

Shailabala Devi Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/477116

Court : Allahabad

Decided On : Aug-18-1933

Reported in : AIR1933All678; 145Ind.Cas.977

Appellant : Shailabala Devi

Respondent : Emperor

Advocate for Pet/Ap. : Mr. Kamla Kant Verma

Judgement :

Sulaiman, C.J.

1. This is an application in criminal revision by Mt. Sri-mad Shailabala Devi, filed in the interest of the accused Bisheshwar Prasad Sinha, her son. The application came up for hearing before a Single Judge who referred it to a Bench of two Judges and the latter have referred the case to a Full Bench as several important questions of law are involved. The accused was arrested for an offence under Section 17(2), Criminal Law Amendment Act, and was prosecuted. At the trial in the Magistrate's Court he said that he did not want to take any part in the proceedings of the case, he did not want it to be adjourned, did not want to cross-examine any witnesses and that he had nothing to say in his defence. He was convicted by the Magistrate and sentenced to 18 months' rigorous imprisonment and a fine of Rs. 200.

2. The accused had a right of appeal to the Sessions Court, but did not choose to avail himself of that right nor did he attempt to file any application in revision in this Court. But the present application in revision was filed by his mother obviously in the interest of the accused, challenging the propriety of the conviction. The learned Single Judge before whom the case first came up has referred to several cases of this Court and enumerated a number of points which were raised by way of objections by the Crown Counsel. The first question is whether a third party who is a total stranger to the criminal proceedings, has any locus standi to file an application in revision on behalf of or in the interest of an accused; and a further question is whether such a person can be represented by counsel.

3. It is an ordinary principle of law that a person who can go up to a superior Court, either in appeal or in revision, should be a person who was a party to the proceedings in the Court below. If he is a total stranger, he has no locus standi to move the higher Court. It seems to me that an application filed by a third party should not be treated as an application in criminal revision filed under Section 435, Criminal P.C. An application of this kind is, in my opinion, not an application contemplated by Sub-section 4 of that section. It is merely an application for bringing some matters to the knowledge of the Court. There is no doubt that in at least two cases this High Court has acted upon an application filed by a third party, but as the question was neither directly raised nor decided I can take it that the applicant was treated as if supplying information to the Court on which the Court may Act.

4. A High Court can interfere in revision: (1) When the record has been called for by itself; (2) when the case has been reported to it for orders by a Subordinate Court, or (3) when the proceedings otherwise comes to its knowledge. Obviously there may be many ways in which the proceeding comes to the knowledge of the Court, one being information supplied by a third party. The Court is certainly entitled to receive such information and to act upon it at its option.

5. To my mind the application referred to in Section 435(4) is an application by a party to the proceeding, E.g., the accused, the Crown or the complainant. But an application by a stranger informing the Court of the proceeding in the lower Court

is merely by way of supplying information and bringing the fact to the knowledge of the Court, and it is nothing more.

6. If an application by a third party were contemplated by Section 435(4) then the result would be that a third party's application filed to the District Magistrate may prevent another application asking for the same relief being made by the accused in the Court of the Sessions Judge. This obviously cannot be the intention. It seems to me that this sub-section not only contemplates that the further application should not be made by the same party who has already made the previous application but that the person should be a party to the proceeding. Of course, a third party can bring facts to the knowledge of the Court either by means of a letter which would not require any court-fee stamps at all, or by means of a regular application filed in Court in the ordinary way. But nevertheless such an application would still remain a miscellaneous application filed for the sole purpose of bringing the facts to the knowledge of the Court.

7. As interference in a criminal revision is discretionary, the High Court is not absolutely bound even to hear the accused or complainant much less his counsel. But it has always been the invariable practice in all Courts to hear them and their counsel, if ready. When an application has been filed by the accused himself either personally or through his pleader, it is consistent with the spirit of Section 439(2) that no order shall be made to the prejudice of the accused unless he has had an opportunity of being heard. In my opinion, that practice should not apply to an application filed by a third party. There can, of course, be no objection to hearing such a third party himself, but as regards hearing his counsel I think that such a course would not always be appropriate and that such counsel should not expect to be heard unless the Judge himself requires the matter to be explained to him and when the Crown counsel is not likely to be in a position to clear up the point. I may note here that we have heard Mr. Kamla Kant Verma not as counsel for the applicant, but merely as *amicus curiae*.

8. My answer to the first question therefore is that an application filed by a third party, who is a total stranger to the proceedings and had no *locus standi* to invoke the jurisdiction of the Court is merely one for bringing the matter to the knowledge

of the Court; and that in such a proceeding his counsel should not expect to be heard. The second question is whether an application in revision should be entertained when the person convicted has failed or refused to avail himself of the right of appeal allowed by law. Section 439(5) provides that where an appeal lies, and no appeal is brought: no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Thus if an accused person fails to avail himself of his right of appeal, the legislature has prohibited his moving the Court in revision. It would therefore be anomalous if an application by the accused himself were barred but an application in revision by his relation, friend or servant would be entertain-able, for such a view would enable an accused person to evade the prohibition contained in the sub-section and get an application in revision filed through a relation, friend or servant.

