

# CALCUTTA HIGH COURT

Krishna Dhan Mandal

Vs

Queen-Empress

(Banerjee, C.J. Sale, J.)

13.11.1894

## JUDGMENT

### **Banerjee and Sale, JJ.**

1. The appellants in this case were tried by a jury before the Sessions Court of the 24-Pergunnahs on charges under Sections 148 and 304, read with Section 149, of the Indian Penal Code, and they have been convicted under Sections 304 and 149 of culpable homicide not amounting to murder, by causing the death of one Mahabir Singh, and sentenced to ten years transportation each. In appeal it is contended on their behalf that the conviction is wrong, first, because there is a previous acquittal which is a bar to the present trial; and, secondly, because the verdict of the jury is erroneous, owing to material misdirection by the Judge to the jury, the misdirection consisting in (a) the Sessions Judge not pointing out properly the distinction between murder and culpable homicide, and (b) the Sessions Judge further not pointing out properly the circumstances under which Section 149 of the Penal Code applies.

2. The facts upon which the first contention is based are as follows : The accused were tried on a former occasion before the Sessions Court of the 24-Pergunnahs for offences punishable under Sections 302 and 325 of the Indian Penal Code, each read with Section 149, that is, for the offences of murder and grievous hurt alleged to have been committed by some members of an unlawful assembly, of which the accused were also members, in prosecution of the common object of the assembly. They were acquitted of the former offence, that is, murder, and were convicted of causing grievous hurt to Mahabir Singh. They appealed to this Court, and the result of the appeal was that the conviction was set aside, the verdict of the jury being found to be erroneous, owing to misdirection by the Judge, and they were ordered to be retried. In the retrial held under the order of this Court, the accused have been convicted under Section 304, read with Section 149, of the Penal Code, and it is against this conviction under Sections 304 and 149 of the Indian Penal Code that the present appeal is preferred.

3. These being the facts of the case, it is contended by the learned Counsel for the appellants in

support of his first ground, (1) that, as a matter of law, this Court could not have interfered with the acquittal of the accused on the charge of murder, there having been no appeal by the Local Government, as provided by Section 417 of the Code of Criminal Procedure; (2) that, as a matter of fact, this Court did not interfere with the acquittal on the charge of murder, it having set aside only the conviction of the accused; and (3) that the previous acquittal of the accused on the charge of murder is by Section 403 of the Code of Criminal Procedure a bar to the trial and conviction for culpable homicide not amounting to murder.

4. With reference to the first point raised in this contention, it is clear from Sections 404 to 417 of the Code of Criminal Procedure, that where a person is tried on one charge only and is acquitted on it, or is tried on several charges and is acquitted on them all, the acquittal cannot in any way be interfered with, except upon appeal by the Local Government. But the matter is not equally clear, when an accused person is tried on several charges, is acquitted on some and convicted on the others, and appeals from the conviction. Clause (b) of Section 423 of the Criminal Procedure Code which provides that in an appeal from a conviction the Appellate Court may set aside the conviction and sentence and order a retrial, or it may alter the finding, maintaining or reducing the sentence, seems to favour the opposite view. The Appellate Court has the whole of the evidence before it, and if it can order a retrial, or alter the finding on the appeal of the accused, why may it not order a retrial on the charge on which the first Court acquitted the accused, or find the accused guilty on the charge on which he was acquitted by the first Court? No doubt it might be said that this would violate the salutary principle which protects with jealous care orders of acquittal from interference except in a special way, that is, on appeal by the Local Government. But the principle would practically be left unimpaired in the majority of cases even if the Appellate Court alters the finding in the way stated above by the express provision in Clause (b), Section 423 against enhancement of sentence. While thus, on the one hand, the construction we put upon Clause (6), Section 423 of the Criminal Procedure Code will not be likely to lead to any prejudice to the accused, on the other hand, it is obviously necessary in the interests of justice that that construction should be put upon it, as otherwise great miscarriage of justice might result. Thus, suppose that the accused is charged with theft and criminal breach of trust in respect of the same property, and that the first Court acquits him of the former offence and convicts him of the latter. If on appeal by the accused the Appellate Court finds that the accused had never been entrusted with the property, but that he stole it, it cannot affirm the conviction for criminal breach of trust; and if it is precluded from convicting him of theft by reason of the acquittal by the first Court, the accused must be acquitted altogether. Such a result, which would be inevitable, unless Clause (b) of Section 423 is construed in the way we have indicated, could never have been intended by the Legislature, which has taken so much care to provide (see Sections 236 and 237 of the Code of Criminal Procedure) against any similar failure of justice in cases where it is doubtful which of two or more offences is constituted by the acts of the accused.

