



Previous conviction: A call for fair procedure

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Abstract

The criminal law focuses upon the gravity of the unlawful act of the offender by awarding maximum penalty thereby induces the courts to judge that act call under maximum punishment or not. The cardinal principle of criminal jurisprudence which speaks up that the accused persons shall be presumed innocent until proved guilty beyond reasonable doubt but this has been misconceived while framing charge under section 75 IPC.

Keywords: Conviction, subsequent offence, *Ambiguity*

1. Introduction

The real test for a Judge comes in determination of the right measure of punishment which ought to be inflicted upon the accused for the offence committed and proved. There is often a great difficulty in determination of sentence. Since, hard and fast rules cannot be laid down in determining the parameters for sentencing, therefore, decision is left to discretion of the Court, and such discretion has to be guided by a variety of considerations. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and if so, by how much.

2. Previous Conviction in sentencing process.

If a person has shown from his past actions that he intends to adopt a criminal career, three things should be borne in mind while sentencing him; first, it is necessary to pass a sentence upon him which will make him realize that a life of crime becomes increasingly hard, and does not pay; secondly, the sentence should serve as a warning to others who may be thinking of adopting a criminal career, and thirdly, the public must be protected against people who know that they are going to ignore the rules framed for the protection of society^[1].

It is with this object in mind, the framers of Indian Penal Code (referred to as IPC for short) enacted S.75. IPC^[2] with an intention to provide for sentence more severe than those provided in the Code for the particular offence charged, if the accused happens to have suffered previous conviction for the similar offence. The words "subsequent offence" u/S.75, IPC mean an offence committed subsequently to previous conviction. Section 75, IPC does not constitute a separate offence^[3], but it only imposes a liability to enhanced punishment for the subsequent offence committed by the accused. The enhanced punishment as provided u/S.75. IPC can be seen as an exception to the limit of punishment prescribed under Chapter XII (Offences relating to coin and Government Stamp) or Chapter XVII (Offences against property) wherein the Court could impose punishment more than the statutory prescription for the offence falling under Chapter XII or Chapter XVII if the offender was previously convicted for the offence under those Chapters punishable with three years' imprisonment.

To bring an offence within the terms of this section:

- (1) The offence must be one under either Chapter XII or XVII of Code.
- (2) The previous conviction must have been for an offence therein punishable with imprisonment for not less than three years; and.
- (3) The subsequent offence must also be punishable with imprisonment for not less than three years^[4].

3. Procedural Ambiguity

While S.75, IPC is a principle of punishment that provide for enhanced punishment for the offence falling under Chapter XII or Chapter XVII, IPC, the procedural aspects for implementation of this substantive procedure can be found under Code of Criminal Procedure, 1973. Under S.211 (7)^[5], S.248 (3)^[6] and Second Schedule in Form No 32^[7] of Cr. P.C., one could find the procedure that deal with the cases of previous conviction. It is stated that a separate charge under S.75, IPC must be framed and recorded if the accused is to be tried for an offence punishable under it^[8]. However, it should not be misconceived that a separate sentence has to be passed for charge u/S. 75, IPC, it is to be observed that S.75, IPC provides for enhanced sentence for subsequent offence and not a separate sentence.^[9] As such a person convicted u/S, 392 and 75. IPC is not convicted of distinct offence within the meaning of S.31 or Cr. P.C^[10].

With this understanding, it is clear that Section 75, IPC does not constitute an independent offence as such no distinct sentence of imprisonment is awarded on account of a previous conviction as it is not in itself an offence. It is merely a circumstance rendering the offender, convicted of a subsequent offence, liable to a larger measure of punishment. The legal position is settled with regard to the aspects of S.75, its applicability and effect. However, still an ambiguity lies in the procedure that is to be adopted for framing charge u/S. 75, IPC.

4. Charge Frame u/S 75. IPC

The stage at which charge u/S.75 IPC is to be framed lingers in doubt. This lack of clarity is giving scope for taking recourse to procedure that goes squarely against the cardinal rules of criminal jurisprudence which stand on the principle that

“Accused shall be presumed innocent until proved guilty beyond reasonable doubt”.