9. In the view that I take of the character of an application made by a third party, namely, that it is merely an information to the Court, there is not the same incongruity. If an application in revision by an accused is barred an application in revision by every one else made at his instigation would be equally barred. I do not think that the words 'at the instance of the party who could have appealed' in Sub-section 5 of Section 439 at all imply that a third party can make such an application at the instigation of such an accused. It was necessary to use that expression so that the Crown or the complainant or the Court itself may not be debarred. But there would be nothing to prevent the Court from receiving information or acquiring knowledge from any source whatsoever and acting upon it, and this information or knowledge can be derived from an application filed before the Court by anyone else.

10. My answer to the second question therefore is that an application in revision would not be entertain able, if the accused has failed to avail himself of Ms right of appeal; but that the Court-can receive information or knowledge from a third party and act upon it of its own accord. The third question is whether an application in revision should be entertained by the High Court when the matter has not first been taken to the District Magistrate or the Sessions Judge. Obviously the High Court has full jurisdiction to entertain any such application, even though the District Magistrate or the Sessions Judge has not been approached in the first instance.

The jurisdiction is concurrent and there is nothing to prevent the High Court from entertaining an application direct and exercising its jurisdiction.

11. At the same time it is quite clear that a practice has grown up in this Court to refuse to entertain applications direct, until the District Magistrate or the Sessions Judge has been approached. This practice is based largely on convenience, and seems to me to be sound. The District Magistrate or the Sessions Judge is on tike-spot and easily accessible and the re-cord can be locally called for promptly without any loss of time and without the necessity of sending it through the post. The proceedings are also likely to be less expensive. The High Court Is a superior Court and its time would not be unnecessarily spent in examining the record and in some cases even considering the evidence, when a, subordinate Court has already considered the matter and made its report. Further, the High Court would have the opinion of another Court before it which would be of help. In practice no great harm is likely to be suffered by the accused, if he is required to go to the District Magistrate or the Sessions Judge in the first instance. When a practice of this kind becomes well-known to the members of the Bar in the Mofussil and in the High Court the accused would be advised to approach the subordinate Court forthwith and not attempt to file a revision in the High Court direct. In many cases, if the District Magistrate or the Sessions Judge reports in favour of the accused, he need not be represented in the High Court, particularly when the illegality of the conviction or the severity of the sentence is patent. On the other hand, if such a salutary rule of practice were. not to prevail, there would be a temptation, and even an encouragement, to accused persons to come up straight to the High Court over the head of the District Magistrate or the Sessions Judge concerned, because the latter can only report to the High Court and cannot themselves pass an order in favour of the accused. Many accused persons may therefore think it more expeditious and much cheaper to come up straight to the High Court. The High Court would then be flooded with. such applications.

12. On these grounds it seems that a practice of a long standing has grown up under which the High Court does not ordinarily, entertain an application in revision unless the District Magistrate or the Sessions Judge has been moved first. In *Empress of India v. Nilambar Babu* (1878) 2 All 276, Spankie, J., remarked:

Resort to this Court as one of revision was premature, and it has been the practice-, I think,. of this Court not to interfere in revision when, the petitioner has neglected to avail himself of the ordinary channel of relief below.

13. But the learned Judge considered that inasmuch as the application had already been admitted by another Judge and the section admitted of his interference it was more convenient for all to dispose of the case. In *Emperor v. Phul Kuri* (1887) AWN 105, Brodhurst, J., held that a petition to the High Court for revision when the Sessions Judge had not been moved to exercise his powers, was premature, and he rejected it.

14. In *Queen-Empress v. Janki Prasad* (1888) AWN 132, Straight, J., remarked:

It has been the invariable practice in reference to applications for revision to refuse to revise orders here when the persons seeking revision could have obtained relief from a subordinate Court.

15. The learned Judge was inclined to the view that under very exceptional circumstances, a High Court may entertain such an application, but preferred not to express any decisive opinion. In *Matai Lal v. Anant Ram* (1890) AWN 164 Brodhurst, J., remarked:

No doubt there are several rulings to the effect that a High Court will not, under ordinary circumstances, entertain an application for revision, in cases where the Magistrate or the Sessions Judge has concurrent revisional jurisdiction with the High Court unless a previous application shall have been made to the lower Court.

16. The learned Judge further remarked that had the attention of the learned Judge who sent for the record been directed to the omission of the applicant he probably would not have called for the record and that had this objection been taken at an earlier stage of the proceedings before himself (Brodhurst, J.), he should have rejected the application. But as the point was not raised until after he had heard a considerable portion of the arguments he felt that it would cause additional work, expense to the parties and unnecessary trouble to them to allow the objection to prevail. In *Emperor v. Kali Charan* (1904) AWN 232, Banerji, J.,

held:

It is not the practice of this Court, under ordinary circumstances, to entertain an application for revision where another Court has concurrent jurisdiction with this Court, unless a previous application has been made to the lower Court.

