MYSORE HIGH COURT

Rangiah

Vs

State (Mysore)

Criminal Appeal No. 15 of 1953 with Criminal Revn. Case No. 13 of 1953, Sessions Case No. 9 of 52-53

(Medapa, C.J. and B. Vasudevamurthy, J.)

05.10.1953

JUDGMENT

Medapa, C.J.

1. The appellant-accused was tried by the Sessions Judge, Bangalore Division, for an offence under Section 302, Indian Penal Code but was convicted under Section 323, Indian Penal Code and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 1000/- and in default to undergo rigorous imprisonment for a further period of three months. The case against him was that on the evening of 8th June 1952 he committed murder of one Rajagopal by squeezing his testicles near a mango garden beyond the limits of the Tumkur town. Of the three assessors, two were of the opinion that the accused was guilty while the third was doubtful.

2. The learned Sessions Judge fully believed the occurrence. He held that the accused had waylaid the deceased Rajagopal and had assaulted him and used criminal force against him by squeezing his testicles as a result of which he died in his house a few hours later. He found that the motive which prompted the accused to assault Rajagopal was clearly established by evidence. The deceased had assaulted the accused's son a few days prior to the date of occurrence in connection with some difference in the matter of supply of stones by the latter. There is no evidence that the accused's son was in any way seriously hurt by the deceased and it appears to have been one of those incidents which would ordinarily have been ignored. P.W. 8, Nemiraj, P. W. 11, Thopiah, P. W. 12 Chinnappa Naidu, P. W. 18 Raghunath, P. W. 22 Kariya were the eye-witnesses to the assault. The assault was apparently comparatively slight, but the accused appears to have become unduly in censed at it and owed vengeance against the deceased. He told P. W. 12, father of the deceased, that he would assault and finish his son as Raja gopal had assaulted his son. The accused expressed a similar intention before P. W. 21 who advised him not to do so and to have the matter settled by a panchayati. Subsequently P. W. 12 went to the Swamiji of Siddaganga Mutt and sought his intervention. P. W. 25 Mr. K. Shivananjiah has spoken about this. As directed by the Swamiji he sent for the accused, but the accused did not go to him. P. W. 9 Rashid, a jutka driver, was asked by P. W. 12 to warn the deceased against going to Tumkur as the accused was waiting to assault him. P. W. 12 approached the accused and begged him not to

hurt his son but the entreaties appa rently fell on deaf ears. The learned Counsel for the appellant did not seriously attempt to show that these facts were not true.

3. That the accused waylaid the deceased with a view to assault him and did so and squeezed his testicles has been conclusively established by clear and disinterested evidence of the eye witnesses against whom nothing has been elicited. P. W. 13 Virupakshiah, P. W. 14, Shivanna, P. W. 15 Rudradevaru, P. W. 16 Sadasivaradhya and P. W. 17 Narasimhamurthy are young students who had recently passed the S. S. L. C. examination. They were returning from Siddaganga High School and on their way back they saw the deceased and the accused quarrelling. The accused caught the testicles of Rajagopal, squeezed and pulled them. Rajagopal cried out and moved slightly back. Then the accused lifted his hand to hit at the private parts of Rajagopal. P. Ws. 13, 14 and 15 then went and stood between them and pacified them and by that time Narasimhamurthy, Sadasivaradhya and Gopaliah also came there running hearing the cries of the deceased. When they went and stood between the accused and the deceased the accused told Rajagopal ..... Then the accused went away towards his house and Rajagopal and the witnesses went towards the Mutt. Rajagopal was limping, clenching his teeth and Narasimhamurthy asked him why the accused had assaulted him. He said that he had assaulted the accused's son near the quarry and out of that ill-will the accused had assaulted him. When the deceased returned to his house he was very much exhausted and P. W. 12, his father, questioned him what the matter was. He said that the accused had assaulted him and squeezed his testicles near Krishna Iyengar garden and that he had much pain. He was then put to bed and the Doctor, P. W. 1 was sent for. He saw the deceased, examined his testicles and gave him a coramine injection. P. Ws. 12, 18, 19 the deceased's wife, and P. W. 1 Doctor have deposed in respect of these matters. P. W. 1 advised fomentation with hot water bottle, but a hot water bottle was not available and some fomentation was given with
The deceased was then attempted to be removed to the Tumkur hospital in a jutka belonging to P. W. 8, but by the time he reached hospital he was dead as spoken to by P. W. 1 the doctor who examined him. P. W. 3 conducted the post mortem examination and discovered internal injuries in the testicles and he is of the opinion that death was due to shock as a result of internal injuries to the testicles.

