

**Ganga Vs. the State**

**Ganga Vs. the State**

**SooperKanoon Citation :** [sooperkanoon.com/464935](http://sooperkanoon.com/464935)

**Court :** Allahabad

**Decided On :** Apr-12-1957

**Reported in :** AIR1957All678; 1957CriLJ1060

**Judge :** Mulla, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 234, 235, 236, 237, 238, 423 and 423(1); [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 378, 379 and 411; [Evidence Act, 1872](#) - Sections 114

**Appeal No. :** Criminal Revn. No. 109 of 1956

**Appellant :** Ganga

**Respondent :** The State

**Advocate for Def. :** Asst. Govt., Adv. and ;Shankar Sahani, Adv.

**Advocate for Pet/Ap. :** V.P. Saxena, Adv.

**Disposition :** Application rejected

**Judgement :**

ORDER

**Mulla, J.**

1. This is an application of revision filed by one Ganga who was convicted under Section 379 I. P. C. by the Railway Magistrate, Lucknow, but the learned Sessions Judge when the case came up in appeal before him altered the conviction to one under Section 411, I. P. C.

2. Briefly stated the facts of the case are that one Sri Mathur, a passenger, was travelling by a train and one Latif picked his pocket at the Charbagh platform. Sri Mathur immediately detected the loss of his purse and he found Latif and the applicant running away together. He raised an alarm and pursued the two and the other persons present on the platform also joined in this pursuit. Latif and the applicant were arrested and then their persons were searched. The purse was found on the person of the applicant. Sri Mathur had further stated that he saw Latif handing over the purse to the applicant. It was on this basis that both Latif and Ganga were prosecuted. The Magistrate came to the conclusion that the two were acting in concert and so convicted both Latif and Ganga under Section 379 I. P. C. The appellate court maintained the conviction of Latif under Section 379 but altered the conviction of Ganga to one under Section 411 I. P. C.

3. The counsel for the applicant has contended before me that the appellate court was not justified in making this alteration under the provisions of Section 237 Cr. P. C. He contended that Section 237, Cr. P. C. can be acted upon only by the trial court and the appellate court cannot act under the provisions of this Section. For this contention reliance was placed upon certain observations of a learned Judge of this Court reported in *Mangal Singh v. Rex* AIR 1949 All 599 (A). The learned Judge who decided this case observed as follows:

'It is to be seen whether the convictions under Section 379 and Section 379/114, Penal Code, can now be substituted in place of the convictions recorded by the Courts below. The applicants were never charged under these sections. They were charged under Sections 411 and 411/109, Penal Code. The only section under which conviction under Section 379 can be recorded by an appellate court or by a court of revision in place of a conviction under Section 411 is Section 237, Cr. P. C., if at all. Section 237 applies only in a case which is governed by Section 236, Cr. P. C. It is to the effect that:

'If a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences'.'

Proceeding further the learned Judge made some observations to the effect that it was the trying court and the trying court alone which could say whether it entertained any doubt on the question which of the offences were constituted by the facts which had been proved. He came to the conclusion that it was not for another court, however superior it might be to say that the trial court should have entertained a doubt on this question. In my opinion the observations of the learned Judge amount to obiter dicta and they do not lay down the rule of law. With respect to the learned Judge, I disagree with the opinion expressed by him. In my opinion, the powers of an appellate court are defined under Section 423 Cr. P. C. The relevant parts of Section 423 for this question are Sub-sections (b) and (d) of Section 423 (1). These two sub-sections run as follows:

'(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such Appellate Court or committed for trial or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence

(d) make any amendment or any consequential or incidental order that may be just or proper.'

It seems to me that under Sub-clause (2) mentioned above an appellate court is entitled to alter the finding and altering the finding includes the application of a different penal provision to the admitted facts of the case.

There are several decisions on this point and there are two views held by the High Courts. The first view is that the powers conferred on the appellate court are not restricted by the provisions of Sections 234 to 238 of the Cr. p. C. The other view with which I find myself in agreement is that these powers are only restricted by the provisions of Sections 234 to 238 of the Cr. P. C. In other words, in all those cases in which the trial court could utilise the provisions of Sections 236 and 237

the appellate court also can do the same. I am fortified in this view by a Bench decision of the Calcutta High Court reported in *Lala Ojha v. Queen Empress* ILR 26 Cal 863 (B). The learned Judge observed:

'If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constituted, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding would not necessitate a retrial expressly on a charge of that offence.'

There are other decisions also which have followed this decision but I need not enumerate them. The learned Judge who decided *Mangal Singh's* case did not discuss the provisions of Section 423 (b) or (d) when he came to the conclusion that an appellate court cannot utilise the provisions of Section 237, Cr. P. C., to correct an error in applying the relevant law.