17. As no application had been made to the Sessions Judge in that case he declined to entertain the application and dismissed it. In *Shafaqat Ullah v. Wali Ahmad Khan* (1908) 30 All 116, Knox, J., agreed with the observations made by Banerji, J., in *Kali Charan's* case discussed above. No doubt he observed that he could well conceive of circumstances which might require that this Court could depart from its ordinary rule. The learned Judge did not suggest any specific circumstances, but considered that the mere fact that it would save unnecessary distress to the applicant to hear him in the High Court rather than to send him to get the relief he seeks from the Sessions Judge was not any special circumstance at all. In *Emperor v. Mansoor Husain* AIR 1919 All 258, Piggott, J., remarked:

I am fully aware that there is a rule of practice in this Court, according to which the Court ordinarily refuses to entertain an application for revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate. I believe this rule to be a very reasonable one and one to be observed in the interests of justice.

18. The learned Judge proceeded to point out why such a rule was advisable and remarked:

I am further of opinion that, if such a rule of practice is once laid down, it ought to be enforced evenly and without making capricious exceptions in favour of particular applicants.

19. Nevertheless the learned Judge in that case made an exception to the general rule of practice, because in that case there had been an appeal to the District Magistrate and he considered that the enforcement of the rule would encourage interference on the part of the Sessions Judge with orders passed by the District Magistrate in the exercise of his appellate jurisdiction, But when a District

Magistrate even when sitting as a Court of appellate jurisdiction, is a criminal Court inferior to that of the Sessions Judge, it is not at all clear why a Sessions Judge's interference is undesirable. In *Manna v. Emperor* AIR 1920 All 226 the same learned Judge remarked:

In admitting the application I seem to have overlooked or condoned the omission of Mannu to apply in the first instance in revision either to the Sessions Judge or to the District Magistrate.

20. But as in that case the questions raised had been fully argued out before him and on the merits he was inclined to reject the application, the learned Judge proceeded to deal with the matter on its merits and dismissed the revision. In *Sharif Ahmad v. Kabul Singh* AIR 1921 All 80 p. 497 (of 43 All) Mears, C.J., and Banerji, J., after quoting with approval the observations of Piggott, J., in *Mansoor Husain's* case remarked:

Now there is a broad understandable general rule which in the opinion of the learned Judge should apply to all cases. We are of opinion that that should be the practice.

21. The learned Chief Justice went on to lay down:

We think that there should be one general, uniform rule of practice, covering all case of revision, because the position of a District Magistrate or Sessions Judge is not that of a mere automaton even in cases where he cannot grant the relief he is asked. He has power to reject and in cases which are clearly unsustainable a rejection by him does, no doubt, in some cases, have the result that the matter is not subsequently pursued to the High Court. He also, in every case which comes up to this Court sets out the circumstances and records his opinion, and we regard that as a matter of importance and value to this Court. We therefore hold that as far as the practice of this Court is concerned, an application to the lower Court should be considered an essential step in the procedure; and that should be so where the District Magistrate or Sessions Judge has power to grant the relief or not. In future therefore failure on the part of the applicant to submit his application to the lower Court will operate as a bar to the application being entertained by this

Court.

22. After having laid down the practice in such strong terms which would be applicable to all cases and which should be followed, the Bench entertained the application and actually set aside the conviction. In *Narain Prasad Nigam v. Emperor* AIR 1923 All 85 this question arose and was not decided and the application was summarily dismissed without the record being called for. In *Nathe Singh v. Emperor* : AIR1927 All829 , Kendall, J., following the ruling in *Sharif Ahmad's* case held that so far as the practice of the High Court on the criminal side is concerned an application to the lower Court should be considered an essential step in the procedure. The learned Judge accordingly dismissed the application at that stage. Similarly in *Sukhraj Singh v. Emperor* : AIR1927 All834 , the same learned Judge held that a previous application for revision should be considered an essential step in the procedure, and considered that there was no support for the view that it was unnecessary to make an application to the lower Court when the revision was an appellate order of the District Magistrate. In *Jadunandan Misra v. Sheopahal* : AIR1929 All272 , Dalai, J., held:

It has been the settled practice of this Court to refuse to hear an application for revision even after an ex parte admission of the application when the applicant has not first applied to the District Magistrate or to the Sessions Judge.' The learned Judge further remarked: When a settled practice has been observed in this Court for at least eight years it is not advisable to vary it though there may not be any rule of statute law on the subject.

