

Subedar and ors. Vs. the State

Subedar and ors. Vs. the State

SooperKanoon Citation : sooperkanoon.com/464595

Court : Allahabad

Decided On : Apr-02-1956

Reported in : AIR1956All529

Judge : Oak, ;Desai and ;V.D. Bhargava, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 233, 236, 237, 369 and 429; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 149, 302, 304 and 323; [Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Criminal Appeal No. 77 of 1952

Appellant : Subedar and ors.

Respondent : The State

Advocate for Def. : H.L. Kapoor, Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Disposition : Appeal allowed

Judgement :

Desai, J.

1. The appellants were convicted by the Additional Sessions Judge under Section 304, I. P. C, for causing the death of Bhajan Lal and under Section 323 for causing

simple hurt to Mitthu. When we heard their appeal, we disagreed on the question whether they are guilty under Section 304, I. P. C., and referred the case to a third Judge for his opinion. We agreed on the question of the conviction under Section 323, I. P. C., and expressly recorded the finding that their convictions and sentences under Section 323 read with Section 34, I. P. C., were to be maintained.

Thus not only was there no difference of opinion between us on the question whether they are guilty under Section 323, I. P. C., but also we expressly excluded it from the jurisdiction of the third Judge. There was only one record of the trial of the appellants for the two charges and it could not be split up into two records, one pertaining to the charge under Section 304, I. P. C., and the other pertaining to the charge under Section 323, I. P. C.

The whole record had to be laid before the Hon'ble the Chief Justice. The third Judge, though he had the whole record before him, had to give his opinion only on the question referred to him and not on other questions which were not referred to him or which had been decided by us or on which we had not disagreed. It is provided in Section 429 of the Code of Criminal Procedure, under which we acted, that

'when the Judges are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, and such Judge shall deliver his opinion, and the judgment or order shall follow such opinion.'

Under this provision what is required to be done in the first instance is laying the case before a third Judge; the third Judge has then to deliver his opinion and the judgment of the Court of appeal has to follow such opinion. What is meant by the word 'case' has not been explained.

If it means the record of the proceedings, there is no difficulty at all because, as explained above, the whole record must of necessity be laid before the third Judge and from the laying of the whole record before him it cannot be inferred that he has jurisdiction to decide all the questions arising upon it. It is not mentioned in Section 429 on what matter the third Judge has to give his opinion, whether only on the matter on which the Judges are equally divided in opinion or on all matters

arising upon the record.

2. The normal rule is that for every distinct offence there must be a separate charge and every such charge must be tried separately, vide Section 233. In certain circumstances mentioned in Sections 234 etc. trial of two or more persons or of a person for two or more offences or of two or more persons for two or more offences is permitted. When a trial is against one person in respect of one offence, no difficulty arises at all, because the word 'case' means the trial.

But when a trial is of two or more persons for one offence, or when a trial is of one person for two or more offences, or when a trial is of two or more persons for two or more offences, the question arises what is meant by the word 'case'; does it mean a trial of one person regardless of the number of offences with which he is charged, or a trial of one person for each offence, or a trial for one offence of any number of persons, or the whole trial of two or more persons for two or more offences. What the word means when one person is tried for two or more offences has not been explained in any authority so far as I am aware; no authority on the point has been placed before us by Sri P. C. Chaturvedi or Sri D.P. Uniyal.

All the authorities that have been cited before us lay down that when two or more persons are tried jointly for an offence, the word 'case' means the trial of each accused and not the whole trial of all the accused. The reasonableness of this interpretation cannot be doubted. It is only when the Judges of the court of appeal are equally divided that the case is required to be laid before a third Judge; obviously if in respect of any accused they are in agreement, there should arise no occasion for his case being referred to the third Judge.

The third Judge has to give his opinion, but In the absence of any words stating on what matter he has to give his opinion it is reasonable to say that he must give his opinion on the matter on which the Judges are equally divided; it is only that matter that requires an opinion. When the Judges are equally divided, there must be an opinion of a third Judge to convert the equal division into an unequal division so that the majority view can be given effect to.

The third Judge has not been given any power of appeal over the two Judges; he has been empowered to give his opinion so that his opinion, should go with the opinion of one Judge composing the Court of appeal to make two opinions as against one Opinion of the other Judge. It follows that the third Judge has jurisdiction to give his opinion only on those matters on which there has been a difference of opinion.

3. I should make it clear at this stage that the division of the two Judges composing the Court of appeal must be in their opinion about the final order to be passed and not about the reasons for the final order. If the two Judges are agreed about the final order to be passed but for different reasons, Section 429 will not apply and the case will not be required to be laid before a third Judge. They will pass the final order as agreed by them. When they disagree about the final order so that they cannot pass any final order, the case must go to a third Judge.

When the case goes before the third Judge, he has full power to decide it in any manner that he likes and is not bound by the opinion expressed by either of the Judges. He is not bound even by their agreed opinion on an interlocutory question arising in the case. The final order to be passed in a case may depend upon answers to several questions; the Judges may agree as to the answers to some of the questions and disagree as to the answers to the other questions and may disagree about the final order to be passed in the case and the third Judge is not bound by the agreed opinion of the two Judges on the questions on which they have agreed, particularly if the final order that should be passed according to his opinion would be inconsistent with the agreed opinion. He has full freedom in forming his opinion on the matter referred to him.

In -- 'Sarat Chandra v. Emperor', 38 Cal 202 (A) the two Judges of a Court of appeal agreed that a certain document was a newspaper but one, held that the order of forfeiture was legal and the other that it was illegal; when the case went before a third fudge, he decided that he had jurisdiction to hold that it was not a newspaper at all. His opinion about the final order was that the forfeiture must be set aside; if he agreed with the reason given by one Judge for maintaining the order of forfeiture and disagreed with the reason given by the other for quashing it

and was bound by their agreed opinion that the document was a newspaper, he would have been obliged to give his opinion that the forfeiture must be maintained.

But the case had gone to him for his opinion about the final order which means that he was not bound to give it in a particular manner; so it follows that if he could not give a free opinion about the final order without disregarding the agreed opinion of the two Judges, he had every jurisdiction to do so. In -- 'Grande Venkata Ratnam v. Corporation of Calcutta', 1919 Cal 862 (AIR V 6) 03) it was observed by Woodroffe J., at p. 870 that the third Judge cannot differ from the two Judges on a point agreed upon by them 'unless there were strong grounds'.

