

indra Kumar Nath Vs. the State

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Court : Kolkata

Decided On : Jan-13-1954

Reported in : AIR1954Cal375,58CWN374

Judge : K.C. Das Gupta, ;Mitter and ;Sen, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 403, 423(1) and 423(2)

Appeal No. : Criminal Misc. Case No. 36 of 1953

Appellant : indra Kumar Nath

Respondent : The State

Advocate for Def. : S.M. Bose, Adv. General and ;N.C. Chakravarty, Adv.

Advocate for Pet/Ap. : Chinta Haran Roy and ;Arun Kishore Das Gupta, Adv.

Judgement :

1. This matter has been laid before me under the provisions of Section 429, Criminal P. C. read with Section 439(1) of the same Code, as Mitter J. and Sen J. who heard the Rule could not agree as to how it should be disposed of.

2. The Rule was issued on the application of Indra Kumar Nath, an accused in a case pending before the Assistant Sessions Judge, Krishnagar, calling upon the District Magistrate of Nadia to show cause why the case should not be transferred

from the Court of the Assistant Sessions Judge before whom it was pending to the District and Sessions Judge, Nadia or in the alternative why the proceedings pending against him should not be quashed or such other or further orders passed as the Court might think fit and proper.

3. The petitioner was first tried by the same Assistant Sessions Judge with the aid of a jury on a charge under Section 304, Penal Code. In accordance with the unanimous verdict of the jury that he was not guilty under Section 304, Penal Code but was guilty of the minor offence under Section 325, Penal Code, the learned Judge acquitted him of the charge under Section 304 but convicted him under Section 325, Penal Code and sentenced him to rigorous imprisonment for three years. The petitioner appealed against this order of conviction and sentence to the Sessions Judge. The Sessions Judge came to the conclusion that it was impossible to maintain the conviction of the appellant and the sentence passed upon him; that the defects and irregularities pointed out were serious misdirections which vitiated the verdict of the jury, but holding that this was a case where a retrial should be ordered, he passed the following order: 'In the result, the appeal is allowed. The verdict of the jury and the conviction and sentence which followed thereupon are set aside. I direct that the appellant be retried according to law by the learned Assistant Sessions Judge, Nadia. The accused appellant will remain on the same bail until the conclusion of the fresh trial.'

4. After the case went back to the learned Assistant Sessions Judge and the retrial commenced, the learned Judge framed a charge under Section 304, Penal Code and empanelled the jury after rejecting certain objections to some jurors raised on behalf of the petitioner. At this stage an application under Section 526, Criminal P. C. was filed before the Judge. The learned Judge adjourned the case in order to give the accused an opportunity to move the higher Courts for transfer. An application was then made before the learned Sessions Judge, Nadia for transfer of the case from, the Assistant Sessions Judge's file to his own file. The learned Sessions Judge refused the application holding that there was no substance in the allegation that the accused could not expect a fair trial in the Court of the Assistant Sessions Judge. He also held that

'When the conviction and sentence were set aside and a retrial was ordered the whole matter must be deemed to have been reopened unless any limitation or restriction in this behalf was imposed by the order of the appellate Court. No such limitation has been pointed out to me and I may observe that the discretion in the matter of framing a proper charge against the accused in a Sessions trial should be left with the trying Judge.'

5. Moving this Court for exercise of its revisional powers under Section 439, Criminal P. C., the petitioner prayed that the case should be transferred from the Court of the Assistant Sessions Judge to the Court of the Sessions Judge and also that the charge under Section 304, Penal Code should be quashed. The Rule that was issued was, as I have already mentioned, in slightly wider terms.

6. Both the learned Judges agreed that there was no case made out for transfer from the Court of the Assistant Sessions Judge. They disagreed, however, on the question whether the retrial of the petitioner could, in law, be on a charge under Section 304, Penal Code of which he had been acquitted or had to be limited to the offence of which he had been convicted. Mitter J. was of opinion, on a consideration of the actual language of Section 423, Criminal P. C., and the pronouncement of the Privy Council in (Sic -- 'Kishan Singh v. Emperor' AIR 1928 PC 254 (A)) that retrial could be only for the offence of which the appellant had been convicted. Sen J. held, however, following the decision in -- 'Krishnadhan v. Queen Empress' 22 Cal 377 (B) and other cases, that retrial could be even on the charges of which the appellant had been acquitted.

7. The decision of this question depends on the Interpretation of the provision as regards the appellate Court's power in an appeal from conviction. The relevant portions of Section 423 are in these words:

'The Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may-

(a) * * *

(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.'

8. Though we are really concerned with this part of Section 423, Criminal P. C., it is convenient to set out the other powers of the Appellate Court as mentioned in the succeeding portion of the clause which are in these words:

'(2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or.