23. Apparently the attention of the learned Judge was not drawn to the fact that the practice had existed for a very much longer period. In *Moti Lal Nehru v. Emperor* : AIR1931 All12 , Mears, C.J., and Sen, J., entertained an application filed by a third party against the conviction of Pandit Moti Lal Nehru and Dr. Saiyid Mahmood, Mears, C.J., and Sen, J., entertained the application and interfered with the order but as there is no reference to be found in the judgment of the previous judgment passed by the learned Chief Justice sitting with Banerji, J., in *Sharif Ahmad's* case it may be presumed that the Government Advocate did not raise any such objection. In *Balkrishna Sharma v. Emperor* : AIR1932 All125 , I

remarked:

No doubt it is the general practice of this Court not to entertain a revision when the applicant could have gone to the subordinate Court of the District Magistrate or the Sessions Judge,

24. I also pointed out that, of course, a settled practice does not oust the jurisdiction of the High Court. I referred to the cases where such a practice had been laid down and also to two cases where such applications had been entertained and then considered that the case before me was 'distinguishable.' The case was under Section 124-A, Penal Code, where an appeal from an order passed by the District Magistrate who was trying the case, would have lain direct to the High Court. It is true that an application in revision could legally have been made before the Sessions Judge, but as an appeal would have lain to the High Court a revisional application to the Sessions Court did not appear to me to be indispensable. In view of the fact that the rule had in some exceptional cases been departed from I considered that in that case the rule should not be enforced, as the application had already been admitted and the record sent for by another learned Judge. In *Mohammad Hashim v. Notified Area Moghalserai* : AIR1933 All283 , Bajpai, J., field:

There can be no doubt that in this Court there has grown a practice that an application in revision to the lower Court is an 'essential step in the procedure and failure on the part of the applicant in this respect operates as a bar to the application being entertained by this Court.

25. The learned Judge referred to some of the cases which have already been discussed above and then laid down that an order of admission made by a Judge of the High Court, *ex parte*, would not be sufficient to take the case out of the operation of such rule of practice. He considered that the salutary effect of the rule would be to a great extent reduced if the application were entertained merely because the record had been called for by an *ex parte* order. The learned Judge accordingly considered himself precluded from entertaining the application at that stage and dismissed it. In a recent case of *R.N. Basu y. Emperor* : AIR1933 All612 , Kendall, J., after pointing out:

I think it must be taken still to be the invariable practice of the Court to refuse to entertain applications in revision where there are no special circumstances, considered that there was a special circumstance in the case before him inasmuch as the application had been made by an outsider to the proceedings.

26. It is therefore quite clear that there is a great preponderance of authority in favour of the existence of the practice of not entertaining a revision filed in the High Court direct, though no doubt in some cases the practice was departed from on special or exceptional grounds; and in most of these cases the High Court did not consider the objection fatal after the application had been admitted and the record called for. In my opinion, when an application is presented before an application Judge, he should in accordance with the practice of this Court refuse to entertain it if the District Magistrate or the Sessions Judge has not been previously approached, unless there are very special reasons why the applicant should not have gone to the District Magistrate or the Sessions Judge in the first instance. But after the application has been entertained and the record called for, the technical objection must cease to have force. The ultimate dismissal of the application on this preliminary ground after the case has been pending in this Court for a long time may be highly prejudicial to the applicant. I have no doubt in my mind that in view of the long series of rulings quoted above the existence of such a practice is fully established and it is our duty to give effect to such a practice. Failure to observe it would cause unnecessary confusion and uncertainty in the mind of accused persons, who would not know whether they should come direct to the High Court or first go to the District Magistrate or the Sessions Judge. At the same time, as a rule of practice cannot have the force of law and cannot, of course, override any statutory enactment, an order passed by a High Court Judge, contrary to this practice, cannot possibly be illegal, particularly if the Judge considers that the case before him is of a very exceptional nature which justifies a departure from the rule. But I must point out that if exceptions are continually added to the rule, the rule itself would be nullified and uncertainty introduced.

27. This being the practice as regards the applications in revision made by accused persons, I think that the same rule of practice must apply to an

application filed by a third party, for he is trying to move the Court for the same purpose though in an indirect, way. Just as a stranger to the proceedings can bring the facts to the knowledge of the High Court, he can in the same way bring the facts to the knowledge of the District Magistrate or Sessions Judge. In my opinion, there seems to be no good ground why he should not go to the subordinate Court in the first instance. Indeed, it seems to me that there are greater grounds for enforcing the rule against him because he is a third party and is not likely to be so well acquainted with the facts of the case as the accused himself. Or it may be a case where the bringing of the facts to the notice of the High Court would result in an enhancement of the sentence and it might have been on account of such fear that the accused himself did not think it fit to come up to this Court. In my opinion, the cases in which it was suggested that the fact that a third party is filing the application is in itself an exceptional circumstance, did not lay down the correct law.

28. My answer to the third question is that, in observance of the well established practice of this Court, neither an application in revision by an accused nor an application by a third party for the purpose of informing the High Court, should be entertained, unless there are special reasons why the applicant should not have gone to the District Magistrate or the Sessions Judge in the first instance; but if a Judge on very special grounds decides to intervene, he cannot be said to be acting illegally although it may be contrary to our practice. Once the application has been admitted and the record called for, such an objection should not be entertained.