With great respect I think that the question is one of law and not of discretion or fact depending upon reasons. In this very case one of us was of the opinion that the appellants were guilty under Section 304 for causing the death of Bhajan Lal and the other was of opinion that he was guilty under Section 325. T. P. C., only; our brother V. D. Bhargava was, however, of the opinion that they committed no offence. He was certainly not required to hold that they committed at least the offence of Section 325, I. P. C.

Having held that the appellants had a right of private defence and that it could not be decided which of them caused the death of Bhajan Lal by exceeding it, he could not hold them guilty under Section 325, I. P. C., first because we were agreed that they were guilty at least under Section 325, I. P. C. The case was referred to him and not a particular question. Section 429 requires the case to be referred to a third Judge and not a particular question arising in the case and on which there has been a difference of opinion.

If a particular question on which the Judges have disagreed is referred to a third judge, he may be able to answer it even though in his opinion it does not arise or is immaterial or does not conclude the case. But it is the case that is referred to him, i.e., he has to give his opinion about the final order to be passed in the appeal. I respectfully agree with Jagannadha Das, C. J. when he laid down in --'State of Orissa v. Minaketan : AIR1953 Ori160 that the difference between the two Judges must be about the final order or about the operative part of the order to be passed and not about the reasons.

4. Since there are differences of opinion and differences of opinion, there may be a difference of opinion in respect of the guilt of one-out of several accused, there may be a difference of opinion about an accused being guilty of one out of several offences, or there may be a difference of opinion about the facts but not about the law applicable to the facts about which there is an agreement and one set of rules cannot govern all kinds of differences of opinion.

When several accused are tried for one offence, the word 'case' means not the whole trial of all the accused but the trial of one accused. If the Judges are divided in their opinion about the guilt of one out of several accused, the case to be referred to a third Judge is the trial of the accused about whom they have differed and not the trial of the other accused.

This is the gist of the authorities relied upon by Sri P. C. Chaturvedi, namely, -- 'Ahmad Sher V. Emperor', 1931 Lah 513 (AIR V 18) (D); -- 'Subedar Singh v. Empero 0065/1942 : AIR1943 All272 and -- 'Daulat Ram v. Emperor', 1947 Lah 244 (AIR V 34) (F). In the Allahabad case it was pointed out by Collister J. at page 272 that it was never intended that the opinion of a single Judge should prevail over that of two Judges composing the Court of appeal. So he held that though the record of the whole trial involving two accused is placed before the third Judge, he has no jurisdiction to give his opinion on the question of guilt of one accused about whom the two Judges were agreed.

It was stated by Mookerjee J. in 'Sarat Cnanclra Mitra's case (A)' on page 208 that when the two Judges are equally divided upon the question of the guilt of one accused person, though they-are agreed in their view about certain aspects of the case, what is laid before the third Judge is not the points upon which they are equally divided in opinion but the whole case of the particular accused.

The question whether in a case of one person charged with two offences referred to a third Judge by the two fudges of the Court of appeal, who were agreed that he was guilty of one offence but differed as to his being guilty of the other offence, the third Judge has power to decide the question of both the offences or of only the offence in respect of which there was a division of opinion did not arise for answer by the learned Judge, and was not answered by him.

5. The contention of Sri P. C. Chaturvedi that our brother V. Bhargava had jurisdiction to decide the question of not only the offence of Section 304 I. P. (J., but also of the offence of Section 323, I. P. C., is not supported by' the principle underlying the cases cited by him. Just as the word 'case means the case of each accused separately so also, when an accused is charged with two or more offences, it means the case in respect of each offence.

As regards the meaning of the word 'case' there is no justification whatsoever for distinguishing between a trial involving two or more persons for one offence and a trial of one person for two. or more offences. Just as the 'ordinary rule is that two persons who have committed the same offence should be tried separately so also the ordinary rule is that a person who has committed two offences-should be tried separately for them. It is for the sake of convenience and economy that a trial of several persons or a trial of one person for several offences or a trial of several persons for several offences is allowed.

What is allowed for the sake of convenience and economy should not affect the rights and the liabilities of the parties. For the purpose of Section 429, in a trial of several persons for several offences, the trial of each person for each offence must be deemed to be a case. The appellants could have been tried in one trial for the offence of Section 304, I. P. C., and in another trial for the offence of Section 323, I. P. C., in that event we would have dismissed their appeal against their conviction under Section 323, I. P. C., and the matter could not possibly have gone to our brother V. Bhargava and he could not possibly have had jurisdiction to express any opinion about it.

The rule of procedure enacted only for the sake of convenience and economy could not confer jurisdiction upon him. The joinder of trials for the two offences cannot be permitted to prejudice the rights of the State and such a prejudice can be avoided only by holding that our learned brother had no jurisdiction to decide the question of the appellants' guilt under Section 323, I. P. C.

It stands to reason that the third Judge has not any greater powers than the two Judges composing the Court of appeal and that he has not greater power than what he would have possessed if he had been a third Judge composing the Court

of appeal. If a Court of appeal consists of three-Judges, there can be no equal division of opinion by them on a question which can be answered in only one of two ways. There must be at least two Judges giving identical opinion and the case would be decided in accordance with it.

It is impossible to conceive of its being decided in accordance with the opinion of only one of them. If this appeal had been heard by us and our brother, the appellants* conviction under Section 323 would have been maintained by us, even if our learned brother was of the opinion that this offence was not proved. His opinion as a third Judge under Section 429 cannot have any greater effect.

6. I, therefore, hold that in an appeal by a person from his conviction for two offences, there are two cases within the meaning of Section 429 and that only that case in respect of which the Judges-are equally divided can be referred to a third Judge. The two Judges have to pass the judgment or order in accordance with the third Judge's opinion which must be an opinion on the case referred to him. If he expresses an opinion on a case not referred to him, the two Judges are not only not required, but also cannot, pass the final order on its, basis.

7. We were not equally divided in the case against the appellants for the offence of Section 323, therefore, it could not be, and was actually not, referred to the third Judge. We find' that our brother V. Bhargava has also not given any opinion on that case. He has given his opinion only on the case against the appellants for the offence of Section 304, I. P. G. He has not said a word about the offence of Section 323. He held that the death of Bhajan Lal was caused by the appellants while conceding their right of defence, but he did not hold that they caused injuries to Mithu in exercise of the right of defence. They might have had a private right of defence to cause injuries to Bhajan Lal but might have had no private right of defence to cause injuries to Mithu; therefore, his holding that they had a right to cause injuries to Bhajan Lal does not amount to his holding that they had a right to cause injuries to him and Mithu both.