4. It is contended by the learned counsel for the appellant that there are some discrepancies in the evidence of the eye-witnesses P. Ws. 13 to 17 about the date on which they were given the S. S. L. C. cards and the date when they witnessed the incident. The learned Sessions Judge has discussed that portion of the evidence in detail. We have also been taken through it and we are in entire agreement with the learned Sessions Judge that those discrepancies are of a minor character and may be due to some confusion of dates or incidents. It is impossible to accept the argument of the learned counsel that all those witnesses, who are educated, young and thoroughly disinterested, would have made common cause to swear falsely about the incident of such an extra ordinary character, and against the accused to whom they bear absolutely no bias or grudge, nor is it shown that they were in any way interested either in the deceased or P. W. 12 to make them depose falsely.

5. It was next urged for the appellant that hot might have been applied to the testicles of the deceased and that it might have brought about his death. It has to be observed that at the post mortem no external marks of any such fomentation were discovered by the doctor. It is not even suggested to the doctor that there were any such injuries which one would have expected if very

hot poultice was applied.

6. On the above evidence one would ordinarily have expected the learned Sessions Judge to have found the accused guilty of an offence under Section 302, Indian Penal Code. It is clear from the evidence that the accused had threatened to do away with the deceased and that he bided his opportunity and deliberately assaulted him on a vital part of his body and was probably prevented from killing him on the spot by the coming on the scene of the eye witnesses. The learned Sessions Judge, however, thought that the accused might not have intended to kill the deceased, and for coming to that conclusion he has relied on a statement of the Doctor P. W. 1 that fomentation, if any, with much heated to the testicles might seriously complicate matters, and of P. W. 3, that generally squeezing of testicles might not result in death and that he himself had not come across any case where people had died as a result of the squeezing of testicles though in re-examination he, however, added that in the present case the injury caused to Rajagopal was sufficient to cause his death in the usual course of nature.

7. When the appeal came up for hearing Mr. Ramachandra Rao, learned counsel for the appellant, took us through the entire evidence and argued the case. We also heard the learned Advocate-General and we ordered notice to issue under Section 439, Criminal Procedure Code as to why the sentence should not be enhanced and posted the case to another day. On that day the appeal was again further argued by Mr. Ramachandra Rao and he has again tried to show that the accused was innocent of any offence and that the prosecution evidence does not support the conviction. He also urged that the finding of the learned Sessions Judge that the accused is guilty of an offence under Section 323 is correct and that he is not guilty of any more serious offence including that under Section 302 with which he was charged. We are inclined, in the circumstances of the case though with some hesitation, to accept the learned counsel's argument that the accused may not have intended to kill the deceased and that he merely threatened to do so without intending it. But nevertheless we think the case would clearly fall under Section 304, Part II, Indian Penal Code. This matter has been numbered as Criminal Revn. Case No. 13 of 1953.

8. Mr. Ramachandra Rao has next urged that this Court cannot enhance the sentence in this case, even if it finds that the appellant has committed a more serious offence, as the learned Sessions Judge has already awarded maximum sentence of one year's rigorous imprisonment. His contention is that under Section 439, Criminal Procedure Code this Court has no power to convert an acquittal into a conviction, and as the learned Sessions Judge has in effect and substance, though he has not said so expressly, acquitted the accused of the offence under Section 302 this Court cannot in an appeal by the appellant convict him of that offence in order to enhance the sentence. The question whether in the circumstances like the present the High Court has power to alter the finding and to convict the accused of the more serious offence with which he was originally charged and tried or any other offence which the facts as found disclose is not free from doubt and has been decided differently by some other High Courts though in Mysore the question has not arisen.