29. The remaining three questions can be considered together. The learned Assistant Government Advocate has drawn our attention to the case of Har Narain Prasad v. Emperor A.I.R. 1923 All. 327, in which Lindsay, J., considered that a person who applied to this Court and was allowed out on bail, but afterwards broke his bail, was not entitled to be heard. The learned Judge refused to hear his counsel in revision. In Narain Prasad Nigam v. Emperor AIR 1923 All 85, Stuart, J., observed that the High Court would be loathe to interfere on behalf of a person convicted in a criminal case if that person is an adult and of ordinary intelligence when that person himself, in no way contests the propriety of his conviction. The

learned Judge regarded a request to look into the matter on behalf of persons who refused to recognise the authority of Courts, as creating a somewhat amazing situation.

30. It seems to me that the mere fact that an accused in the Magistrate's Court refused to take part in the proceedings before him or stated that he had nothing to say in defence should not prevent a revision from his conviction from being heard. There is an obligation on the High Court to superintend and supervise the subordinate criminal Courts and to see that orders of conviction passed by such Courts are not illegal and contrary to law. If the illegality of a conviction is brought to our notice, there should not be a refusal on our part to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it or because he had no objection to his being prosecuted and convicted. In this view I can see no unfairness to the Magistrate merely because certain new grounds are urged in revision which were not placed before him. It is the duty of every Magistrate to see for himself that he proceeds according to law and that his order is not illegal. He is not exonerated from this liability merely because the accused is silent. There is no additional duty in this respect cast upon the accused at all. It also seems to me that although we have a discretion not to interfere, a refusal to intervene on the mere ground that the accused had some sort of a scrupulous objection to invoke the jurisdiction of the Magistrate's Court or of this Court would be more in the nature of vindictiveness than administration of justice. However willing an accused may be to submit to the sentence and however reluctant he may be to move this Court, I would have no hesitation in setting aside his conviction if I were satisfied that the conviction was illegal. I do not think that my acting in such a way would in any sense be derogatory to the dignity of the High Court. Indeed, I consider that it would be upholding its dignity and maintaining the high traditions of this Court, if in spite of the accused's refractoriness I were to interfere. Even where an accused has been guilty of a contempt of Court, I would punish him separately for such contempt but would not on that account uphold an illegal conviction of his. I would accordingly answer the last three questions by saying that these create no serious obstacles in the way of the High Court's interference.

31. The last question in this revision is whether the All India Congress Committee, of which the accused was an accountant, as distinct from its Working Committee, had also been declared to be an illegal body by any Government notification. There is no evidence on the record to show this. On the other hand, the Assistant Government Advocate has conceded before us that the All India Congress Committee had not in fact been declared to be an illegal body up to the time of the accused's arrest. As a learned Judge of this Court entertained the application and acting upon the knowledge derived therefrom, called for the record, and even admitted the accused to bail, it is too late for the Crown Counsel now to object that the applicant should have first gone to the District Magistrate or Sessions Judge. This High Court has already decided to act in the exercise of its revisional jurisdiction, and however much I may think that the fact that a third party was applying was in itself not any exceptional circumstance to take the case out of the rule, I must hold that we should not now refuse to interfere when we are satisfied that the conviction is illegal.

32. I would accordingly in the exercise of my revisional powers under S 439 Criminal P.C., set aside the conviction and the sentence and acquit the accused. He would not then surrender to his bail.

Mukerji, J.

33. One Bisheshwar Prasad Sinha has been convicted under Section 17(2), Criminal Law Amendment Act, and has been sentenced to 18 months' imprisonment and payment of a fine of Rs. 200. He did not take any part in the proceedings before the Magistrate who convicted and sentenced him. He did not file any appeal. His mother has come forward with this petition before the High Court alleging that the conviction is wholly illegal and that this Court should set the same aside. A learned Judge of this Court admitted the petition and directed that the convicted person should be let out on bail, and accordingly Bisheshwar Prasad is out of jail.

34. The rule issued by the learned Judge who admitted the petition came for hearing before another learned Judge, and on behalf of the Crown several

preliminary points were urged as being in bar to the hearing and granting of the petition. The matters raised for the consideration of the Court being important, the case has been laid before a Full Bench. I will take the points urged serially. The first point-is whether the High Court should entertain this petition, having been made by a party who is an outsider to the proceedings sought to be revised, having special regard to the fact that Bisheshwar Prasad was a 'Congress man' and refused to take part in the proceedings before the Magistrate.