There is nothing whatsoever in his opinion to suggest that we had no right to exclude the case against the appellants under Section 323, I. P. G., from his jurisdiction or that he had a right to give his opinion on that case even it we had

not referred it to him. When he gave his opinion that 'the conviction of these appellants is to be set aside altogether' he did not mean that their conviction under all the sections is to be set aside.

Not only did he use the word 'conviction' in singular but also the word 'altogether' was used because our opinion was that the appellants must be convicted under one section or another for causing the death of Bhajan Lal, whereas his opinion was that they could not be convicted under any section.

8. Therefore, the conviction of the appellants under Section 323 must be maintained and they should be acquitted only of the offence of Section 304, I. P. C.

V.D. Bhargava, J.

9. The appellants Subedar, Ram Lal and Naththa, who are brothers, were convicted under Section 304 (Pt. I), I. P. G. for causing the death of Bhajan Lal, and under Section 323, I. P. C. for causing simple hurt to Mithu.

10. The appellants had two fields Nos. 488, and 489 and to the east of their fields was the field of Bhajan Lal (deceased) and Mithu. The dispute arose between them about a certain piece of land which each of them claimed to be their own. The case for the prosecution was that the appellants were making a mend on which Bhajan Lal and Mithu objected. It was alleged that thereupon Naththa directed Subedar to strike Bhajan Lal with a pharas who having 'been hit fell clown and later on he as well as Mithu were also given a beating.

11. The defence was that they were making the on which Bhajan Lal and Mithu along with one Ram Kishen made an attack on them and that they had given a beating in self defence. Both the partita had lodged reports and the learned Sessions Judge convicted the appellants as already mentioned, under Sections 304 (Pt. I) and 323 read with Section 34, I. P. G.

Subedar was sentenced to transportation for life under Section 304 (Pt. I) and also to six months' rigorous imprisonment under Section 323 read with Section 34, I. P.

C. The other two were only sentenced to six years' rigorous imprisonment under Section 304 (Pt. I) and to six months' rigorous imprisonment under Section 323 read with Section 34, I. p. C.

12. The accused appealed to this Court and the case was heard by my brother Desai J. and myself. I was of opinion that the accused acted in self defence but that they exceeded their right of private defence and, therefore I was of opinion that the conviction should be altered from one under Section 304 (Pt. I) read with Section 34, to one under Section 325, I. P. C. as, in my opinion, they had exceeded their right of private defence.

My brother Desai J. was of opinion that the conviction should have been under Section 302, I. P. G, and, therefore, there was no scope for any interference with their conviction and sentence. Thus, the case was laid before the Hon'ble the Chief Justice for obtaining the opinion of a third Judge on the question, it was also mentioned in the referring order that the appellants' conviction and sentences under Section 323 read with Section 34, I. P. C. were to be maintained.

On reference the case was laid before V. Bhargava J. He has given his opinion that the conviction of these appellants should be set aside altogether. He was further of opinion that it was not a fit case for directing a de novo trial. The case was again laid before us for final orders. The third Judge agreed with me that the appellants had a right of private defence. He was further of opinion that if the appellants can at all be guilty of any offence whatsoever it would be the offence of causing the death of Bhajan Lal by inflicting on him injuries at a stage where infliction of those injuries amounted to exceeding the right of private defence.

But as they were charged only for the offence of murder of Bhajan Lal and inflicting injuries on Mithu in prosecution of the common object of an unlawful assembly consisting of themselves and two other persons they could not be convicted of any offence. '

13. The question that was referred, as already mentioned was whether the appellants should have been convicted under Section 304 (Pt. 1) or under Section 325, I. P. C. But, as is apparent from the opinion of the third Judge, they could not

be convicted at all. It was, therefore;, contended on behalf of the State that it was not open to him to give an opinion different from the opinion of either of us.

While on behalf of the appellants it was eon-tended, relying on Section 429, Cr..P. C. that the opinion of the third Judge is binding as it was the whole case of the appellants which was laid before the third Judge and it was open to him to come to any finding. He was not bound to agree with either of the two Judges. He could have an independent opinion of his own,. Before I deal with the scope of the word 'case', I would like' to make it clear that after the return of the opinion of the third Judge I am also in agreement with that opinion.

14. It is clear, that these appellants were charged under Sections 148, 302 read with Sections 149 and 323 read with Section 149, I. P. C. Originally there were five accused, but two of them were acquitted on the finding, that they had not taken any part in ' the assault. Thus there were only three persons left and the learned Sessions Judge was of opinion, that under the circumstances Section 149, I. P. C. did not apply.

It escaped my notice when I was dictating the judgment that the accused were charged not with Sections 302 and 323, I. P. C. but they were charged under those sections along with Section 149, I. P. C. -- 'Surajpal v. State of Uttar Pradesh : 1955 CriLJ1004 was a case where the accused were charged under Sections 147 and 302 read with Sections 149 and 307 read with Section 149 I. P. C. and there were no direct and individual charges against the' accused for specific offences under Sections 302 and 307, I. P. C.

The Sessions Judge thought that all the accused were guilty of the various offences charged with and sentenced them. On appeal the High Court acquitted some of the accused, and as regards one of the accused who was suspected of firing his pistol against the deceased, the High Court, while setting aside the conviction and sentence of the accused under Section 307 read with Section 149, and Section 302 read with Section 149, I. P. C. .convicted and sentenced him, under Section 307 to transportation for life and to death under Section 302, I. P. C. It was hold:

'there were no direct and individual charges against the accused for the specific offences under Sections 307 and 302, Penal Code. The absence of specific charges against the accused under Sections 307 and 302, I. P. C. was a very serious lacuna in the proceedings and had materially prejudiced the accused, Hence the convictions and sentences under Sections 307 and 302 could not be maintained against the accused.'

It was further held:

'The question that arises is whether, without such direct charges the convictions and sentences for those offences can be maintained. It appears to us quite clear, that a charge against a person as a member of an unlawful assembly in respect of an offence committed by one or the other of the members of that assembly in prosecution of its common object is a substantially different one from a charge against any individual for an offence directly committed by him while being a member, of such assembly.'

After discussing the scope of Section 149, I. P. C. it was held that Section 149 created a distinct head of criminal liability which came to be known as a constructive liability, and on that view they came to the conclusion:

'There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence. Such a case is not covered by Ss. 236 and 237, Criminal P. C. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor.