9. The Madras High Court in - '*K. Bali Reddy v. Emperor*[1]', had a case before them of five accused persons who were charged with rioting armed with deadly weapons and with having murdered a man. The Sessions Judge found the accused not guilty of those offences but of simple rioting and of culpable homicide not amounting to murder under Sections 147 and 304,

Indian Penal Code. The accused appealed against their sentence to the High Court and the High Court as a Court of Revision issued notice, altered the finding to one of murder punishable under Section 302 and awarded enhanced sentences. Their Lordships on a reading of Sections 423 and 439, Criminal Procedure Code held that Section 423 (b) gives power to the High Court, when hearing an appeal against a conviction, to alter the finding and Section 439 gives power to enhance the sentence so as to make it appropriate to the altered finding. They observed that Section 439, sub-sections (4), which enacts that "nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by Section 423, Clause (b). They followed two earlier decisions of their own Court and distinguished the case reported in - '*Queen Empress v. Balwant*[2]*',* (B) on the ground that in that case there had been a "complete acquittal" and that there had been no appeal before the High Court against a conviction so as to make Section 423 (b) read with Section 439 applicable and the effect of that provision had not been considered. They also observed that the acquittal by the lower Courts in respect of the offence under Section 302 could not be relied on as a bar under Section 403, Criminal Procedure Code as the appeal was not a second trial but only a continuation of the trial in the Sessions case. See in this connection a recent case in - '*Kalawati v. State of Himachal Pradesh*[3]*',* (C) where a similar view has been taken in respect of an appeal against an acquittal while dealing with Article 20 (2) of the Constitution.

10. In - 'Subba Chukli, In re', AIR 1927 Madras 582 , a Division Bench of the same High Court which had only an application for revision before it held that it had no power in revision under Section 439 to convert a conviction under Section 304 (2) into one under Section 302 with which the accused had been charged and not convicted. They, however, set aside the judgment and directed a fresh trial. They dissented from - 'AIR 1914 Madras 258 ' and thought that the correct view had been enunciated in - '*Emperor v. Sheo Darshan Singh*[4]*',* They thought that a complete or partial acquittal could not be the ground for the application of Section 439. That case was also one under Section 439 only and there was no room for the application of Section 423 (1) (b).

11. 'AIR 1914 Madras 258 ' came up for discussion in - '*Kishan Singh v. Emperor*'[5]*,* That was a case purely of a revision. The accused who had been charged with the offence of murder under Section 302 had been convicted by the

[1] AIR 1914 Mad 258 [3] AIR 1953 SC 131 at p. 132 [5] AIR 1928 PC 254
[2] 9 All 134 (FB) [4] AIR 1922 All 487

Sessions Judge under Section 304 and sentenced to a term of imprisonment. The local Government did not appeal but applied to the High Court in revision. The High Court convicted the appellant of murder and sentenced him to death. On appeal under special leave their Lord ships of the Privy Council held that in view of the provision contained in Section 439, sub-sections (4) that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction - the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial Judge's finding of acquittal on the charge of murder into one of conviction of murder. Referring to - 'AIR 1914 Madras 258 ' which was pressed on their attention, their Lordships pointed out that the facts of that case were different from the facts of the case before them, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction and the High

Court as a Court of Revision had given them notice to show cause why they should not be convicted of murder and sentenced for that offence. They also made an observation which has given rise to some controversy. They said :

> "It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in Section 439, sub-sections (4), refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision."

Those observations were we think, necessary to be made even in order to lay down as the Privy Council did that while exercising powers of revision alone under Section 439 the High Court could not convert an acquittal into a conviction irrespective of whether in the trial the accused had been partly convicted of some other offence, i.e., he was not completely acquitted. Their Lordships referred with approval to - ' AIR 1922 Allahabad 487 ' and - '*Emperor v. Shivaputraya Durdandaya*[6]*,* which were both cases where the High Court was acting only as a Court of Revision under Section 439, and there were no appeals before them under Section 423 (1) (b) to attract the powers given under that section conjointly with those under Section 439.