35. Point No. 1.--This point involves a consideration of several matters of utmost importance. It is really composed of two portions; the first is whether a person who is not a party to the criminal proceedings may file an application in order to move the Court to take action under Section 439, Criminal P.C. If we read Section 439 carefully, we shall find that the law speaks of the powers of the High Court and of those powers alone. These powers are to be exercised by it, whenever it thinks fit to do so. The High Court need not consider a petition simply because it is made by a party to the proceedings. The powers given may be exercised whenever the facts calling for the exercise of them are brought to the notice of the Court, it matters little how the facts are brought to its notice and who brings them to its notice, with one exception and it is this. Where an appeal lies and the party applying for revision could have appealed and has failed to appeal, the Court is told not to move at the instance of that party. The language of this exception is wide and it cannot be argued with any force that because the convicted person has not appealed and as the Court would not move at his instance, it should not move at the instance of a third party and for his benefit. It is not correct to say that Sub-section (5) which contains the rule was devised to punish the convicted person, who does not appeal. This interpretation would imply that the legislature was revengeful. Sub-section (5) would apply to the Crown as well. Suppose there is an acquittal by a Magistrate, in a case in which the offence was triable only by the Court of Session. The Crown can appeal against acquittal, and suppose it does not file an appeal. Sub-section (5), of Section 439 would debar the Crown from moving the High Court to consider the acquittal on its revisional side and to order a retrial. But if the matter be brought to the notice of the High Court, it would dismiss the application of the Crown but would, at least it may, take up the matter of its own accord and direct a retrial, after setting aside the acquittal. It would be

clear from the illustration given above that the rule is not based on an idea of revenge or punishment. The object of the rule is to induce the party who could appeal to avail himself of the larger remedy.

36. The Crown is the protector of its subjects and therefore would see that no innocent person, being its subject, shall suffer and that no subject shall suffer a larger sentence than is just and proper. This duty and privilege of the Crown is entrusted to the High Court and this is the reason for conferring on it the large powers, both under the Government of India Act, Section 107 and Section 439, Criminal P.C. In this particular case before us, the Crown Counsel has admitted that the conviction is illegal. It would then be the duty of the Court to interfere, it being immaterial--it being absolutely immaterial--for the purpose who gives the information on which the Court is to act.

37. It has been said that the High Court should not encourage these third party applications. This idea is based on misconception of the duties of the High Court. The High Court is not intended for general administration of the country and cannot be guided by matters of policy. Let there be no illegal convictions and no too severe punishments and the High Court will not interfere. The High Court's duty is to see that the Criminal Law is properly administered. It does not make the law, nor does it dictate the policy of the law. It takes the law as it stands for the time being, and administers it and sees that Courts under its subordination administer the law properly. The legislature has not so far declared that illegal convictions shall stand unless the convicted persons themselves move for the setting aside of the conviction. If that be so, no question of encouraging or discouraging these 'third party applications' can arise. Let the High Court stay its hand and say that it will not interfere, and lower Courts will cease to fear the wholesome superintendence of the High Court. Nobody will argue that illegal convictions tend to good administration of the country, or that unless too severe sentences are inflicted administration will be impossible. Even if this were so, it would be for the legislature and legislature alone for altering the law, and the High Court will, with equal impartiality, administer the law, whatever it may be. For the reasons given above, I am of opinion that the 'third party applications' are quite legitimate things and they have been accepted as legitimate in several other High

Courts, such as the Lahore High Court, Chief Court of Oudh: see A.I.R. 1930 Oudh 497 : A.I.R. 1931 Lah. 145, and 97, and A.I.R. 1932 Lah. 364, 559 and 613.

38. The next question is whether the fact that the convicted person took no interest or part in his trial should be a good ground for our non-interference. I would without hesitation answer the question with a 'No.' The High Court will interfere only on the evidence as it stands unless a good case is made out for further enquiry, either for the benefit of the prosecution or for the benefit of the accused person. If the conviction on the face of the record cannot stand, it will not do to say that it should stand simply because the accused person did not take part in the proceedings. Taking no part in one's prosecution has not yet been made for a Court of justice. The only relevant question is, 'has he committed the offence?' If he has, he may be the most 'Anti-Congress-man,' if it be permissible to coin such an expression, yet he will be punished. I hold that the considerations mentioned in the first question do not arise, and the High Court will interfere if a proper case be made out.

39. Point No. 2. -- The next point is that the convicted, person has not appealed and we should or not intervene. We are precluded-to intervene at the instance of the convicted man himself--S. 439(5),. Criminal P.C. But there is no bar to the High Court acting on its own-, information or when the information is supplied by a person other than the: accused person. Nobody, even the convicted person, has the right to have the question of his conviction taken, up on the revisional jurisdiction of the Court. Under Section 439 his application; stands on the same footing as the application of a third party. I am of opinion that there is no bar.

40. Point No. 3. -- The third: point is concluded by authorities in this Court. Numerous cases have laid down that in the first instance a party applying in revision should approach either the District Magistrate or the Sessions Judge, before he comes to the High Court. The rule is one of practice and is based on sheer convenience to all, especially to the High Court. If the applicant went to one of the Courts below, many cases where there are no merits, would be never brought before this Court. Where a Court below reports a case for the orders of the High Court, the High Court's work will be easier. Hence it has been said that

ordinarily, the High Court would not entertain an application in revision unless the applicant has approached one of the two subordinate revisional Courts. This rule would apply as much to a person who is a party to the proceedings sought to be revised as to a person who was no party, as in this case. But in exceptional cases the High Court may entertain an application made direct to it.