The absence, therefore, of specific charges against the appellant under Sections 307 and 302, I. P. C. in respect of which he has been sentenced to transportation for life and to death respectively is a very serious lacuna in the proceeding in so far as it concerns him.'

On this authority, which is binding upon me, it is clear that the conviction of the appellants could not be maintained under Section 302 or 323, I. P. C. because

there had been no specific and distinct charge in respect of these offences. And if they cannot be convicted under Sections 302 and 323, I. P. C., 'for which though no specific and definite charge was made in spite of the fact that they were charged under those sections along with Section 149, much less can they be convicted under Sections 304 (Ft. I) and 325, I. P. C. for which no charge at all in any form whatsoever 'was made.

Attention to that aspect was not drawn during the arguments from the bar when the case was initially argued before us. But as the conviction according to the aforesaid decision would be illegal, I agree with the opinion of the third judge and I further agree that in the circumstances, it is not a fit case for trial de novo.

15. Before a final judgment is delivered I think it is 'always open to a Judge to correct himself. I would even go to the extent of saying that if any illegality or irregularity is pointed out to the Judge before he actually signs and delivers the final judgment in Court, it is his duty to take that point into consideration. It would, in my opinion, be preposterous to say, that even if the Judge is satisfied that his previous opinion which is not yet final, is demonstrated to be illegal yet he must adhere to it.

I have not yet become functus officio, I am still possessed of the case. The only prohibition may be under Section 369, Cr. P. C. when final judgment is delivered by me, but not till then. Their Lordships of the Supreme Court in -- 'Surendra Nath Singh v. State of Uttar Pradesh : 1954 CriLJ475 have said:

'In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court.

* * * * *It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. But, however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing.

Every thing-else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they -may have been signed. The final operative act is that, which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the 'judgment'.

Further they say:

'Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of *locus paenitentiae* and indeed last minute alterations sometimes do occur. Therefore,, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative.'

Though these observations were not made in exactly similar circumstances, yet the observations make it quite clear that it is open to a Judge to change his mind till he has delivered his final judgment. The final judgment in this case has not yet been given, and under the circumstances, it is open to me to change my opinion. In these circumstances, in any event, I think having agreed with the opinion of the third Judge, the appeal should be decided in accordance with that opinion.

16. Now coming to the scope of Section 429, Cr. P. C. three points arise for consideration in connection with the meaning and scope of the word 'case'. Firstly, does the word 'case' mean a charge under a section, and if there are more charges than one then will the trial of the accused be of several case or only one case and, therefore, when the question referred to the third Judge was whether the conviction should be under Section 304 (Pt. I) or under Section 325, was the case of Section 323, Indian Penal Code taken out of his jurisdiction? The second question is whether the third Judge was bound to agree with the opinion of either of the two Judges, or he could give a third and independent opinion? Thirdly, in case, the third Judge gives an opinion which is different from the opinion of either

of the two Judges, is the bench bound by the opinion of the third Judge?

17. As regards the first question, the word 'case' has not at all been defined anywhere in the Code of Criminal Procedure. In my opinion, the word 'case' is a comprehensive word and includes the whole case. That would be the ordinary meaning in common parlance. If a word is not defined in the statute then it would be safe to use it in the meaning which has been attributed to it by long standing judicial decisions, or if there has been no judicial decision it should be used in the sense in which it is being used in common parlance.

18. A man may be charged under various sections, but there is only one case against him. Only one case is registered and numbered. If a person is being tried under five sections no one will say that there are five cases pending against the accused. This word seems to have the same meaning in judicial parlance as well.

19. The word 'case' has not only been used in Section 429, Cr. P. C. but has also been used at numerous other places and is not limited to the Code of Criminal Procedure but has been used in other Acts as well, where in similar context the meaning attributed to the word 'case' can only be the whole matter in dispute. For example, the word 'case' has been used in Section 526 Clauses (1) (e) (ii) and (iii), Cr. P. C. which run as follows :

'(ii) that any particular * * * case or appeal, or class of case or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular * * * case or appeal be transferred to and tried before itself;'

It is quite clear that what is contemplated in the above section, is that if an accused is charged with several offences, the case which is to be transferred will be the entire case and cannot possibly be the trial of one offence only.

20. Article 228 of the Constitution provides:

'If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution

the determination of which is necessary for the disposal of the case, it shall withdraw the case and may---

(a) either dispose of the case itself or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.'

It is manifestly clear from the language of this Article, that the clear intention of the Constitution was that if a case is to be withdrawn it would be the whole case, and if in a criminal trial any question of law as to the interpretation of the Constitution was involved only that question shall be decided and the case shall be decided by the trial court. It would not be open to the High Court to withdraw only the case as regards one offence and leave the case as regards the other offences for disposal in the trial court.

21. In Rule 6 of Chapter V of the Rules of Court, we have provision for a reference to a larger bench and this rule runs as follows :

'The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event, the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.'

The word in the first part of the first sentence used is a 'case', and according to the context it clearly means that if a case is referred, it is not confined to any question, but if any particular question is referred then the bench is to answer that question alone. The meaning of the word 'case' here also clearly is the whole matter in dispute.

22. I have taken assistance from other statutes and rules in interpreting the meaning of the word 'case' only where the 'case' is to be taken out of one court

and sent to another as Section 429, Cr. P. C. provides.

23. It was argued on behalf of the State that the difference contemplated in Section 429, Cr. P. C. was the matter in difference only and could not include the whole matter, particularly it could not include that portion of the proceedings about which there was no disagreement. It was further contended that this section never contemplated to create a further difference between the two Judges where none existed.

There is no question of any difference being created. If the whole case is laid before the third Judge it would be 'his' opinion, unfettered by any agreement of the two Judges hearing the case, which would ultimately prevail.

24. According to the counsel for the State the words 'the case shall be laid before another Judge mean that the 'His' shall be laid. If the word 'case' means the 'file' or the 'record' even then a part of the record cannot be placed. It will be the whole record. His further contention was that it is when the two Judges differ on the operative portion of the judgment only then the case can be referred to a third Judge and for that proposition he relied on : AIR1953 Ori160 where Jagaimadhadas C. J. (as then he was) held:

'The 'opinion' contemplated by Section 429 is nothing more or nothing less than the decision as to the operative order to be passed in the case. It is not merely what may be called the inclination of the Judge as to the view to be taken on the question arising in the case. It is only where there is any difference as to the disposal of the case, that it can be said that the Judges are divided in opinion.'

(24a) This authority is not of much assistance in solving the question raised before us. Because admittedly the difference that existed between ourselves was as regards the operative portion only.

