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Emperor Vs. Abdul Qayum

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Court : Allahabad

Decided On : Apr-21-1933

Reported in : AIR1933All485

Appellant : Emperor

Respondent : Abdul Qayum

Judgement :

Bennet, J.

1. This is an application by the Local Government for the enhancement of sentences of three years passed under Sections 392 and 397, Penal Code, concurrently by the learned Sessions Judge and Subordinate Judge of Etawah on one Abdul Qayum. It is clear in the first place that the sentence is illegal as it is contrary to the provisions of Section 397, Penal Code. That section lays down that:

If, at the time of committing robbery or dacoity the offender... attempts to cause death to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

2. In the present case it was found by the learned Sessions Judge that the accused had caught a small girl in the streets of Etawah at night and forcibly carried her to a well and took off her nose-ring of gold and her silver hanjhan and her dhoti with a border coloured pink and he threw the small girl into a well and ran

away. The girl is aged 9 or 10 years and she remained in this well all night supporting herself in the water on a pile of bricks which had fallen into the well and also by clinging to the places where the wall of the well had broken down. In the morning people took her out of the well and she made a report that she was robbed, that she knew the appearance of the man who robbed her, that he was a Mahomedan and that he lived in a house in front of which a horse was tethered and that she could point out the house. The Sub-Inspector asked her to point out the house and she pointed out the house of the accused. This occurrence took place on the night of 21st-22nd of October 1930 and it was not till a year later on 3rd October 1931 that the accused came to give himself up. He made an attempt at an alibi which failed.

3. Certain points have arisen in this case, There was a jail appeal made by the accused to this Court and that jail appeal was dismissed by one of the members of this Bench on 4th August 1932. Under the rules of this Court the seal should not be affixed until the period of sixty days for filing an appeal through counsel had passed. The seal was not affixed until that period had expired from the order of the Sessions Judge which was dated 21st July 1932. The letter to the Additional Sessions Judge stating that the appeal is dismissed is dated 5th October 1932. Previous to that on 4th October 1932 the present application for enhancement was filed by the learned Government Advocate. The point which has been argued before us is that according to the learned Counsel for the accused as the appellate powers of this Court have already been exercised on the jail appeal therefore it is not open to this Court to consider the enhancement of the sentence on revision. No direct authority was shown for this proposition. The contrary has been held in Emperor v. Jorabhai Kisanbhai : AIR1926 Bom555 . In that case an appeal by a convicted person to the Bombay High Court was dismissed and the conviction was confirmed and on an oral application made immediately afterwards by the Government Pleader the appellate Bench issued a notice to the accused to show cause why his sentence should not be enhanced. An objection was taken on behalf of the accused that enhancement would amount to reviewing or revising the judgment already delivered and that at least the accused had under Section 439(6), Criminal P.C., a right to have his appeal reheard on the merits in regard to his conviction. The Court held that the accused had no right to have his appeal

reheard on the merits and that Section 439(6) would not apply to the case and the Court further held that the exercise of the powers of enhancement did not amount to reviewing or revising the judgment already delivered. Reference was made to Emperor v. Kale AIR 1923 All 473 but in that case it was merely held that this Court had no power to revise an order of this Court upholding a conviction on appeal, the application in revision being directed to the reversal of that finding and asking this Court to hold that the conviction was incorrect.

4. The learned Counsel argued that Section 369, Criminal P.C., would apply to the present case and would prevent the exercise of powers of enhancement. That section provides that a Court shall not alter its judgment or review the same except for a clerical error when the judgment has been signed. It is argued that the judgment of the learned Single Judge of this Court fixed the sentence at three years' rigorous imprisonment and that the enhancement of that sentence in this Court would be a review or alteration of that judgment. We do not consider that this is correct and our reason for so considering is that Section 430, Criminal P.C., provides that:

Judgments and orders passed by an appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Ch. 32.

5. learned Counsel argued that this would not cover the present case because he said that the exception would not apply to the exercise of the powers of enhancement in the present case. We consider that the exception does cover the power of enhancement. In exercising the power of enhancement we consider that we are not in any way violating the provisions of Section 369 because the provisions of Section 369 must be read subject to the provisions of Section 430. In the present case it is also clear that Ch. 32 dealing with the powers of enhancement refers to a jurisdiction which could not have been exercised by the learned Single Judge. Under the rules of this Court Ch. 1(17)(d) a Single Judge cannot exercise the jurisdiction of enhancement and that jurisdiction can only be exercised by a Bench of this Court. Accordingly the order of the learned Single Judge disposing of the jail appeal cannot be taken to have been an exercise of the jurisdiction of this Court under Ch. 32 so far as the power of enhancement is

concerned. We therefore consider that it is open to this Bench to exercise the powers of enhancement vested in this Court. The law clearly provides in Section 397, Penal Code, that the sentence passed on the accused person who has been found guilty of attempting to cause death at the time of committing robbery cannot be less than 7 years. Accordingly we accept this application in revision. We sentence the accused Abdul Qayum to seven years' rigorous imprisonment concurrently under Sections 392 and 397, Penal Code. It was urged that no charge-was made under Section 397, Penal Code, but it is not necessary that that section should appear on the charge sheet as it is not a substantive offence.

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