41. Where one of the Judges, in exercise of his revisional power has admitted an application and has sent for the record it is not open to another Judge of the same High Court to dismiss the application on the ground that the application should never have been admitted. The simple reason is that all the Judges have equal power and in these matters one Judge does not sit in appeal against the judgment of another Judge. In a civil case, for example, when a Judge has ordered no. i.e to issue to the respondent, no Judge would say that the notice should not go and the appeal should be summarily dismissed. The proper procedure, consistently with the practice mentioned will be this: I mention it for the guidance of the members of the bar and the litigants in general.

42. When an application in revision is brought before the petition Judge, the applicant would be asked whether he had been to either the District Magistrate or the Sessions Judge. If he says 'no,' and if he does not give any satisfactory explanation as to why he should not go to either of the Courts mentioned; the application would be rejected then and there. This would be no bar to the applicant going before the District Magistrate or the Sessions Judge and making an application there; nor will this order of the High Court be a bar to the applicant's coming up again, if the District Magistrate or the Sessions Judge's order has failed to give him satisfaction. If however the Judge taking the petition on some special ground stated in the petition, or disclosed by the applicant or his counsel decides to exercise the revisional power of the High Court, the petition will be admitted and notice will issue to the Crown or the plaintiff or to both and the case would be heard, on the merits, before the same Judge or any other Judge. It would not be open to the Judge who hears the application on the merits, to reject the application on the ground that the applicant did not go before the District Magistrate or the Sessions Judge.

43. Some question has been raised as to whether a third party who makes an application to the Court on its revisional side and thereby brings some information to the Court with a view to its acting upon it, should be heard by counsel. No hard and fast rule can be laid down on the point. If the Judge hearing the application thinks that it would be more convenient for him to hear the counsel than to examine the record alone or with the aid of a Government Counsel, he would be at liberty to hear the applicant's counsel. Nobody has a right in a revision case to be heard by counsel whether he be an accused person himself or a third party or whether it be the Crown itself. All stand on the same footing: see Section 440, Criminal P.C. It follows that a third party, who is bringing up some facts for the information of the Court, cannot insist on his counsel being heard. Indeed, he cannot even expect that his counsel would be heard.

44. Point No. 4.-- Point 4 is whether it is fair to the trial Magistrate to interfere with his decision on grounds that could be but were never brought to his notice during the course of the trial. No question of fairness to the trial Court arises at all. It has been held by their Lordships of the Privy Council that a question of pure law which may be decided on the materials already on the record may be taken for the first time even in the Privy Council, although it has not been taken in any of the Courts in India. Higher Courts exist to correct the errors of the lower Courts, and Judges, whether they be of higher Courts or lower Courts, must be above the idea of their prestige suffering by the reversal of their judgments. Courts and officers of the Courts exist for the people and it is not the case that the people exist for the Courts and the officers. My answer to the question is that no question of fairness arises, and therefore the application should be heard.

45. Point No. 5.-- The fifth point is whether this Court should send for the records from the record room of the Magistrate and take the trouble of satisfying itself as to the legality of the conviction when the convicted person has scrupulous objections to invoke the jurisdiction of this Court. I have already answered this question, in answering question No. 1, and my answer is that it is the duty of the High Court to see that criminal law is properly administered by itself and Courts subordinate to it.

46. Point No. 6.-- Point No. 6 is whether the revisional jurisdiction of the Court may be exercised when the convicted person is in contempt and refused to answer questions put by the trial Magistrate. I have already stated that refusal to take part in one's own trial is not an offence, and a man cannot be punished on that account, on the law as 'it stands at present. If a man before the Court has committed a criminal contempt of it, he may be punished for that, but his refusal to answer questions of the Court cannot justify his conviction or justify inactivity on the part of the High Court, where it is brought to its notice that the conviction is illegal. As I have said, it is the special anxiety of His Majesty and his Government that no innocent person shall suffer, or that no subject shall suffer more than his guilt justifies. Any order that goes beyond this, any order which amounts to an illegal conviction or any order that amounts to a too severe sentence may be set aside by the High Court and will be set aside by it when the matter is brought before it. For the foregoing reasons, I agree with pay Lord the Chief Justice that, the application should be accepted, the conviction and the sentence should be set aside and Bisheswar Prasad Sinha should be acquitted. He being on bail, should not be called on to surrender.

King, J.

47. I concur in the order proposed and in the main conclusions arrived at by my learned brothers but think it advisable to state my own views briefly.

