

APPELLATE CRIMINAL

Before R. P. Khosla and P. D. Sharma, JJ.

JANGIR SINGH AND OTHERS,—Appellants

versus

THE STATE,—Respondent

Criminal Appeal No. 589 of 1960

1961

Nov. 17th

Code of Criminal Procedure (V of 1898)—Sections 423 and 439—Person charged with and tried for a major offence but convicted for a minor one—No appeal by the State—Appeal by the convict and Revision petition by private complainant—High Court—Whether can convert the conviction from minor offence to major offence.

Held, that the High Court in exercise of its appellate or revisional powers under section 423(1)(b) or section 439 of the Code of Criminal Procedure is not competent to reverse the finding of acquittal recorded by the trial court in favour of the appellant in respect of an offence which directly was not the subject-matter of the appeal. The power conferred by the expression "alter the finding" in section 423(1)(b) does not include the power to alter or modify the finding of acquittal. The question of enhancement of sentence under section 439(1), dependant upon contemplated alteration or modification of the finding of acquittal cannot thus arise. Hence where an accused had secured acquittal on the charge of murder section 302/34, Indian Penal Code, and had been convicted by the trial Court under section 304, Part I, instead, their said conviction on an appeal by the convicts and petition for revision filed by the complainant cannot be altered to one under section 302/34, Indian Penal Code, either under section 423 or section 439, Criminal Procedure Code, or both read together.

Case referred by Hon'ble Mr. Justice Bedi, on 14th April, 1961, to a larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice R. P. Khosla and Hon'ble Mr. Justice P. D. Sharma, returned the case after deciding the question of law to Single Bench on 17th November, 1961, for decision on merits. The case was finally decided by Hon'ble Mr. Justice Falshaw, on 11th December, 1961.

DARA SINGH, ADVOCATE, for the Appellants.

NARINDER SINGH, ADVOCATE, for the Respondents.

ORDER

. SHARMA, J.—Jangir Singh, Bhola Singh, Dalip Singh and Joginder Singh were tried under section 302 read with section 34, Indian Penal Code, for committing the murder of one Pritam Singh in furtherance of their common intention. The learned Additional Sessions Judge, Faridkot came to the conclusion that the charge under section 302 read with section 34, Indian Penal Code, had not been brought home to the accused and proceeded to convict them under section 304, Part I, Indian Penal Code, and sentenced them to three years' rigorous imprisonment and to pay a fine of Rs. 500 each, or in default of payment of fine to undergo rigorous imprisonment for a further period of six months each. A sum of Rs. 1,500 out of the fine, if realised, was to be paid to Shrimati Gurdial Kaur, widow of the deceased.

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The accused preferred an appeal against the order of this Court. The complainant also filed a revision petition contending that the accused should have been convicted for culpable homicide amounting to murder and as a result prayed for enhancement of punishment already awarded to them. The appeal and the revision both came up for hearing before the learned Single Judge, who in view of the importance of the point agitated, which was to the following effect, referred the case to a larger Bench; in consequence, it has been placed before us for decision:

“Where accused are tried by a Sessions Court on charge of murder committed in furtherance of common intention, and the Sessions Court acquits the accused of this charge and convicts them only of an offence under section 304, Part I, read with section 34, Indian Penal Code, and the accused appeal to the High Court against the conviction and sentence but the State Government does not appeal against the acquittal of the accused on charge of murder, is it open to the High Court under section

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423 or section 439, Criminal Procedure Code, on a revision filed by the complainant for enhancement of punishment, to set aside the conviction and sentence under section 304, Part I, read with section 34, Indian Penal Code, and to convict and sentence them for murder under section 302 read with section 34, Indian Penal Code?"

Section 423, Criminal Procedure Code, relates to powers of Appellate Court in disposing of appeal and sub-sections (1) and (1A) are as under:—

[His Lordship read sub-sections (1) and (1A) and continued:]

Section 439, Criminal Procedure Code, governs the High Court's powers of revision and sub-sections (1), (4) and (5) are reproduced below:

[His Lordship read sub-sections (1), (4) and (5) and continued:]

The learned counsel for the accused-appellants maintained that the High Court in exercise of its appellate and revisional powers under section 423(1) (b) or 439, Criminal Procedure Code, could not reverse the finding of acquittal recorded by the trial Court in favour of the appellant in respect of an offence which directly was not the subject-matter of appeal and in doing so referred to the case, *Kishan Singh v. Emperor* (1), where a similar point came up for decision. In the cited case, an accused was charged with the offence of murder under section 302, Indian Penal Code, in the Sessions Court. He was, however, convicted under section 304, Indian Penal Code, and sentenced to a term of imprisonment. The said judgment of the Sessions Court was questioned in the High Court at the instance of the local Government on the revisional side. The High Court on reviewing the evidence concluded that the offence under

