of *Emperor v. Dunning*<sup>(1)</sup>, which is relied upon by Mr. Velinkar in support of his contention, is really not in point. There the evidence of a previous conviction was admitted before the conviction of the accused of the offence charged; and the observations in the judgment have relation to that fact. The question raised in this appeal, viz., whether after conviction the proof of a previous conviction not covered by section 75 of the Indian Penal Code can be given, did not arise and could not have been considered in that case.

I have also considered the provisions of section 348 of the Code of Criminal Procedure in connection with this point. In my opinion the section does not touch the point that has been argued in this appeal.

It follows that the proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly

(1) (1903) 5 Bom. L. R. 1034.

relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment. The lower Court was justified in taking it into consideration in deciding the question of punishment after the accused was found guilty. I do not say that any previous conviction not covered by section 75, Indian Penal Code, is relevant to the question of sentence. But the question of relevancy of a previous conviction not falling under section 75, Indian Penal Code, must be considered and decided in each case as it arises with reference to the circumstances of that case.

*Order accordingly.*

R. R.

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ORIGINAL CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.*

IN THE MATTER OF THE INDIAN COMPANIES ACT (VI OF 1882), AND IN THE MATTER OF THE CREDIT BANK OF INDIA, LIMITED (IN LIQUIDATION):

FAZULBHOY JAFFER, APPLICANT AND APPELLANT, *v.* THE CREDIT BANK OF INDIA, LIMITED (IN LIQUIDATION), BY ITS OFFICIAL LIQUIDATOR, R. D. SETHNA, RESPONDENT.<sup>c</sup>

*Company—Winding up—List of contributories—Minor—Estoppel by conduct after attaining majority—Indian Companies Act (VI of 1882).*

F, a minor, applied for and was allotted certain shares in a limited company. He received dividends, and continued to do so after attaining majority. On the winding up of the company he was included in the list of contributories,

*Held* that, having intentionally permitted the company to believe him to be a share-holder and in that belief to pay him dividends since he attained majority, he was estopped by his conduct while a person *au jus* from deuying as between himself and the company that he was a share-holder.

View of Stirling J. in *Re Yeoland Consols Limited (No. 2)*<sup>(1)</sup> adopted.

<sup>c</sup>Appeal No. 8 of 1914.

<sup>(1)</sup> (1888) 58 L.T. 922.

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