48. Question No. 1.-- The chief question is whether this Court should exercise its revisional jurisdiction at the instance of a person who is a total stranger to the proceedings. My opinion is that this Court can do so, and should do so if it considers that the exercise of its revisional, powers is called for. If a person has been illegally convicted, it is open to any one, even to a total stranger to the proceedings to move the High Court to set aside the illegal conviction in the exercise of its revisional powers. If the stranger moves the Court by a formal written request presented to the Court, then his request is an application for criminal revision. The Court can take action on it just as it can upon a similar application presented by the convict or his counsel. Under Section 439 the High Court can take action suo motu, without any formal application or request of any

kind made by any one. The Court can also take action in the case of any proceeding 'which otherwise came to its knowledge.' If a proceedings comes to its knowledge by means of an application presented by a stranger, the Court can undoubtedly act under Section 439, and, in my opinion, should so act if good cause is shown. If good cause is shown for interference with a proceeding, it is immaterial who brings the proceeding to the notice of the Court.

49. The mere fact that the convict is a Congressman who took no part in the proceedings before the Magistrate is, in my opinion, not a valid reason for refusing to exercise revisional power if their exercise is called for on the merits of the case. The Court has discretion to take action under Section 439 but its discretion should be exercised judicially. It is impossible to lay down any general rule whether a Court should, or should not, take action under Section 439. Each case must be considered and decided on its merits. A subsidiary question arises whether a stranger who applies to the High Court in revision should be heard either personally or by counsel. It is quite clear that he has no right to be heard either personally or by counsel (Section 440). He cannot be in a better position, in this respect, than the convict himself. I think no general rule can be laid down. It is a question for the Court to decide as it thinks fit. It is a general rule of practice in this Court to hear an accused person or his counsel in Court if he expresses his desire to be heard. The same practice would not necessarily apply to a mere stranger. I agree with the Hon. Chief Justice that a stranger should not expect to be heard by counsel.

50. Question No. 2.-- When a convict has failed or refused to appeal then no proceedings by way of revision can be entertained at his instance; Section 439 (51). This rule of law does not bar revisional proceedings at the instance of a stranger.

51. It seems anomalous that the convict cannot move the Court himself, but a stranger can do so for his benefit. The convict is thus able to do indirectly what he cannot do directly. Of course, if it could be proved that the stranger acted under the Orders, or at the instigation, of the convict then the bar would operate; but! it would rarely be possible to prove such orders or instigation. I think that

applications by strangers on behalf of convicts who could not apply personally or by counsel, amount to an evasion of the intention of the legislature. If it is an evasion, then it would be easy for the legislature to stop it by amending the language of Section 439(5). As the law now stands, I think revisional proceedings at the instance of a stranger are not barred although they would be barred at the instance of the convict himself. I think the Court should be reluctant to interfere when the convict has not appealed, but should not refuse to interfere when the conviction is clearly shown to be illegal.

52. Question No. 3.-- In view of the long settled practice of this Court I would answer this question in the negative. I regard our rule of practice as salutary and reasonable, and its observance as a matter of great importance. The application to this Court should not be entertained unless some valid reason is shown for not applying to the District Magistrate or Sessions judge in the first instance. The mere fact that the application is by a stranger is not a valid reason. In my opinion a stranger can apply to the District Magistrate or Sessions Judge to take action under Section 435 just as well as he can apply to the High Court to take action under Section 439. The question then arises whether the application to this Court should be rejected, on the ground that the applicant has failed to approach the District Magistrate or the Sessions Judge in the first instance, even after it has been admitted by an ex parte order passed by a Judge of this Court. I think that the answer should be in the negative. It may be presumed that the Judge who admitted the application was aware of the rule of practice but decided that special grounds had been shown for making an exception to the general rule. For this reason the question of enforcing the general rule of practice should not be reconsidered after the application has been admitted.

53. In the present case the application has not merely been admitted and the record summoned. The accused has also been released on bail. The case has been partly argued before a Single Judge and fully argued before a larger Bench. The Assistant Government Advocate has further admitted that the 'All India Congress Committee' has not been declared an unlawful association. On the charge framed the accused was therefore not guilty. In these circumstances, I think, it would be unreasonable to refuse to exercise our re-visional jurisdiction.

54. Question No. 4.-- No question of fairness to the Magistrate arises. No blame whatever attaches to him. The accused has only himself to thank for his conviction, because he failed to point out the distinction between the 'Working Committee' and the 'All India Congress Committee.' The only matter for regret is that public funds have unnecessarily been spent on keeping the accused in jail, and that the time of this Court has been wasted in hearing this application.

55. Question No. 5.-- It is not clear that the accused denies the jurisdiction of this Court. The mere fact that the accused did not himself apply to this Court is no valid ground for refusing to set aside an erroneous conviction. Having failed to appeal, the accused could not successfully apply to this Court himself.

56. Question No. 6.-- The accused did not adopt any contemptuous or insulting attitude towards the Magistrate. He-merely stated that he did not wish-to cross-examine or to take any part in the proceeding and that he wished the case to be decided promptly. This is no valid ground for refusing to set aside an illegal conviction, but I think it would be a ground for refusing to interfere unless the illegality were admitted or perfectly clear upon the face of the record.

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