3. with or without such reduction and with or without altering the finding, alter the nature of the sentence, but subject to the provisions of Section 106, Sub-section (3), not so as to enhance the same;'

9. In view of the pronouncement of the Privy Council in -- 'AIR 1928 PC 254 (A)', to which I shall presently refer, it is hardly necessary for me to enter into a detailed discussion of the proper interpretation to be put on the section. It is necessary, however, to mention the previous decisions of this Court on this question. The earliest case in which this question arose is that of -- 22 Cal 377 (B). The Court (Banerjee J. and Sale J.) held that

'Where an accused person is charged with & tried for various offences arising out of a single act, or series of acts, it being doubtful which of those offences the act or acts constitute, and where he has been acquitted by the verdict of a jury of some of such offences and convicted of others and appeals against such conviction, and where the Appellate Court reverses the verdict of the jury, and orders a retrial without any express limitation as to the charges upon which such retrial is to be held, such retrial must be taken to be upon all the charges as originally framed, and the acquittal by the jury on the previous trial upon some of such charges is no bar to the accused being tried on them again, as, having regard to the provisions of Section 423, Criminal P. C., the provisions of Section 403 in that respect cannot apply to such cases.'

This decision was followed in -- 'Queen-Empress v. Jabanulla' 23 Cal 975 (C). There the appellants had been charged with offences punishable under Section 148, Section 302 read with Section 149 and Section 326, Penal Code. The sessions Judge convicted the appellants of an offence under s, 326 and acquitted them of the offence under Section 148. They appealed to the High Court. It was argued that the High Court had no power under Section 423, Criminal P. C. to deprive the appellants of the benefit conferred upon them by an acquittal. The learned Judges, however, held that the Appellate Court can, in an appeal from conviction, alter the finding of the lower Court and find the appellants guilty of any offence of which he might have been acquitted by that Court, except where such conviction would have the necessary result of enhancing the sentence.

10. In the case of -- 'Nazumuddi v. Emperor' 40 Cal 163 (D), this Court set aside the conviction under Section 147, Penal Code in an appeal by Nazumuddi but ordered a retrial on the original charges, namely, under Sections 148 and 304, Penal' Code though the accused had been convicted by the learned Judge only under Section 147, Penal Code.

In the case of -- 'Kamala Kanta Roy v. Emperor' 41 Cal W N 1112 (E), Henderson J. and Biswas ,J. followed a similar course in an appeal by one Kamala Kanta Roy Choudhury against his conviction under Section 304, Part I and Section 381, Penal Code. They set aside the order of conviction and sentence and ordered that he should be retried by the Sessions Judge on charges of murder and robbery on which he had originally been tried. The reasons given in -- 'Krishna Dhan's case (B)' appear at p. 380 of the report. 'With reference to the first point raised in this contention, it is clear from Ss, 404 to 417, Criminal P. C., that where a person is tried on one charge only and is acquitted on it, or is tried on several charges and is acquitted on them all the acquittal cannot in any way be interferedwith, except upon appeal by the local Government. But the matter is not equally clear, when an accused person is tried on several charges, is acquitted on some and convicted on the others, and appeals from the conviction. Clause (b) of Section 423, Criminal P. C. which provides that in an appeal from a conviction the Appellate Court may set aside the conviction and sentence and order a retrial, or it may alter the finding, maintaining or reducing the sentence, seems to favour the opposite view.

The Appellate Court has the whole of the evidence before it, and if it can order a retrial, or alter the finding on the appeal of the accused, why may it not order a retrial on the charge on which the first Court acquitted the accused, or find the accused guilty on the charge on which he was acquitted by the first Court?

No doubt it might be said that this would violate the salutary principle which protects with Jealous care orders of acquittal from interference except in a special way, that is, on appeal by the Local Government. But the principle would practically be left unimpaired in the majority of cases even if the Appellate Court alters the finding in the way stated above by the express provision in Clause (b), Section 423 against enhancement of sentence. While thus, on the one hand, the construction we put upon Clause (b), Section 423, Criminal P. C. will not be likely to lead to any prejudice to the accused, on the other hand, it is obviously necessary in the interests of justice that that construction should be put upon it, as otherwise great miscarriage of justice might result.

Thus, suppose that the accused is charged with theft and criminal breach of trust in respect of the same property, and that the first Court acquits him of the former offence and convicts him of the latter. If on appeal by the accused the Appellate Court finds that the accused had never been entrusted with the property, but that he stole it, it cannot affirm the conviction for criminal breach of trust; and if it is precluded from convicting him of theft by reason of the acquittal by the first Court, the accused must be acquitted altogether. Such a result, which would be inevitable, unless Clause (b) of Section 423 is construed in the way we have indicated, could never have been intended by the legislature, which has taken so much care to provide (see Sections 236 and 237, Criminal P. C.) against any similar failure of justice in cases where it is doubtful which of two or more offences is constituted by the acts of the accused.

There is one other way of viewing the matter which will make it clear that the construction we have put upon clause (b) of Section 423 is the only one that it should bear. If the contention of the appellants were correct that the acquittal on the charge of murder was final and incapable of being interfered with in the appeal by the accused from the conviction for grievous hurt and must be a bar to any

further trial for murder or culpable homicide not amounting to murder, it would equally well be a bar under the first paragraph of Section 403 to any fresh trial for grievous hurt. This would be manifestly absurd, and would render Section 423, Clause (b), and Section 403 incompatible with one another. When an act or 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, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the Appellate Court in such a case is directed primarily, not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate court must deal with the whole case.