5. There is one other way of viewing the matter which will make it clear that the construction we

have put upon Clause (b) of Section 423 is the only one that it should bear. If the contention of the appellants were correct that the acquittal on the charge of murder was final and incapable of being interfered with in the appeal by the accused from the conviction for grievous hurt, and must be a bar to any further trial for murder or culpable homicide not amounting to murder, it would equally well be a bar under the first paragraph of Section 403 to any fresh trial for grievous hurt. This would be manifestly absurd, and would render Section 423, Clause (b), and Section 403 incompatible with one another. When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the Appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the Appellate Court in such a case is directed primarily, not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate Court must deal with the whole case. And this becomes more than ordinarily necessary, in a case like the present, where the trial is by jury. Here if the verdict is found to be erroneous, owing to a misdirection by the Judge, it must be set aside in its entirety, as the Appellate Court cannot go into the facts (see Section 418 of the Code of Criminal Procedure), and substitute its own verdict for that of the jury. There was some discussion as to what was meant by the verdict in Section 423, Clause (d)-Mr. Allen, for the appellants, contending that it meant the verdict upon each charge separately, and Babu Ram Churn Mitter, for the Crown, urging that it meant the entire verdict on all the charges collectively. Having regard to the provisions of Sections 300 to 307 of the Code of Criminal Procedure, we think the "verdict" in Section 423, Clause (d), means the entire verdict on all the charges.

6. Where, therefore, the Appellate Court reverses the verdict of a jury and orders a retrial, unless it has limited the scope of the retrial, such retrial must be taken to be one upon all the charges originally framed.

7. This brings us to the consideration of the second point, namely, whether, as a matter of fact, this Court ordered a retrial of the whole case. In its judgment it no doubt simply sets aside the conviction and directs a retrial. But as we have said above, this, in the absence of any express limitation, must be taken to mean a retrial of the whole case.

8. We wish it to be distinctly understood that what we have said above is intended to apply only to those cases which are contemplated by Section 236 of the Code of Criminal Procedure, and in which the accused is charged with different offences arising out of a single act or a series of acts, it being doubtful which of those offences the act or acts constitute, and the accused is convicted by the first Court of one of these and acquitted of the others. Where an accused person is charged at one trial with distinct offences constituted by distinct acts, such as the causing of death to A and of grievous hurt to B, or the forgery of document A, and that of document B, and he is acquitted of one of these offences and convicted of the other, a different principle would, we

think, apply. That is not the kind of case we have before us, and we do not here determine anything with reference to cases of that class.

9. From what has been said above, it would follow that the former acquittal on the charge of murder is no bar to the present trial, for this simple reason, that that acquittal is no longer in force having in effect been set aside by the order for retrial made by this Court on the appeal of the accused.

10. Babu Ram Churn Mitter, for the Crown, relied upon a further reason for holding that the previous acquittal was no bar to the present trial, viz., that the previous acquittal was on a charge of murder, whereas the present trial is for culpable homicide not amounting to murder. We do not consider this argument sound, as it appears from the first paragraph of Section 403 of the Criminal Procedure Code, that a previous acquittal for an offence is a bar to a trial on the same facts for any other offence for which a different charge might have been made under Section 236 of the Criminal Procedure Code.

11. It remains now to consider the second ground urged on behalf of the appellants, namely, that relating to misdirection by the Judge. The misdirections are said to consist in the Judge not having properly explained to the jury, first, the distinction between murder and culpable homicide; and, secondly, the meaning and effect of Section 149 of the Indian Penal Code. As to the first we do not think that there is any misdirection at all, and even if there had been any misdirection, it could not possibly have prejudiced the accused, seeing that the verdict is one of guilty on the charge of culpable homicide not amounting to murder.

12. As to the second, it is not contended that the Judge gave any wrong direction to the jury. What is urged is that he did not explain to them the meaning of Section 149 of the Indian Penal Code, as fully as it has been explained by a Full Bench of this Court in *The Queen v. Sabed Ali*<sup>1</sup>. Considering that there has been much discussion, and some difference of opinion, regarding the meaning of Section 149 of the Indian Penal Code, it would certainly have been better if the Judge had explained that section to the jury somewhat more fully. But what the learned Judge said in his charge in explaining Section 149 of the Indian Penal Code, though concise, is in our opinion quite sufficient and clear. We do not think that there was any misdirection in the Judge's charge to the jury.

13. The two grounds urged before us, therefore, both fail. We see no reason for interfering with the convictions and sentences, and we accordingly dismiss the appeal.

Cases Referred.

<sup>1</sup>11 B.L.R. 247 : 20 W.R. Cr. 5