25. The word 'case' has been also judicially interpreted and the learned counsel for the appellant has cited 38 Cal 202 (A). That was a case, which was referred to Sir Ashutosh Mookerjee J. on a difference of opinion between Harington and Teunon JJ. The question before him was as to the meaning of the word 'case' and

the effect of the opinion of the third Judge. After quoting Section 429, Cr. P. C. Mookerjee J. observed as follows:

'Two points are worthy of note in connection with this section first, that what is laid before another Judge is the 'case' and, secondly, that the judgment or order follows the opinion delivered by such Judge. I am not now concerned with the question of the trial of two prisoners with regard to one of whom the Judges composing the Court of Appeal may be agreed in their opinion, while as regards the other the Judges may be equally divided in opinion.

In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term 'case' what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are equally divided in opinion on the question of guilt of one accused person, though upon certain aspects of the case they may be agreed in their view.

In such a contingency what is laid before another Judge, is, not the point or points upon which the Judges are equally divided in opinion, but the 'case'. This obviously means that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case.

The judgment or order follows such opinion which need not necessarily be the opinion of the majority of the three Judges; for instance, at the original hearing of the appeal, one Judge may consider the prisoner not guilty, another Judge may consider him guilty of one section of the Indian Penal Code, and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as he thinks fit. It is this last opinion which prevails, subject to the provisions of Section 377, of the Code of Criminal Procedure in the case of confirmation of the sentence of death.'

I respectfully agree with the opinion of Mookerjee, J. expressed above. The dictum of Mookerjee, J. was followed by the Lahore High Court in 1931 Lah 513 (AIR V

18) (D), which was also a case referred to a third Judge on the difference of opinion between two Judges of that Court, and also in 1947 Lah 244 (AIR V 34) (F). 38 Cal 202 (A), was also referred and approved by a bench of this Court in 0065/1942 : AIR1943 All272 . After quoting the observation of Mookerjee, J. from 38 Cal 202 (A), (referred to above), the bench observed :

'We have no doubt in our mind that this is the proper view to take of Section 429, Criminal P. C.'

It is true that the point did not very directly arise in the manner in which it has arisen in this case before the bench of this Court. In my opinion, there is no doubt about the meaning of the word 'case' and all the courts have followed a uniform interpretation. The courts would be very unwilling and reluctant to change that interpretation which has been accepted by different High Courts for a number of years unless there be a cogent reason for doing so.

Section 429 is a procedural law, in which deviation from the accepted interpretation, unless it be contrary to the meaning of the enactment should be deprecate.

26. Varadachariar, J. in -- 'Neelikandi Moidin v. Kunhayissa : AIR1936 Mad158 , enunciated one of the rules of interpretation in the following words :

'On a point of practice, it is a well established principle that the legislature must be presumed to approve of established rules and practice if, on occasions when it turns its attention to the subject, it does not introduce any provision to the contrary.'

Though the history of a legislation does not afford any conclusive argument, yet it may be usefully employed at times in interpreting the meaning of a statute. I am supported in this view by the Federal Court in the case of -- 'Emperor v. Benoari Lall', 3.943 FC 36 (AIR V 30) (J), wherein it was held:

'such topics as the history of the legislation and the facts which give rise to the enactment may usefully be employed to interpret the meaning of the statute, though they do not afford a conclusive argument.'

This dictum in the judgment was based on the observations of Lord Halsbury in -- 'Powell v. Kemp-ton Park Racecourse Co/, (1899) AC 143 (K).

27. Therefore, 1 would be justified in this case to look at the history of the section and see whether at any time any attempt was made by the legislature to introduce any provisions contrary to the accepted interpretation.

28. After the decision of Mookerjee, J. when there was a Bill in 1914 to amend the Code of Criminal Procedure, suggestions were made for amending the section in the following language :

'When the Judges composing the Court of Appeal are equally divided in opinion, the case shall e re-heard before them and another Judge of the Court, and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing the case.'

(Vide 1914 Gazette of India Pt. V p. 111). The reason for the amendment as contained in the report of the Select Committee is in the following words, (ibid page 125):

'At present when the Judges composing the Court of Appeal in the High Court are equally divided in opinion the case is laid before a third Judge., In order to prevent the possibility of this third Judge interfering with the unanimous decision of the previous two on any point of the case, it is provided that the whole case should be re-heard before a third Judge and the Judgment given in accordance with the opinion of the majority.'

Thus we find that the attention of the legislature was directly drawn to the difficulty which has arisen in the present case and an attempt was made to introduce a provision to the contrary. This matter again came up before another Select Committee in the year 1917. Then instead of the amendment mentioned above it was suggested that a proviso be added to the existing Section 429, Cr. P. C. and the proviso suggested was in the following terms :

'Provided that, if either of the Judges composing the Court of Appeal so require, the appeal shall be re-heard before them and another Judge or if the Chief Justice

or the Judicial Commissioner so directs, before a third Judge and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing the case.' (1917 Gazette of India Pt. V p. 107).

The reason given by the Select Committee for this was :

'We prefer to retain Section 429 in its existing form, but would add a proviso on the lines of our amendment to Section 378 Clause 86A of the amended Bill'

Clause 86A of the amended Bill was :

'We think that in confirmation cases, where the Judges hearing the case are equally divided, it may not always be sufficient to refer the case to another Judge by whose opinion it is to be decided. We think that it should be within the power of the Judges before whom the case was originally heard in the High Court to insist upon a re-hearing before themselves and the additional Judge. As in some cases this may not be feasible, we would allow the Chief Justice in any such case to direct a re-hearing before three other Judges.'

In spite of this attempt this amendment was not accepted by the Select Committee in 1922 (vide 1922 Government of India Gazette Pt. V pp. 263 and 264), and the reason given was :

'In view of the fact that the difficulty which the amendment is intended to meet is probably a rare occurrence, and that the second portion of the proviso will be inapplicable in the case of Judicial Commissioners Courts which do not at present consist of five Judges, we prefer to leave the law as it is, and we delete this clause.'

Therefore in 1923 when the Criminal Law Amendment Act was passed this section was retained in its original wordings. In this historical setting, I would be justified in presuming that the legislature approved of the decision of Sir Ashutosh Mookerjee, J.

