CALCUTTA HIGH COURT

Queen-Empress

Vs

Jabanulla

(O'Kinealy and Banerjee, JJ.)

25.06.1896

JUDGMENT

O'Kinealy, J.

1. The circumstances out of which this case has arisen are as follows : The appellants with a large number of men armed with spears and tatties went near the house of a man named Ayat Ullah and abused him, and Safat Uilah, the deceased, spoke to them, and then a man from the party of the appellants named Najib Ullah directed him to be beaten. It is said that the appellant Abdul Hakim speared Safat Ullah in the chest, and the appellant Jaban Ullah speared him on the left side as he was falling. Safat Ullah was speared through the heart and died instantaneously.

2. The appellants were charged with offences punishable under Sections 148, 302, 149 and 326 of the Indian Penal Code, and there was an additional charge laid against the appellant Abdul Hakim for an offence punishable under Section 302/149 of the Code.

3. The assessors in the Court below found the appellants guilty of an offence punishable under Section 148 of the Code, and they held that the common object was to take possession of or measure some land. The Sessions Judge was of opinion that this common object was not made out. He found, however, that the appellants were the persons who actually killed Safat Ullah, and convicted them of an offence under Section 326, namely, of causing grievous hurt by a dangerous weapon. He acquitted them of the offence under Section 148.

4. In appeal it has been argued before us that the evidence on the record is not sufficient to support the conclusion arrived at by the Sessions Judge, namely, that the appellants are the persons who actually caused the death of the deceased, and that as they have been acquitted by the Sessions Judge of the offence under Section 148 they must be acquitted.

5. We do not. share the difficulty experienced by the Sessions Judge as regards the common object. Here we have a large body of men armed with dangerous weapons crossing a broad river

and marching to the house of an obnoxious individual, and there, under the directions of a leader, attacking Safat Ulliah and killing him. It seems to us that, at the moment at least at which they obeyed the directions of the leader, their common object was to cause hurt, and that they are liable under Sections 149 and 326.

6. Then it is said that we have no power under Section 423 of the Procedure Code to alter the finding and deprive the appellants of the benefit already conferred upon them by an acquittal in respect of the offence under Section 148.

7. We are of opinion that the appellants cannot rely upon Section 403 on the ground that they have been previously acquitted, because the present appeal is not a second trial, but only a continuation of the first trial. Under Section 423 the Appellate Court can alter the finding, maintaining the sentence but not enhancing it. The power of the Court to alter the finding, therefore, is not limited in the manner 'claimed by the appellants. There are no doubt some cases to which this procedure would not be appropriate. That depends upon different considerations.

8. We, therefore, alter the conviction under Section 326 to a conviction under Sections 149 and 326, and maintaining the sentence we direct that the appeal be dismissed.

Banerjee, J.

9. I am of the same opinion.

10. The appellants in this case have been convicted by the learned Sessions Judge of Sylhet of the offence of voluntarily causing grievous hurt by dangerous weapons, and they have been sentenced to rigorous imprisonment for six years each.

11. The learned Counsel for the appellants contends that the evidence is not sufficient to prove that the grievous hurt was caused by the appellants. This, contention seems to me to be to some extent well founded; but it cannot, in my opinion, be of much avail to the appellants. For I think the evidence fully proves that the accused were members of an unlawful assembly; that the grievous hurt in question was caused in prosecution of the common object of that assembly; or that at any rate the accused knew that such grievous hurt was likely to be caused in prosecution of that object; and that having regard to Section 149 of the Indian Penal Code the accused have been rightly convicted of the offence of voluntarily causing grievous hurt by dangerous weapons, even if they did not themselves cause such hurt. I should, therefore, under Clause (b) of Section 423 of the Criminal Procedure Code affirm the conviction and sentence, the lower Court's finding of guilty under Section 326 of the Indian Penal Code being altered into one of guilty under Section 326 read with Section 149 of the Indian Penal Code.

12. It was contended by the learned Counsel for the appellants that we could not alter the finding

in that way, as the appellants, who were also charged with rioting under Section 148 of the Indian Penal Code, have been acquitted by the learned Sessions Judge of that offence, on the ground that they were not members of an unlawful assembly, and there is no appeal by the Local Government against such acquittal. It was argued that the power conferred on the Appellate Court by Section 423, Clause (b), to alter the finding, must be held to be subject to this restriction, namely, that it cannot find the appellant guilty of any offence of which he has been acquitted by the Court below; and in support of this argument the last paragraph of Section 439 was referred to.

13. I am unable to accept this argument as correct. The last paragraph of Section 439 of the Criminal Procedure Code, relied upon by the learned Counsel for the appellants, cannot be held to limit the powers of a Court of Appeal. It is intended only to limit in certain respects the revisional powers of this Court, which would otherwise have been competent in revision to convert a finding of acquittal into one of conviction. As to the extent of this limitation on the powers of this Court as a Court of Revision, there is some conflict of opinion [*See Queen-Empress v. Balwant*[1] *Heera Bai v. Frqmji Bhikaji*[2] *Thandavan v. Perianna I.L.R. 14 Mad. 363(Supra)];* but it is not necessary to consider the question here.

14. Section 423, Clause (6), has no such restriction imposed upon it. There is, under that clause, only one restriction to the power of the Appellate Court on an appeal from a conviction, and that is, that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the Appellate Court's altering 'the finding. Thus, if an accused person is charged with having murdered A, and _ also with having caused grievous hurt to him, and is acquitted of the former offence but convicted of the latter and sentenced to seven years' rigorous imprisonment by the first Court, the Appellate Court cannot, on the appeal of the accused, alter the finding into one of guilty of murder, because, as it cannot enhance the sentence, the result will be that a person convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for seven years-a sentence which is not in accordance with law. That, however, is not the case here, and so we need not consider it further. But in a case like this, in which no such difficulty arises, 1 think the Appellate Court can, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of any offence of which he may have been acquitted by that Court.

15. This view does not in any way clash with the salutary principle which protects with zealous care orders of acquittal against interference except upon appeal by the Local Government; nor does it tend to throw any difficulty or discouragement in the way of persons seeking to have convictions by which they feel aggrieved set aside by appeal. It is the accused who by appealing from the conviction brings the whole case before the Court of Appeal; and the whole case being before it, and the law in express terms empowering it to alter the finding, there is no reason why it should not have the power to find the appellant guilty of an offence which it considers established, merely because the Court below has acquitted him of that offence and found him

guilty of some other offence. The power of enhancing sentence being taken away no such alteration in the finding can prejudice the accused materially.

16. There is, therefore, no reason for limiting the plain and unrestricted language of Section 420, Clause (b), of the Code of Criminal Procedure in the manner contended for. I may add that the view I take is supported to some extent by the decision of this Court in *Krishna Dhan Mondul v. Queen-Empress*[3]

17. For the foregoing reasons I would alter the conviction into one under Section 326 read with Section 149 of the Indian Penal Code and maintain the sentence in the case of each of the appellants.

Cases Referred.

1I.L.R. 9 All. 134
2I.L.R. 15 Bom. 349
3I.L.R. 22 Cal. 377