

State Vs. Jai Prakash

State Vs. Jai Prakash

SooperKanoon Citation : sooperkanoon.com/450929

Court : Allahabad

Decided On : Aug-04-1958

Reported in : AIR1959All129; 1959CriLJ156

Judge : B.R. James and ;S.K. Verma, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 428 and 428(1)

Appeal No. : Govt. Criminal Revn. No. 709 of 1956

Appellant : State

Respondent : Jai Prakash

Advocate for Pet/Ap. : H.N. Seth, Asst. Govt. Adv.

Disposition : Revision allowed

Judgement :

B.R. James, J.

1. One Jai Prakash was tried before an Assistant Sessions Judge of Meerut, of an offence under Section 409 I. P. C., for embezzlement of certain Government funds. His principal defence was that he had deposited the money in the Government treasury, and in support of this plea he cited a number of Government officials as defence witnesses. The learned Assistant Sessions Judge made

several attempts to secure the attendance of these witnesses, but none of them appeared; hence, refusing to allow any further adjournment, he accepted the evidence led on behalf of the prosecution, found Jai Prakash guilty and sentenced him to imprisonment for less than four years.

Jai Prakash took an appeal to the Court of Session, and the appeal was heard by an Additional Sessions Judge, Mr. Ram Ratan Kaushik. Mr. Kau-shik upheld the plea that the defence case had been seriously prejudiced by the non-examination of the defence witnesses, and holding that these witnesses were necessary ones he directed the Assistant Sessions Judge under Section 428 Cr. P. C., to record the evidence of the witnesses concerned and to certify such evidence to him.

The State Government thereupon filed a Revision before this Court contending that Mr. Kau-shik's order was contrary to law inasmuch as he had no jurisdiction under section 428 of the Code to get the fresh evidence recorded by an Assistant Sessions Judge. The Revision was heard by our brother Bishambhar Dayal, and in the course of arguments the decision of a single Judge of the erstwhile Chief Court of Oudh in *Hori Lal v. Emperor*, AIR 1935 Oudh 402 (A) was cited before him. Feeling doubtful about the correctness of that decision he referred the case to a Division Bench, and accordingly the Revision is before us for disposal.

2. Section 428 occurs in Chapter XXXI of the Code which bears the title 'of Appeals,' and entitles the appellate Court to take further evidence or direct it to be taken by a subordinate Court. The section forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court.

Its manifest object is the prevention of a guilty man's escape through some careless or ignorant proceedings of a trial Court or the vindication, of an innocent person wrongly accused where the trial Court through some carelessness or ignorance has omitted to record the evidence of the circumstances essential to the elucidation of the truth, Being an exception to the general rule the powers under it must always be exercised with circumspection, and the doing of justice should be the goal invariably aimed for.

3. The first clause of the section is in these-words :

'In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Sessions or a Magistrate.'

For a proper understanding of this clause there are two aspects of it which require to be borne in mind first, it invests 'the appellate Court' with a specific power; second, it provides for the machinery through which that power is to be exercised. What confers jurisdiction to utilise Section 428 (i) is that the Court should be 'the appellate Court' and that for reasons to be recorded it should think the additional evidence to be necessary.

Only when the Court finds it possesses jurisdiction that it becomes entitled to use the prescribed machinery; then it can either record the additional evidence itself or direct it to be recorded by a Magistrate: if the appellate Court happens to be the High Court it can also direct it to be recorded by a Court of session. There is an analogous provision in the Code in Section 540; but it differs from. Sec 428 in two respects; first, under it the Court must record the additional evidence itself and cannot get this done by another Court; second, under the first part, which is purely discretionary no condition is laid down for the taking of extra evidence, while under the second part, which is mandatory, the evidence must be such as appears to the Court, 'essential to the just decision of the case,' thus-under the second part laying down a far more stringent condition than section 328 (1), whereunder it is sufficient for the evidence to be 'necessary' --see the decision of a Division Bench of this Court in *Ram Jeet v. State*, 1958 All LJ 69: (AIR 1955 All 439) (B).

4. Now, in the Oudh case mentioned above the conviction was by an Assistant Sessions Judge, and the Sessions Judge who heard the appeal recorded additional evidence. The single Judge of the Chief Court who heard the Revision against the Sessions Judge's order thought that only when the Sessions Judge sat to hear an appeal from the judgment of a Magistrate did he have power under section 428 to record additional evidence himself or direct it to be taken by a Magistrate, and that since the conviction was by an Assistant Sessions Judge he had no power to take any evidence himself; accordingly the learned Judge

disregarded the additional evidence as illegally recorded. With great respect to the learned Judge, we are unable to endorse his view.

As mentioned by us earlier, what confers jurisdiction is that the Court should be 'The appellate Court.' Indeed, appeals against convictions by Assistant Sessions Judges are provided by section 408, another section which falls within Chapter XXXI of the Code; consequently so far as an Assistant Sessions Judge who passes a sentence of four years imprisonment or less is concerned, the Court of Session is the proper 'appellate Court.' It follows that section 428 applies to convictions by an Assistant Sessions Judge just as it applies to convictions by a Magistrate, and consequently under that provision of the law the Court of Session as the appellate Court is perfectly entitled to exercise the powers which section 428 invests it with.

Consequently, the Sessions Judge in the Oudh case aforesaid must be held to have acted within his jurisdiction and hence to have recorded the additional evidence lawfully. We are accordingly obliged to hold that the case of *Hori Lal v. Empe-rir (A)* has been erroneously decided.

5. Turing now to the case in hand, we have no doubt whatsoever that notwithstanding the fact that section 428 applies equally where the conviction is by a Magistrate or an Assistant Sessions Judge, the Court of Session cannot direct fresh evidence to be recorded by an Assistant Sessions Judge.

This is made abundantly clear from a reading of Clause (1) quoted above, under which, in cases where the appellate Court is the Court of Sessions, the machinery for taking such evidence is confined to the court of Session itself or a Magistrate -- there is no provision in the clause authorising an Assistant Sessions Judge to record the required evidence. That is to say, although in dealing with the appeal the Court of Session has jurisdiction to receive necessary additional evidence, the recording of it has to be done either by itself or by a Magistrate, but cannot be done by an Assistant Session's Judge.

6. In this view of the law, Mr. Kaushik's order in the present case must be struck down as being contrary to law; all he could do under section 428 was either to

record Jai Parkash's defence evidence himself or to direct a Magistrate to do so.

7. Accordingly we allow the Revision, set aside the order in question and direct Mr. Kaushik to take the extra evidence himself. In case he is no longer in the district the Sessions Judge of Meerut should himself act as the appellate Court or make over the appeal to some Additional Sessions Judge. After the necessary defence evidence has been recorded the appeal should be heard and decided as expeditiously as possible according to law.

8. The stay order previously passed in the case is hereby vacated.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com