29. Learned counsel for the State relied on 28 Cal LJ 32, also reported in 1919 Cal 862 (AIR V 6) (B). That was a case in which there was a difference of opinion

between Chitty, J. and Smither, J. and the matter was referred to Woodroffe, J. Chitty, J. was of opinion that the accused could not be convicted, but he was of opinion that there should be a trial de novo, while Smither, J. was of opinion that there should be no retrial, and that the accused should be acquitted. When the matter came before Woodroffe, J. on the interpretation of the word 'case', he in his judgment says :

'It has consequently been argued that the only question before me is whether the accused should be acquitted or retried. Without deciding that the word 'case' does not include the whole case it is plain that a third Judge would not differ upon a point on which both the referring judges were agreed unless there were strong grounds for doing so. I am not going to do so here.'

From this observation it cannot be said that the opinion of Woodroffe, J. was that the word 'case' did not include the whole case. The matter actually was left open by him. On the other hand, his saying, 'that a third Judge would not differ unless there were strong grounds for doing so,' clearly means that the third Judge has jurisdiction to go beyond it and the learned Judge may have gone beyond it, if the facts of that case required any interference.

30. There is a great difference between joinder of charges and joinder of persons. When three or more persons are jointly tried, there is a case against each one of them and each one of them has a separate right of appeal and even a court can decide the case of one accused separately from that of the others; and if each accused proposes to file a separate appeal the appeals will be separately numbered and may be decided by different Judges and at different times, but if one accused is charged with several offences in one trial he cannot have separate appeals on different charges; nor can the case be decided separately on separate charges and, therefore, it would not be correct to say that there is no distinction between a trial involving two or more persons for one offence and a trial of one person for two or more offences.

Under different sections of the Code of Criminal Procedure 'any person' has been given a right of appeal and, therefore, each individual accused out of the several persons jointly convicted has been permitted under the law to file the appeal, but

the right of appeal has been given against the conviction on a 'trial' and therefore, as I have said above, there is no separate right of appeal under different sections.

31. I would, therefore, hold that the whole case of the appellants was before the third Judge and he was not bound to agree with either of the Judges, and his opinion is binding upon the bench. And, in any event, would, as I have already said, after reconsideration of the legal position, hold that the appellants cannot be convicted either under Section 325 or 323, I. P. C. and they must be acquitted.

32. I would further hold that it will not be in the interest of justice in these circumstances to order a trial de novo.

By The Court.

33. Since we are equally divided in opinion on the question whether the appellants' conviction and sentence under Section 323 I.P.C., should be maintained or quashed, we direct the case to be laid before the Hon'ble Chief Justice for obtaining another Judge's opinion on the matter.

Oak J.

34. This is a reference to a third Judge for opinion in view of difference of opinion between the learned Judges of a Division Bench of this Court in the disposal of a criminal appeal. The appeal arose out of a case, in which three persons, Suborder, Ram Lal and Natha were convicted by the learned Additional Sessions Judge of Farukhabad. Subedar was convicted under Section 304 I.P.C. and Section 323/34, I.P.C. Ram Lal and Natha were convicted under Section 304/34, I P.C, and Section 323/34 I.P.C. Various sentences were passed upon these three persons for, the different offences.

35. According to the prosecution, Bhajan Lal deceased and his brother 'Mitthu had two adjoining plots Nos. 495 and 498/8 under their cultivation. There was some waste land to the west o these plots. Some years ago Mitthu and Bhajan Lal extended their cultivation into this waste land, Previously the boundary of plots Nos. 495 and 498/8 was almost a straight line.

But as a result of the extension of cultivation into the waste land, the boundary line became curved with a bulge into the waste land. One evening Bhajan Lal and Mitthu went to their fields,, and found that Subedar accused was raising a boundary wall which would be almost a straight line. That is to say, Subedar was trying to restore, the old boundary of pilot No. 498/8 by detaching, land, which had been included in the extended cultivation of Bhajan Lal and Mitthu. Bhajan Lal and Mitthu asked Subedar not to make any new boundary, and suggested that -the dispute should be settled by arbitration.

Subedar, Ram Lal, Natha and Dulare accused insisted on changing the boundary forcibly. Mitthu and' Bhajan Lal objected. Natha accused incited Subedar to strike Bhajan Lal with a spade. Subedar gave a blow to Bhajan Lal with the back side of the spade. Bhajan Lal fell down on receiving the blow. Mitthu and Ram Kishan came to Bhajan Lal's rescue. But Mitthu and Ram Kishun also were beaten by the four accused. One Natha (not Natha accused; joined on the side of Bhajan. Lal and Mitthu. But that Natha was also beaten by the accused.

The accused persons kept on striking Bhajan. Lal even after he had fallen on the ground injured. When other people arrived, the four accused-ran away. There was one Lallu in the company of the four assailants. Bhajan Lal died on the way to hospital as a result of his injuries. So the police prosecuted live persons, Subedar, Ram Lal, Natha, Dulare and Lallu. The live accused were. committed to Sessions on charges under Sections 148 and 302, I.P.O. read with Section 149 I.P.C. The learned Sessions Judge added a charge under Section 323/149, I.P.C. for causing simple hurt to Mitthu.

36. All the five accused pleaded not guilty. Subedar, Ram Lal and Natha accused admitted their presence on the spot at the time of the-light. It was admitted that Subedar accused was altering the boundary of the field. The defence-was that Subedar accused was entitled to alter the boundary of the field. The accused persons relied upon a lease obtained by them from the zamindar. According to the defence, it was Bhajan Lal deceased who snatched away Subedar's spade on feeling annoyed 'about the alteration of the boundary.

Bhajan Lal was joined by Ram Kishun, Nattha (not the accused) and Mitthu. These four persons, beat Subedar accused. Ram Lal and Natha accused pleaded that they used their lathis against. Bhajan Lal and Mitthu in order to save the life of Subedar accused. The learned Sessions Judge came to the conclusion that, three accused, Subedar, Ram Lal and Natha, had beaten Bhajan Lal deceased and Mitthu in a sudden and free fight in the heat of passion, and not in exercise of any right of self defence. So the three accused, Subedar, Ram Lal and Natha, were convicted by the learned Sessions Judge as detailed above. Lallu and Dulare accused were acquitted. Subedar, Ram Lal and Natha appealed to this Court.

37. The appeal came up for hearing before a Division Bench consisting of Mr. Justice Desai and Mr. Justice Vishnu Datta. Mr. Justice Desai was of the opinion that, the appeal should be dismissed, M'. Justice Vishnu Datta was of the opinion that although the appellants' conviction and sentence under Section 323/34, I.P.C. should be maintained, their conviction under Section 304/34, I.P.C. should be altered to Section 323/34, I.P.C. In view of the difference of opinion between the learned Judges, the case was referred to a third Judge for his opinion. On 2-11-1955, the Division Bench passed the following order;

'Since we differ on the question whether the appellants are guilty under Section 304, Part I, I.P.C. or under Section 325, I.P.C., we direct the case be laid for obtaining a third Judge's opinion on the question. The appellants' convictions and sentences under Section 323/34, I.P.C. are to be maintained.'