12. In - 'On *Shwe v. Emperor*[7]*',* the Rangoon High Court held that where a man charged with murder has been convicted of a minor offence, the High Court can while acting both as a Court of Appeal and a Court of revision convict him of murder and sentence him to death but if it is acting solely as a Court of revision it cannot convert the acquittal of murder into conviction. The learned Judges relied on - 'AIR 1914 Madras 258 ' and a case decided by the Punjab Chief Court in - '*Bhola v. King Emperor*[8]*',* (I). They referred to - ' AIR 1922 Allahabad 487 ' which they said was "not parallel" since there the prisoner had not appealed and the High Court was merely acting under Section 439. In - '*Emperor v. Kan Thein*[9]*',* the learned Judges

[6] AIR 1924 Bom 456 [8] 12 Pun Re Cr 1904 p. 34
[7] AIR 1924 Ran 93 [9] AIR 1926 Ran 154

referred to - ' AIR 1924 Rangoon 93 ' and explained how they could not interfere in revision and convert an acquittal into a conviction as they had previously dismissed summarily an appeal by the convict.

13. The Allahabad High Court had on an earlier occasion while deciding - '*Dulli v. Emperor*[10]*',* taken the view that it was open to a High Court to convict an appellant who had appealed against his conviction for a minor offence under Section 325, of a more serious offence under Section 302 with which he had been charged. They observed

> "It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire case, and that the appellate Court being empowerd to alter the finding under Section 423 (1) (b) may record a conviction in respect of an offence of which the

trial Court has found the accused not guilty."

Their Lordships recognized fully that under Section 423 (1) (b) by itself, the finding could only be altered without enhancement of the sentence. The power to order enhancement was, however, given to the High Court under Section 439 and they felt no doubt that the High Court had authority to record a conviction under Section 302, Indian Penal Code and pass an appropriate sentence. Their Lordships eventually dis missed the appeal, altered the conviction to one under Section 302 and enhanced the sentence to trans portation for life.

> '*Dulli v. Emperor* (K)' has been followed in - '*Lakhan Singh v. Emperor*[11]*',* by Nanavati, J. In - '*Jado Rahim v. Emperor*[12]*',* which is quoted with approval by Waliullah, J., in - '*Taj Khan v. Rex*[13]*',* David, C. J. and Lobo, J., considered that the better view to take was that Clause (b) of Section 423 (1) does not apply to cases of acquittal, that it is only under Clause (a) of Section 423 (1) that an appellate Court could convert an acquittal into a conviction and that such powers could only be exercised if there was an appeal by the Government against the acquittal and not otherwise. They gave as a reason for their conclusion that the exercise conjointly of the powers of the appellate Court under Section 423 and of revision under Section 439 could not depend upon a chance circumstance that in a case where the accused has been convicted of a lesser offence he has been given already the maximum sentence therefor.

With great respect to the learned Judges who decided that case it is not easy to follow that reasoning. The revisional powers of the High Court can be exercised in the case of any proceeding the record of which has been called for by itself or which has been reported for order or 'which otherwise comes to its knowledge'. The circumstance that the illegality found or injustice occasioned by a decision of a lower Court comes to the notice of the High Court during the course of their hearing of an appeal by one who has been convicted of a minor offence and been awarded the maximum sentence therefor cannot be more in the nature of a chance than the discovery of the same as a result of the perusal of the periodical reports or statements of cases decided by the

[10] AIR 1918 All 65 [12] AIR 1938 Sind 202
[11] AIR 1934 Oudh 200 [13] AIR 1952 All 389

Sessions Judges received by the High Court or on an appeal by the Government over which occurrences also the accused cannot claim any control.

14. In - '*Sardaprasad v. Emperor*[14]*',* a person was accused of two offences but the trial Magistrate acquitted him of one and convicted him of the other. On appeal the Sessions Judge reversed the findings and convicted the appellant of the offence of which he had been acquitted. On a revision petition by the accused (and with no appeal by the Government against the acquittal. Sulaiman, C. J. and Bennet, J., held that the appellate Court's order was wrong and that he could not so alter the findings. They did not follow - ' AIR 1918 Allahabad 65 ' as the subsequent case of - ' AIR 1922 Allahabad 487 ' had been approved by the Privy Council in - 'AIR 1928 PC 254 '. There can be no doubt that the Sessions Judge who had no revisional powers under Section 439 could not act in the manner he did, his duty being to report the matter to the High Court which under its revisional powers could not order a retrial in that case.

