

Kali Kumar Mitter Vs. Emperor

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Court : Kolkata

Decided On : Apr-29-1936

Reported in : AIR1937Cal413

Appellant : Kali Kumar Mitter

Respondent : Emperor

Judgement :

Cunliffe, J.

1. A preliminary objection which we consider to be well founded is taken by the Crown here against the competence of this appeal. It is preferred by one Kali Kumar Mitter against a sentence of six months' rigorous imprisonment passed on him by one of the Presidency Magistrates for an offence of conspiracy to cheat, under Sections 420 and 120-B of the Code read together. The right of appeal in criminal matters is a statutory one, and is primarily governed by that first Section 404 which forms the commencement of Ch. 31, Criminal P.C., which is headed, 'Of Appeal, Reference and Revision'. Section 404 is in these terms:

No appeal shall lie from any judgment or order of a criminal Court except as provided for by this Code or by any other law for the time being in force.

2. Turning further on in the chapter, we come to Section 411, the section appropriate to this particular conviction. Section 411 is in these terms:

Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding Rs. 200.

3. No other section that I know of in the appeal, reference and revision chapter of the Code can rightly be considered as being appropriate from the point of view of procedure, to this conviction and sentence before us now. Reliance was placed upon the circumstance that a co-conspirator of the present appellant was the subject of an order under Section 562 of the Code, that section which deals with the binding over of first offenders. And it was contended that because there is a decision of a Bench of this Court that an order under Section 562 is an appealable order, therefore the right of the co-conspirator, who was the subject of this direction as a classified first offender, ought to attract the same right of appeal to the present appellant. That argument is based upon the wording of Section 415-A of the Code which runs as follows:

Notwithstanding anything contained in this chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any such persons all or any of the persons convicted at such a trial shall have a right of appeal.

4. The decision to which I have just made reference is to be found in the case in *Bahadur Molla v. Ismail* : AIR1925 Cal329 . There it is held that an appeal lies under Section 407 and Section 408, Criminal P.C., from an order passed under Section 562, and that the restrictions imposed on Sections 413, 414 and 415 do not apply to such orders. The appeal there was from the district. The learned Judges there seem to have followed a case decided in the old Chief Court of Lower Burma and three other cases all of which I think I am right in saying also dealt with appeals from the decisions of Magistrates in the mufasil. But it may be remarked that whatever views were expressed in this judgment, no attempt was made to deal with the specific circumstance, which of course did not arise there, of a conviction and sentence under Section 411. It seems to me that these cases can be distinguished in their circumstances of the case before us now, and for these reasons we propose to uphold the contention of the Crown that this case is not

appealable in law under the Code. Such a decision however will not prevent us from considering any rights the unsuccessful appellant here may possibly have in revision and when my learned brother has delivered the judgment, we shall take up the question of granting a rule which is still open to the learned advocate, who appears for the appellant. Accordingly the appeal is dismissed.

Henderson, J.

5. I agree. It never was and could not be contended that the sentence imposed upon the appellant was appealable. The contention however made on this behalf is that he has a right of appeal, in view of the provisions of Section 415-A of the Code. The solution of that question depends upon whether the co-accused had a right of appeal against an order directing him to be released on the execution of a bond under the provisions of Section 562 of the Code. Mr. Roy candidly conceded that there is no section in the Code which specifically provides for such a right of appeal. I should have thought that in such circumstances Section 404 would have by its very terms been decisive. Reliance was however placed on the decision reported in *Bahadur Molla v. Ismail* : AIR1925 Cal329 , and we were asked to follow that decision. All I desire to say at present is that decision has no application to the present cases. That decision is to the effect that Sections 407 and 408 give a right of appeal in case of this kind. It is therefore sufficient to say that neither of those sections has any application to an order made by a Presidency Magistrate. Appeals in such cases are prescribed by Section 411. There is no provision for an appeal against an order under Section 562 and I am therefore of opinion that the present appeal is incompetent.

Revision Cases Nos. 1274 and 1275 of 1935.

Cunliffe, J.

6. Having upheld the contention of the Crown here that no appeal lay in the circumstances of this conviction and sentence, we have had to consider the question of revision, and we thought it best in the interest of the accused and generally that we should dispense with the formalities of considering the

preliminary issue of the rule nisi, and approach the matter from the final standpoint. It has been urged upon us that there was an illegality in the charges here. We reject that contention. It has been most strongly urged upon us that this is a case in which the powers of the Court should be exercised in the petitioner's favour by substituting a binding over as a first offender order, for the sentence and conviction. That would be under the provisions of Section 562 of the Code. And it may be noted that the petitioner co-conspirator was dealt with in this way by the trial Court. We regret in the circumstances of this particular case that we are unable to bring the petitioner within the ambit of Section 562. All that we can do for him is to direct that the two sentences passed upon him respectively of six months and three months should not run consecutively but concurrently. We make this alteration because we are by no means satisfied that in reality he has not been tried for the same offence twice over. That will then be the order of the Court upon the rules. We shall make the rules absolute to that extent only. Perhaps I ought more strictly to say that is our order in the applications for revision because in fact there were no rules granted. The petitioner must surrender to his bail and serve out his sentence.

Henderson, J.

7. I agree.

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