38. The case went before Mr. Justice V. Bhargava for his opinion. He was of the opinion that, it is not possible to convict the appellants for any offence whatsoever on the basis of the trial held by the lower Court, and that this is not a fit case for directing a de novo trial. That opinion was returned to the Division Bench.

39. When the appeal came up before the Division Bench for passing final orders, the learned Judges of the Division Bench again disagreed as to the manner in which the appeal should be finally disposed of. Mr. Justice Desai pointed out that, the third Judge did not state in his, opinion that the accused should 'be acquitted of the charge under Section 323, I.P.C. Mr. Justice Desai was further of the opinion that, that the third Judge had no jurisdiction to decide the question of the

appellants' guilt under Section 323, I.P.C.

Mr. Justice Desai, therefore, concluded that, the appellants' conviction under Section 323 I.P.C. must be maintained, and they should be acquitted only of the offence under Section 304, I.P.C. On the other hand Mr. Justice Vishnu Dutta was of the opinion that, the whole case of the appellants was before the third Judge, that he was not bound to agree with either of the Judges of the Division Bench, and that his opinion is binding upon the Division Bench. And, in any event, after reconsideration of the legal position, the applicants cannot be convicted either under Section 325 or 323, I.P.C., and they must be acquitted.

In view of this difference of opinion between the learned Judges of the Division Bench, the case was again referred to a third Judge for opinion. The Division Bench passed the following Order:

'Since we are equally divided in opinion on the question whether the appellants' conviction and sentence under Section 323, I.P.C. should be maintained or quashed, we direct the case to be laid . . . for obtaining another Judge's opinion on the matter.'

This time the case has been referred to me for opinion.

40. Firstly, I shall express my opinion as regards disposal of the appeal on merits. The main question involved in the appeal was whether appellants acted in the exercise of the right of private defence. Mr. Justice V. Bhargava concluded:

'The attack was first made from the side of the complainant when Bhajan Lal attacked Subedar and thereafter a fight developed. The appellants, one of whom was first attacked, consequently had the right of defence of person. Therefore, inflicting injuries on Mitthu and Bhajan Lal at the first stage they cannot be held guilty of having committed any offence whatsoever.'

The learned Deputy Government Advocate was prepared to accept this finding of the learned Judge. The learned Judges of the Division Bench are now agreed that, the appellants should be acquitted of the charge under Section 304, I. P. C. It will, therefore, be sufficient for me to discuss whether the appellants' conviction

under Section 323, I. P. C. for causing injuries to Mitthu should be maintained OP not.

I shall assume that in the initial stage of the fight the accused persons had the right of private defence, and no offence was committed by any accused till Bhajan Lal fell down. ' The question for consideration is whether the appellants can be convicted under Section 323, I. P. C. for causing injuries to Mitthu alter Bhajan Lal's fall.

41. Anokhe (P. W. 2) described the fight thus:

'He (Bhajan Lal) fell down. Then Mitthu wielded his lathi & hit Subedar or Natha. Lallu came with lathi and joined the four accused. All the five accused beat Bhajan, Mitthu and Ram-Kishun.'

AnoKne's statement suggests that, Mitthu was beaten after Bhajan Lai fell down. On the other hand Mitthu (P. W. 1) described the fight differently. He stated:

'Subedar struck Bhajan with the back side of the spade. Ram Kishun and I went to the rescue of Bhajan. We too were struck by Natha, Ram Lal, Dulare. Accused Lallu also arrived with, a lathi and joined - the assailants. Bhajan fell down on receiving the blow with the end of the pharsa and all the accused beat him still.'

Thus the account given by Mitthu suggests that, he rushed to help Bhajan Lal while Bhajan Lal was still standing, and that Mitthu received a few lathi blows before Bhajan Lal's fall.

It is now conceded on behalf of the prosecution that, the accused persons cannot be convicted under Section 323, I. P. C. for causing injuries to Mitthu before Bhajan Lal's fall. Mitthu Lai received eight injuries in all. It is not possible to say Which of these eight injuries were received by Mitthu before Bhajan Lal's fall, and which injuries. were received by Mitthu alter Bhajan Lal's fall,

42. The learned Deputy Government Advocate contended that, the accused persons had no. justification for striking Mitthu with lathis after Bhajan Lal had fallen. It is true that the blows upon Bhajan Lal alter his fall cannot be justified. But

the blows inflicted on Mitthu are on different footing. We have seen that Bhajan Lal was the aggressor.

The accused persons were justified in repelling, the attack by Bhajan Lal. Admittedly, Mitthu rushed to support Bhajan Lal, so the accused persons had the right to strike Mitthu also. It is true that Bhajan fell down during the fight. But Mitthu kept on fighting. So the appellants' right to hit Mitthu continued.

43. Since the accused persons had the right of private defence of the person at least during the first stage of the fight, it cannot be said that the-appellants acted in furtherance of a common intention to commit any offence. So Section 34, I. P. C. is inapplicable. If any accused is to be convicted, under Section 323, I. P. C., that conviction will have to be based on the footing that that accused is personally responsible for a particular injury.

The evidence on the record does not disclose that, any particular injury of Mitthu was caused by a particular accused at a definite stage of the-fight. Further as shown above, the right of private defence continued as against Mitthu even after Bhajan Lal's fall. For these reasons, it is not possible to convict any accused under Section 323, I. P. C. Now I proceed to consider how the appeal ought to have been disposed of in the light of the opinion expressed by Mr. Justice V. Bhargava.

The learned Judges of the Division Bench were not agreed about the true effect of the opinion of Mr. Justice V. Bhargava. It was open to the learned Judges to obtain a clarification from the learned Judge as to what exactly he intended to convey by his opinion.

44. As previously observed, Mr. Justice V. Bhargava came to the conclusion that, the attack was first made from the side of the complainant when Bhajan Lal attacked Subedar, and thereafter a fight was developed. It was found that, 'in inflicting injuries on Mitthu and Bhajan Lal at the first stage, they cannot be held guilty of having committed any offence whatsoever.' Later, the learned Judge remarked:

'Consequently in the circumstances of this case, if the appellants can be held guilty of any offence whatsoever, it would be an offence of causing the death of Bhajan Lal by inflicting injuries on him at a stage when the infliction of those injuries amounted to exceeding the right of private defence.'