(1) A.I.R. 1928 P.C. 254.

section 302, Indian Penal Code, had been made out instead, and while convicting the accused accordingly sentenced him to death. Their Lordships of the Privy Council on appeal by special leave observed that the accused must be deemed to have been acquitted in the Sessions Court of the charge of murder and that the order of the High Court resulted in altering a finding of acquittal into one of conviction and was, therefore, without jurisdiction. The same view was propounded in *Mohammad Sharif and another v. Rex* (1), *Tej Khan and others v. Rex* (2), and *Thadi Narayana v. The State* (3). The Supreme Court on an appeal by the State of Andhra Pradesh in *Thadi Narayana's case* (4) (Criminal Appeal No. 222 of 1959, *The State of Andhra Pradesh v. Thadi Narayana*, decided on 24th July, 1961), confirmed the decision taken by the Andhra Pradesh High Court. Their Lordships laid down that the power conferred by the expression "alter the finding" in section 423 (1) (b) (2) did not include the power to alter or modify the finding of acquittal.

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A Full Bench decision of the Lahore High Court in *Bawa Singh Sawan Singh v. Emperor* (5), however, pointed to the contrary while laying down:—

"It is open to an appellate Court, in an appeal from a conviction by a convict who had been charged, say for example, under section 302, Penal Code, but convicted under section 304, Part I, Penal Code, to alter the conviction from one under section 304, Part I, to one under section 302, Penal Code, and then in the exercise of the powers conferred by section 439(1) to enhance the sentence to one of death."

(1) A.I.R. 1950 Allahabad 380.

(2) A.I.R. 1952 Allahabad 369.

(3) A.I.R. 1960 A.P. 1.

(4) A.I.R. 1962 S.C. 240.

(5) A.I.R. 1941 Lah. 465.

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This decision was noticed and obviously not approved of by their Lordships of the Supreme Court while deciding *The State of Andhra Pradesh v. Thadi Narayana* (1). In view of the rule of law indicated by the Supreme Court in *Thadi Narayana's case*, it cannot now be urged with any show of justification that an Appellate Court in an appeal from a conviction by a convict, can alter or modify the finding of acquittal under section 423 (1) (b)(2) of the Code of Criminal Procedure. The question of enhancement of punishment under section 439 (1), Criminal Procedure Code, dependent upon contemplated alteration or modification of the finding of acquittal, could not thus arise. The High Court in exercise of revisional powers under section 439 (4), Criminal Procedure Code, is not competent either to convert a finding of acquittal into one of conviction. The prohibition is obvious on the plain reading of the provisions of section 439, sub-section (4) and refers to a case where the trial ended in a complete acquittal of the accused in respect of all charges of offences, as well as, to a case such as the present one, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder. The proposition is well founded and stands amply supported by the observations and dictum in *Kishan Singh v. Emperor* (2), and *The State of Andhra Pradesh v. Thadi Narayana* (1).

For all these reasons, we are irresistibly driven to the conclusion that if the accused had secured acquittal on the charge of murder under section 302/34, Indian Penal Code, and had been convicted by the trial Court under section 304, Part I, instead, their said conviction on an appeal by the convicts and petition for revision filed by the complainant cannot be altered to one under section 302/34, Indian Penal Code, either under

(1) A.I.R. 1962 S.C. 240

(2) A.I.R. 1928 P.C. 254

section 423 or section 439, Criminal Procedure Code, or both read together. The reference is answered accordingly.

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The case should now go back to the learned Single Judge for disposal on merits.

R. P. KHOSLA, J.—I agree.

R. P. Khosla, J.

K. S. K.

REVISIONAL CRIMINAL

Before Gurdev Singh, J.

JIT SINGH *alias* RANJIT SINGH,—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Revision No. 725 of 1961.

Criminal Miscellaneous No. 387 of 1961.

Code of Criminal Procedure (V of 1898)—Section 257—Rules and Orders of Punjab High Court Volume III—Chapter 9A, Rule 1—Defence witnesses—Whether to be summoned at State expense—Capacity of the accused to pay the expenses of summoning his defence witnesses—Whether a valid ground to refuse to summon such witnesses unless the accused deposits process fee and diet money, etc.

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Held, that under section 257 of the Code of Criminal Procedure the Magistrate has the power to call upon the accused to deposit reasonable expenses for summoning witnesses on his behalf but this power has to be exercised on judicial principles and after recording reasons. Rule 1 of Chapter 9A of the Punjab High Court Rules and Orders, Volume III, prescribes the cases in which the witnesses are to be summoned at the State Expense and no distinction is made between witnesses summoned by the prosecution or the accused in the payment of their expenses. Where a Court summons a witness under section 540 of the Code of Criminal Procedure his expenses have to be met by the State irrespective of the fact whether the case has been