4. There is another aspect of the case also from which it can be inferred that the appellate court is entitled to utilise the provisions of Section 237 Cr. P. C. Section 237 runs as follows:

'1. If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.'

Reading Section 237 along-with Section 236 Cr. P. C. the only circumstance necessary to bring these two sections in operation is that on the admitted facts of the case a doubt arises whether the illegal act or omission committed by the offender falls under one section of any penal statute or some other section of the

penal statute. The moment such a doubt arises, these two sections come into operation. I do not find anything in the language of Section 238 or 237 to indicate that this doubt must arise only in the mind of the trial court and not in the mind of the appellate court. As observed by me above, the entire case is before an appellate court and if such a doubt is entertained by the appellate court, it can also utilise the provisions of these two sections.

5. There is, however, one factor to be guarded against before the appellate court brings these sections into operation. An accused has a right to know the charge against him and he should be given a full opportunity to defend himself. If the application of these two sections is likely to prejudice an accused person, it is obvious that they should not be brought into operation, it is only in those cases where there is no reasonable possibility of prejudice being caused to an offender that an appellate court can alter a conviction under Section 237 Cr. P. C. As observed by a Bench of this Court in *State v. Rasool* : AIR 1955 All 620 :

'Sections 236 and 237, Cr. P. C. are really meant to apply to that type of cases where there is no doubt about the facts alleged but there is a doubt as to the applicability of any particular law against the proved set of facts; in other words they can be acted upon only where the same facts raise a doubt in the mind of a Court whether they constitute one offence or some other offence. They obviously do not apply to those cases where a different set of facts are to be given prominence for coming to a conclusion that a particular offence was committed.

Sections 236 and 237, Cr. P. C. can only be used where it can be held that the accused was not prejudiced by his conviction under a section for which he was not charged. Where the accused has been prejudiced or can be prejudiced, a conviction with the help of Sections 236 and 237, Cr. P. C., cannot be maintained or upheld.'

Accepting the rule of law laid down in the extract quoted above I have only to determine whether there was any possibility of the applicant being prejudiced by this alteration. The record shows that the applicant took up the plea that the purse was not recovered from his possession. The same defence would have been taken up by him even if a charge under Section 411 had been framed against him.

The prosecution proved the following set of facts which consisted of four links:

1. the purse of Sri Mathur was removed by Latif.
2. Both Latif and the applicant were near Sri Mathur when the theft was committed and both ran away together.
3. Latif handed over the purse to the applicant immediately after the theft and
4. the purse was recovered from the possession of the applicant.

Both the trial court as well as the appellate court accepted these facts. The appellate court, however, felt that the proper penal section applicable to the illegal act committed by the applicant was Section 411 I. P. C. while the trial court came to the conclusion that Section 379 was applicable to this set of facts. Personally I am of the opinion that the trial court was right and the appellate court erred in changing the conviction from Section 379 to Section 411 I. P. C. The trial court erred only so far that it did not utilise the provisions of Section 34 I. P. C. when it framed the charge against the two accused, although the circumstances of the case clearly indicated a joint intention. The second and third links mentioned by me above, in my opinion prove that the applicant committed an offence under Section 379/34 I. P. Code and not one under Section 411 I. P. Code. If a stolen article, almost at the very moment when it is stolen is handed over by the thief to a companion who was with him at the time of the commission of the offence, the proper inference to be drawn from this circumstance is that the second person was in concert with him and not that he merely received the stolen property. To bring home a charge under Section 379/34 it is not necessary for the prosecution to prove that the physical act of lifting the stolen property was committed by an offender himself. It is sufficient if it is established by evidence or circumstances that he shared the intent on of committing theft with the actual thief. This, however, is immaterial on the question before me. perhaps the appellate court was not willing to raise the presumption under Section 114, Illustration (a) Indian Evidence Act, to its utmost limit although in my opinion the circumstances fully warranted it. Accepting that these facts constitute only an offence under Section 411 I. P. C. I am satisfied that no prejudice was caused to the applicant by the alteration of his

conviction from Section 379 to Section 411, I. P. Code.

6. Lastly, the counsel for the applicant contended that the sentence inflicted in this case is very severe. It is not easy to detect this type of pick-pocketing and it has become extremely rampant. The applicant has been awarded a sentence of six months' rigorous imprisonment and in my opinion it cannot be said that this punishment is excessive.

7. Nothing else was contended before me and I see no force in this application of revision which I reject. The applicant is on bail. He should surrender forthwith to serve out the sentence.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**