The learned Judge, however, found that, 'it is not possible to convict these appellants for any offence whatsoever on the basis of the trial held by the power Court.' It was pointed out that, the accused persons were charged under Section 149, I. P. C. on the principle of constructive liability. It was, therefore, held that, 'the conviction of these appellants is to be set aside altogether.'

The question of ordering a de novo trial was considered. It was found that this is not 'a fit case for directing a de novo trial. From all these observations, I take it that Mr. Justice V. Bhargava was of the opinion that, it is not possible to maintain the conviction of the appellants for any offence. It was implied that, the appellants' conviction under Section 323, I. P. C. also must be set aside.

45. The Division Bench, by its order dated 2-11-1955, had expressly mentioned that the appellants' convictions and sentences under Section 323/34, I. P. C. are to be maintained. Nonetheless the third Judge expressed an opinion implying that, the appellants' convictions under Section 323/34, I. P. C. also should be set aside. The question, therefore, arises whether the third Judge was entitled to enter into a question, on which there was no difference of opinion between the learned Judges of the Division Bench.

46. The reference to the third Judge was made under Section 429, Cr. P. C. Section 429, Cr. P. C. runs thus:

'When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment on order shall follow such opinion.'

It is to be noted that, what is referred to another Judge is 'the case', and not any particular point on which there is difference between the Judges composing the

Court of Appeal.

47. The true scope of Section 429, Cr. P. C. was discussed by Mookerjee, J. at the same length in 38 Cal 202 (A). The learned Judge observed at page 208:

'Two points are worthy of note in connection with this section: first, that what is laid before another Judge is the 'case, and, secondly, that the Judgment or order follows the opinion delivered by such Judge. I am not now concerned with the question of the trial of two prisoners with regard to one of whom the Judge composing the Court of Appeal may be agreed in their opinion, while as regards the other the Judges may be equally divided in opinion.

In such a contingency it is quite possible to maintain the view that, upon a reasonable' interpretation of the term 'case', what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are equally divided in opinion upon the question of the guilt of one of the accused person, though upon certain aspects of the case they may be agreed in their view.

In such a contingency, what is laid before another Judge, is, not the point or points upon which the Judges are equally divided in opinion, but the 'case'. This obviously means that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case.

The judgment or order follows such opinion which need not necessarily be the opinion of the majority of the three Judges; for instance, at the original hearing of the appeal, one Judge may consider the prisoner not guilty, another Judge may consider him guilty under one section of the Indian Penal Code, and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as thinks fit. It is this last opinion which prevails, subject to the provisions of Section 377 of the Criminal Procedure Code in the case of confirmation of sentences of death.'

48. In 1919 Cal 862 (AIR V 6) (B), it was held that, the third Judge will not differ upon a point which both referring Judges are agreed unless there are strong grounds for doing so. This decision supports the view that, in proper cases the third Judge may differ upon a point which the two referring Judges are agreed.

49. The expression 'the case' used in Section 429, Cr. P. C, is ambiguous. This ambiguity has created difficulty in interpreting the section. Three interpretations of the section are possible:

'(i) 'The case' means the point or points on which the referring Judges differ;

(ii) 'the case means the entire case of a particular accused about whose guilt there is some difference of opinion between the referring Judges; and,

(iii) 'the case¹ means the entire case of all the accused as regards all the charges on which they have been convicted or acquitted, as the case may be.'

These three interpretations may be referred to as the narrow interpretation, intermediate position, and wide interpretation respectively.

50. According to the wide interpretation, even if the referring Judges are agreed that a particular accused should be acquitted, it will be open to the third Judge to maintain the conviction of that accused. Even the intermediate position may lead to curious results. Suppose, the trial court records conviction under Section 302, I. P. C. When the matter goes in appeal before a Division Bench, one Judge is of the opinion that the conviction should be under Section 304, I. P. C., while the second Judge is of the opinion that the accused should be acquitted altogether.

In such a case it will be open to the third Judge to come to the conclusion that the conviction under Section 302, I. P. C. should stand. In that case the Division Bench will be obliged to uphold the conviction under Section 302, I. P. C., although both the Judges of the Division Bench are agreed that the accused is not guilty under Section 302, I. P. C.

51. The decision in 'Sarat Chandra Mitra's case (A) was quoted with approval by a Division Bench of Allahabad High Court in 0065/1942 : AIR1943 All272 . In that

case there were several appellants. There was disagreement between the learned Judges of the Division Bench as regards one appellant, Subedar Singh.

The question arose whether the whole case or the case of that particular appellant should be referred to a third Judge under Section 429, Cr. P. C. It was observed that, it could never have been in the contemplation of the Legislature that, the opinion of a single Judge should prevail against the opinion of the Bench which originally heard the appeal as regards any particular appellant.

52. The narrow interpretation of Section 429, Cr. P. C. was rejected by Calcutta' High Court in 'Sarat Chandra Mitra's case (A)'. That view was approved by Allahabad High Court in 'Subedar Singh's case (E)'. The wide interpretation was rejected in 'Subedar Singh's case (E)'. So we are forced to accept the intermediate position. The result may not be logical. But that seems to be the trend of decisions of various High Courts.

I, therefore, hold that, when the case of an appellant is referred to another Judge under Section 429, Cr. P. C. it is open to that Judge to take a view different from that taken by the referring Judges so far as that appellant is concerned. Upon this interpretation of Section 49, Cr. P. C. Mr. Justice V. Bhargava had jurisdiction to express the opinion implying that the appellants should be acquitted of all the charges, although the referring Judges had expressly mentioned that convictions under Section 323/34, I. P. C. are to be maintained. The opinion of the third Judge is binding on the Division Bench. So the Division Bench had to acquit the appellants under Section 323, I. P. C., also.

53. Thus on merits, and also in view of the opinion already expressed by the third Judge (Mr. Justice V. Bhargava), the Division Bench should not maintain the appellants' conviction under Section 323, I. P. C. I am of the opinion that the appellants' conviction under Section 323, I. P. C. should also be set aside, and the three appellants should be acquitted of all the charges. Let the record be returned to the Division Bench with this opinion.

Desai and Bhargava, JJ.

54. In view of the opinion of the third Judge, we allow the appeal of the appellants and acquit them of all the charges of which they have been convicted. Their sentences are set aside and their bail bonds are discharged.

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