' AIR 1922 Allahabad 487 ' was, as already noticed, also a case of the exercise by the High Court of revisional powers only. In - '*Zamir Qasim v. Emperor*[15]', (P), a case heard by a Full Bench of five Judges, Iqbal Ahmad, C. J., Ismail and Bar, JJ., held that an appellate Court is subject to other provisions contained in the Criminal Procedure Code, empowered under Section 423 (1) (b) (2) to alter a finding of acquittal into one of conviction even though no appeal has been preferred by the Provincial Government. This power is, however, subject to the condition that the appellate Court cannot enhance the sentence imposed by the trial Court. But Mulla and Hamil ton, JJ., held that a Court of appeal is not em powered under Section 423 (1) (b) (2) to alter a finding of acquittal into one of conviction; the same could be done only on an appeal under Section 417. Iqbal Ahmad, C. J., also observed that even in the absence of an appeal under Section 417 it is open to the High Court under Section 439 to set aside an acquittal and order a retrial. It was, he said

"manifest that the mere omission of the provincial Government to appeal against an order of acquittal does not, in all cases, attach finality to that order, and such order is liable to be set aside by the High Court in the exercise of its revisional jurisdiction. The contention that the omission to file an appeal under Section 417 renders an order of acquittal immune from attack is, therefore, not sustainable."

Ismail, J., also thought similarly. He pointed out

"There is no doubt that some sanctity should be attached to an order of acquittal but it cannot be disputed that it is liable to be set aside in more than one way (e.g.) on an appeal under Section 417 or in revision under Section 439 (by ordering a re trial)."

In that case no question of the combined use of Section 423(1)(b) and Section 439 arose and Hamilton, J., ex pressly said it was unnecessary for the purposes of the reference to express any opinion in that matter. In - '*Mahammed Shariff v. Rex*[16]', [14]AIR 1937 All 240 [16] AIR 1950 All 380

[15] AIR 1944 All 137 (FB)

Agarwala and Bhargava, JJ., held that where the accused is found not guilty and acquitted of the offence punishable under Section 302, Penal Code, but is found guilty under Section 304, the High Court as a Court of appeal has no power to convert the finding of acquittal into one of conviction under Section 302 and to enhance the sentence imposed upon him. They said they could have set aside the acquittal and ordered a retrial taut did not feel called upon to do so in that case, but were content with enhancing the sentence. In - ' AIR 1952 Allahabad 369 (FB) (N)', Wall Ulla and Agarwala, JJ., held that it was not open to the High Court in an appeal from conviction under Section 323, Penal Code, to alter the conviction of the appellant to one under Section 302, Penal Code, with which he had been charged, and in exercise of its revisional jurisdiction after having previously given notice for enhancement of the sentence, to enhance the sentence of imprisonment to one of death or transportation for life. Harish Chandra, J., disagreed. He was of the opinion that Section 439(4) did not in any way fetter the discretion of the High Court to convert a finding of acquittal into one of conviction while dealing with an appeal by a

convict.
The qualification that a finding can be altered only as long as the sentence is not enhanced does not appear to be germane to the interpretation as the reversal or alteration of the finding can not depend on the sentence which is to be awarded as the result of the finding, which again depends on the facts and circumstances of the case which go to constitute the offence either charged or found by the trial Court or by the appellate Court. The provision that the appellate Court must retain the sentence may be merely a limitation on the power of the subordinate appellate Courts in the interests of accused person only, the High Court acting under Section 439 being given the power to enhance sentence in proper cases.

15. The Lahore High Court in - '*Bawa Singh Sawan Singh v. Emperor*[17]', (decided by a Full Bench of three Judges) unanimously held that it is open to a High Court hearing an appeal from a conviction by a convict who had been charged, as in this case, under Section 302, Indian Penal Code, but convicted under Section 304 (part I) to alter the conviction from one under the latter section to under the former and then in the exercise of the powers conferred on the High Court under Section 439(1), Criminal Procedure Code, to enhance the sentence to one of death. In the course of their decision they referred to - 'AIR 1928 PC 254 '. They thought that the general trend of judicial authority in India up to the date of that decision was to the effect that the High Courts had such a power (Vide - 'AIR 1914 Madras 258 '; - ' AIR 1924 Rangoon 93 ' and - '*Queen Empress v. Jabanulla*[18]', (S)). They observed that their Lordships in - 'AIR 1928 PC 254 ' had only held that under Section 439 the High Court in revision could not convert a finding of acquittal into one of conviction; they had however expressly left the point open whether while exercising appellate jurisdiction they could do so by reason of the combined operation of Sections 423 and 439. They had merely said that the decision in - 'AIR 1914 Madras 258 ', which was pressed on their attention might or might not be correct, while pointing out that a portion of the reason of that ruling was not correct in that clause (4) of Section 439 applied both to partial and complete acquittal.