The literal interpretation by conjoint reading of S.211(7), S.248(3) proviso and second scheduled Form No.32 of the Code of Criminal Procedure, 1973, one gets to understand that charge under S.75, IPC has to be framed along with the subsequent offence. An illustrative approach would be better in communicating the idea; Say Mr. X is charged with offence u/S. 379, IPC and S.75, IPC, as per the general understanding and the practice prevailing in majority of the Courts, charge u/S.75, IPC is framed along with charge u/S. 379, IPC, however same is not read over to the accused asking him to plead thereto on the charge of S.75^[11]. Reference to S.75, IPC is made to accuse only after conviction is recorded for the offence u/S.379. IPC, wherein charge under Section 75 is read out to accused explaining him of his previous conviction and if accused denies the charge, evidence is led to prove previous conviction.

5. Charge frame under Cr.PC.

The purpose of framing the charge is as to give first notice to the accused of his offence and it should convey to him in sufficient clearness and certainty what the prosecution intends to prove against him^[12].

However, with the reading of S.211(7) and S.248(3) Proviso, it is understood that charge has to be stated along with subsequent offence but such charge shall not be read over to the accused unless conviction is recorded for the subsequent offence. It is noted that the words “framing the charge” is divided into two parts for convenience of understanding the above assumption, part one consists of stating a charge which could be inferred as putting the charge into writing and other part is reading over the written charge to the accused. It is the combination of these two process which culminate into saying that charge is “framed”, if this understanding is taken as true, than the question is what purpose would be served if previous conviction charge is stated (taken down in writing) along with subsequent offence and not being read over the same to accused? Is such procedure adopt the fair rule of practice?

Further if a careful reading is given to S.248 (3) proviso, it states that no previous conviction 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 in any evidence adduced by it, unless and until the accused has been convicted under sub-section (2) of S.248. As such, the reading over of previous conviction charge comes into play only after conviction is recorded for the subsequent offence. Therefore, it would be absurd to say that charge u/S.75, IPC has been stated along with subsequent offence but such charge shall not be read over to accuse unless conviction is recorded for subsequent offence. The interpretation of S.211 (7) and S.248 (3) proviso if read in consonance with criminal jurisprudence, it only leads to a conclusion that charge u/S.75. IPC need to be framed after conviction is recorded for the subsequent offence.

6. Conclusion

Therefore, it would be better to frame charge u/S.75, IPC after conviction is recorded for the subsequent offence. In a way S.211(7), S.248(3) Cr.P.C. provide the powers to a Magistrate to again conduct trial after recording conviction for the subsequent offence, therefore no irregularity would be

caused if charge u/S.75. IPC is framed after recording conviction. On the other hand, if charge u/S.75. IPC is framed along with subsequent offence, prejudice would be caused to the accused affecting his fundamental right provided under the criminal law. As such it is better to err on right by framing charge u/S.75. IPC after recording conviction for subsequent offence.

7. Reference

1. Mahomed Hanif. 44 Bom LR 456, 43 Cr L.J754. 1942 AIR (B) 215, 1942.
2. Enhanced punishment for certain offence under Chapter XII or Chapter XVII after previous conviction: Whoever, having been convicted, (a) 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 upwards, shall be guilty of any offence punishable under either of those chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years.
3. Refer to S.40. IPC for definition of the word offence.
4. The Law of Crimes. T Ratanlal and Dhirajlal. 19th edition (Bombay Law Reporter (P) Ltd). 1942, 122.
5. S. 211 (7), Cr. P.C. states that previous conviction charge has to be distinctly framed.
6. S.248 (3) provides procedure as to when evidence of previous conviction to be taken by Court.
7. Form No.32 under Second Schedule gives the contents of previous conviction charge (Proforma).
8. Refer S.211 (7) and Second Schedule Form No.32 of Cr.P.C.
9. 1992 Cr LJ, 2989.
10. 1969 Ker LT 838: AIR 1970 Ker 735.
11. Since there is bar under Section 248(3) proviso which reads 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 in any evidence adduced by it, unless and until the accused has been convicted under sub-section (2).
12. Mannalal Khartik v. State of West Bengal, AIR 1967 Cal 478.