

**In Re: Jadayandi and anr.**

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**Court :** Chennai

**Decided On :** Jun-28-1962

**Reported in :** AIR1963Mad83; 1963CriLJ301

**Judge :** Sadasivam, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 423(1)

**Appeal No. :** Criminal Revn. Case No. 1043 of 1961 (Case Refd. No. 29 of 1961)

**Appellant :** In Re: Jadayandi and anr.

**Advocate for Def. :** V.V. Radhakrishnan, Adv. for Public Prosecutor

**Advocate for Pet/Ap. :** K. Narayanaswami Mudaliar, amicus curiae

**Judgement :**

ORDER

**Sadasivam, J.**

1. Reference by the District Magistrate, North Arcot, to quash the order of the Sub-Divisional Magistrate, Cheyyar, directing re-trial of accused 5 Jadayandi and accused 7 Subramaniam in C. C. No. 371 of 1961 on the file of the Sub-Magistrate, Wallajah. Nine persons were charge-sheeted in C. C. No. 371 of 1961 on the file of the Sub-Magistrate, Wallajah, with having committed affray punishable under Section 160, I. P. C. But the Sub-Magistrate, Wallajah, acquitted

three of the accused and convicted the rest and sentenced each of them to pay a fine of Rs. 15 and in default to suffer simple imprisonment for two days. Four of the convicted persons alone preferred an appeal to the Sub-Divisional Magistrate, Cheyyar, against their convictions and sentences. The Sub-Divisional Magistrate, Cheyyar, who heard the appeal set aside the convictions and sentences not only against the four persons who preferred appeals to him, but also as regards accused 5 Jadayandi and accused 7 Subramaniam and ordered re-trial of all these six persons. In pursuance of the judgment accused 5 and 7 also got refund of the fine amounts paid by them. The District Magistrate has made this reference to quash the order of the Sub-Divisional Magistrate so far as accused 5 Jadayandi and accused 7 Subramaniam are concerned and to order recovery of the fine amounts from the said persons.

2. The question for consideration in this case is whether the appellate court has powers under Section 423(b), Crl. P. C. to set aside the conviction and sentence and order re-trial of persons who have not preferred an appeal against their convictions and sentences while disposing of an appeal preferred by the co-accused who have also been convicted and sentenced in the same case. It is clear from the wording of Section 423 (b) Crl. P. C that the powers of the appellate court to acquit or discharge or order re-trial could be exercised only with regard to a person who has preferred an appeal. In *Empress v. Jaimal*, 1883 All WN 163 on a reference by a Sessions Judge under similar circumstances, the High Court set aside not only the order of the appellate Court but also of the trial court and directed a fresh trial by a competent court according to law. There is however no discussion in that judgment as to the powers of an appellate court to order re-trial as regards a person who has not preferred an appeal.

In *Abdul Kader v. Emperor*, 50 Cal WN 88 : AIR 1946 Cal 452, it was held that in the circumstances of that case the conviction of the non-appealing accused should also be set aside but a re-trial could not be ordered in the absence of the accused and the proper procedure to follow would be to issue a rule on the accused and the Crown to show cause why the conviction should not be set aside and a retrial ordered. But this could be done only by a High Court by invoking its revisional jurisdiction while disposing of a regular appeal. The Sub-Divisional Magistrate

Cheyar, has no such powers of revision to give notice to the non-appealing accused and to order retrial as was done in the above Calcutta case. The order of the Sub-Divisional Magistrate, Cheyyar, setting aside the conviction of accused 5 Jadayandi and accused 7 Subramaniam and ordering their retrial is without jurisdiction and is quashed.

3. There may be cases in which it would not be proper and in fact would be illegal to allow the conviction of a non-appealing accused to stand while acquitting or setting aside the conviction and ordering re-trial of an appealing accused. It is easy to conceive of such cases and it is sufficient to mention cases involving charges of conspiracy, rioting, dacoity etc. by way of illustration. Thus in the Privy Council case in *Aratchige Dharmasena v. The King*, 1951 MWN Cri. 178 their Lordships expressed the opinion that if two persons are accused of a criminal conspiracy and convicted and on appeal one is sent for retrial the other should be sent at the same time for retrial also upon that charge so that both may be convicted or acquitted together. I do not say that the present case is one of that kind. But if such a case arises, it is the duty of the lower appellate court to make a reference to the High Court to exercise the powers of revision to pass suitable orders. In this case notices have been issued to both accused 5 Jadayandi and accused 7 Subramaniam and they have been served. In exercise of the powers of revision, I pass the same order which the learned Sub-Divisional Magistrate has passed, namely, to set aside the conviction of accused 5 and accused 7 and order their retrial.

4. I am thankful to Sri K. Narayanaswami who helped me as *amicus curiae* in this case.

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