16. In - '*Fauja Singh v. The State*'[19], , the same question came up before a Full Bench
[17] AIR 1941 Lah 465 [19] AIR 1951 Pepsu 154
[18]23 Cal 975
of that Court. Teja Singh, C. J., with whom Kesho Ram Passey, J., agreed, held that

> "in an appeal by a convict and without an appeal by the State Government, on the findings of fact at which it arrives in appeal, the High Court can alter the finding under Section 423 (1)(b)(2) to any other finding it considers proper subject to the proviso that as regards the alteration of the finding under Section 423(1)(b)(2) the power of the High Court as the Court of Appeal is subject generally to other provisions of the Criminal Procedure Code."

Gurnam Singh, J., who dissented from the majority was of the view that :

> "In an appeal by a convict and without an appeal by the State Government on the findings of fact, at which it arrives in appeal, the High Court can alter the finding under Section 423 (1)(b)(2) to any other finding it considers proper subject to the limitation prescribed in sections for joinder of charges. But in no case a finding of acquittal can be converted

into conviction by the appel late Court by acting under Section 423(1)(b)(2)."

And the majority of the Full Bench further held that

> "after altering the finding under Section 423(1)(b)(2), the High Court can enhance the sentence under Section 439 to any sentence it considers suitable in spite of the fact that Section 423(1)(b)(2) enjoins that in case of alteration of finding, the sentence cannot be enhanced by the appellate court in the appeal by the convict."

The majority quoted with approval the decisions of the Allahabad High Court reported in - ' AIR 1937 Allahabad 240 ' and - ' AIR 1941 Lahore 465 (FB) (R)' and - '*Ranjha v. Emperor*'[20], '. They did not choose to follow the later decision of the Allahabad High Court in - ' AIR 1950 Allahabad 380 '.

17. This difference of opinion has risen as a result of the interpretation placed on the words "reverse" and "alter" in Section 423(1) (a) and (b), the limitation in clause (1)(b) of that section that while the finding may be "altered" the sentence may not be enhanced, and the express prohibition contained in Section 439 (4) that in revision an acquittal cannot be converted into a conviction. It may be that in Section 423(1) (a) while using the word "reverse" the legislature had in mind the case of an order of "complete" acquittal in the sense that the accused was found innocent or not guilty of any offence of any kind at all when on an appeal therefrom by the Government the acquittal order would have to be reversed, while in Section 423 (1)(b) they used the word "alter" to deal with a case where the accused was found guilty of one offence rather than of another with which he was or could have been charged or found guilty subject of course to the further limitations contained in that section. In the latter case the appellate Court could alter the finding so as to fix, on the facts found either itself or by the trial Court, the exact offence in law of which the accused could be convicted. The limitation on that power is that the appel late Court acting under Section 423 (1)(b) cannot en hance the sentence. That power was given to the High

[20] AIR 1948 Lah 74

Court alone under Section 439. The High Court could exercise that power either on its own motion or on some application by a party, aggrieved and who could not have appealed from the decision of the Court below, or on a report from the Sessions Judge. But even the High Court sitting in revision only cannot convert a finding of acquittal into one of conviction and can only set aside the acquittal and order a retrial if it finds that the same is necessary in the interests of justice.

18. In - 'AIR 1928 PC 254 ', their Lordships merely decided that the High Court while exercising revisional powers under Section 439 could not set aside an acquittal. Their observation to the effect that no difference can be made between a partial or complete acquittal while applying this rule, does not militate against the meaning and interpretation suggested above and which has also found favor with the learned Chief Justice in - ' AIR 1941 Lahore 465 (FB) (R)'.

19. Apart from this interpretation when we come to examine the various arguments against the use of such combined powers by the High Court we think that such use is not only not prohibited but open to no real objection either in law or on any ground of public policy or principle of

criminal jurisprudence. In some of the cases cited above the learned Judges have treated the words 'reverse' and 'alter' either as meaning much the same, or as substantially different, or the word "alter" as merely a less radical expression than the word "reverse" and meaning "change in form without changing the underlying character of the thing to be changed", conviction under one section in place of another being considered no more than a change in form. It is difficult to reconcile the various constructions placed on the use of those words in Section 423, Criminal Procedure Code.

20. The High Court can enhance the sentence in the exercise of its revisional jurisdiction under Section 439 when the records of a criminal proceeding are brought to its notice by an appeal from a conviction; see - '*Chunbidya v. Emperor*[21]', That the High Court cannot without an appeal before it by either the Government or the convict in exercise of its revisional powers set aside an acquittal and pass an enhanced sentence must now be taken as well established; see - 'AIR 1928 PC 254 '. That in a proper case where the High Court finds, while hearing an appeal from a convict that there has been a miscarriage of justice and that the accused should really have been convicted of a more serious offence of which he had been charged and acquitted by the lower Court, the High Court can direct a retrial cannot also be disputed; vide - ' AIR 1937 Allahabad 240 '. Under the same circumstances if the High Court finds that there is no need at all to order a re trial, that the entire available evidence has been placed before the Court and that no useful purpose except further harassment to the accused and waste of public time will be caused by a retrial and. as in this case, even the learned counsel for the accused does not ask for such a retrial, it is difficult to see why the High Court cannot use their powers under Sections 439 and 423 conjointly so as to do substantial justice for which the Courts exist. The limitation set upon the power of revision found in Section 439; that no order shall be made to the prejudice of the accused unless he has had a full opportunity of being heard either personally or by a Pleader in his own defense, that no greater sentence shall be awarded than that prescribed under that section, that where an appeal lies from a conviction and

[21] AIR 1935 PC 35

sentence and no appeal has been brought, no proceedings by way of revision could be entertained at the instance of a party who could have appealed, that the convicted per son to whom a notice has been given to show cause against the proposed enhancement of sentence shall while doing so be entitled to show that his conviction itself is bad, and that wholesome rule laid down for their own guidance by all the High Courts and the Privy Council that the Re visional Court may not ordinarily interfere with findings of fact and even on a question of sentence very rarely at the instance of a private party are all sufficient safeguards against any possible misuse of the combined powers.

21. In the absence of such power the High Court would find itself in rather an unenviable and anamolous position of being unable to inter fere where clear illegality or injustice has been committed. It is possible to lay too much stress on the argument that the accused has been acquitted and that some sacrosanctity attached to it. The order of acquittal is by no means final. It is open to appeal by the local Government and according to the ruling of the Supreme Court and our Court, the appellate Court can in proper cases practically re-hear the matter and evaluate the evidence. It can be set aside in revision and a retrial ordered. The accused has an opportunity of defending that order in the High Court when he receives notice and in proper cases there is no doubt that if it is shown that a retrial is necessary it will be readily granted by the High Court. The provision that the State alone should be empowered to appeal against an acquittal is no doubt

a very necessary safeguard and they are expected to use that power very sparingly and in really deserving cases. But if by some oversight or otherwise such an appeal is not filed which is more likely especially in cases where the lower Court convicts for a lesser offence and does not acquit the accused altogether, we think we will be unduly denying to the High Court the undoubted powers and unquestionable jurisdiction it has to set right a clear and serious wrong if we say it cannot interfere. Of course such power would be used only in extraordinary circumstances and in very serious cases or where some very vital principle of law is involved or where on the facts found the lower Court has applied the law wrongly and its decision amounts clearly to a perverse one bearing in mind that the accused has been found innocent of that charge by a competent Court and in the opinion of the Government it is not a fit case to appeal.

22. In our opinion, this is a clear case calling for our interference. We, therefore, alter the conviction of the accused under Section 323 and convict him for an offence under Section 304, Part II, Indian Penal Code. The accused who is described in the evidence as a Pailwan or a Wrestler deliberately lay in wait for days and in spite of entreaties by the deceased's old father assaulted him in a particularly cruel and sadistic manner by which the deceased who was a young man must have suffered excruciating agony. At the trial and even subsequently he has merely denied the offence and has shown neither regret nor contrition. But nevertheless we do not wish to be too severe. In lieu of the sentence which has now been passed against him by the Sessions Judge we sentence him to rigorous imprisonment for 5 (five) years. The accused will surrender to his bail and serve out the sentence.
Order accordingly.