And this becomes more than ordinarily necessary, in a case like the present, where the trial is by jury. Here if the verdict is found to be erroneous, owing to a misdirection by the Judge, it must be set aside in its entirety, as the Appellate Court cannot go into the facts (see Section 418, Criminal P. C.), and substitute its own verdict for that of the jury. There was some discussion as to what was meant by the verdict in Section 423, Clause (b) -- 'Mr. Alien, for the appellants, contending that it meant the verdict upon each charge separately, and Babu Bam Churn Mitter, for the Crown, urging that it meant the entire verdict on all the charges collectively. Having regard to the provisions of Sections 300 to 307, Criminal P. C., we think the 'verdict' in Section 423, Clause (d) means the entire verdict on all the charges.'

11. In -- 'Jabanulla's case (C)' all that was said by way of reasoning was that 'the accused who by appealing from the conviction brings the whole case before the Court of appeal; and the whole case being before it, and the law in express terms empowering it to alter the finding, there is no reason why it should not have the power to find the appellant guilty of an offence which it considers established, merely because the Court below has acquitted him of that offence and found him guilty of some other offence. The power of enhancing sentence being taken away no such alteration in the finding can prejudice the accused materially.'

12. In -- '40 Cal 163 (D)' it was merely said: 'When a conviction is set aside and a retrial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed, and having regard to the provisions of Section 423, Criminal P. C., the provisions of Section 403 in that respect cannot apply.' Krishna Dhan v. Queen Empress (B) and -- Queen Empress v. Jabanulla (C) referred to.

13. In the case of -- '41 Cal W N 1112 (E)' Henderson J. said:

'The appeal is merely another stage in the trial itself. The solution of the problem depends in my opinion on the interpretation to be placed upon the words 'in an appeal from a conviction' in Section 423. Now it might be argued that in an appeal from a conviction the only matter before the Court is the charge upon which the appellant has been convicted; but to give the words this rather artificial interpretation would unnecessarily narrow the scope of the words 'order him to be retried by a Court of competent jurisdiction'. It is only common sense that, when once the conviction and sentence have been set aside and a retrial ordered, the whole matter should be reopened.'

Biswas J. said:

'There is clear authority in support of the view that when a conviction is set aside and a retrial ordered, the whole case is reopened, and the accused may be tried again on all the charges originally framed.'

Later on in the judgment he said: 'The trial of the accused would not in fact be concluded until the retrial has been held, and it cannot, therefore, be said that an acquittal at the original trial (no more than a conviction), 'remains in force' during the retrial within the meaning of Section 403 (1). The matter really depends on the construction of Section 423. As was indicated in the earlier decisions already referred to, there is no warrant for limiting the construction of this section in the way suggested by Lort-Williams, J. Such a construction would, in fact, lead to grave miscarriage of justice in many cases, and would obviously be contrary to the spirit of the Code which has taken care to make provision in numerous sections to prevent such a result.'

If effect is given to Lort-Williams J.'s view and the order of acquittal under Section 302 is allowed to stand, the accused would be cheating the law of its dues. Such an absurd result ought in my opinion to be avoided, unless this is rendered imperative by the constraining provisions of the statute.'

Biswas J. in this passage referred to the judgment of Lort-Williams J. in -- 'Abdul Khan v. Emperor' 39 Cal W. N. 677 (F), where he said:

'Section 423(1) (a) defines the powers of the Appellate Court in an appeal from an order of acquittal, and (b) in an appeal from a conviction. Each provision is restricted to the appeal, either from an order of acquittal, or from conviction, as the case may be, which is before the Court. No power is given by the section to interfere with an order of acquittal in the absence of an appeal from that order, or with a conviction in the absence of an appeal from that conviction.'

14. With the greatest respect to the learned Judges who decided the cases reported in -- '22 Cal 377 (B)'; '23 Cal 975 (C)'; '40 Cal 163 (D)' and '41 Cal W. N. 1112 (E)', I find it impossible to accept as correct the view that as soon as an appeal is filed from a conviction, the whole case is reopened. The appeal from a conviction can reopen only the case as regards the charge on which the accused has been convicted. Why it should be thought that an appeal from a conviction reopens for consideration of the Court of Appeal even the case as regards which the accused has been acquitted and against which no party has moved the Court is difficult to understand. With the greatest respect I would also add that it is also not right to put a wider interpretation on the words merely for fear that some really guilty man may escape unless the Wider interpretation that the filing of an appeal from a conviction reopens the entire prosecution case is allowed. It would be unfortunate, if in deciding on the interpretation, we allow our judgment to be influenced by a consideration of the results that would follow.

15. For myself I would respectfully agree with the observations of Harries, C. J. in the case of -- 'Amallesh Chandra v. The State' : AIR1952 Cal481 (G), where he says:

'Why should it be only commonsense when once a conviction for causing grievous hurt had been set aside that the accused should be retried for murder upon which he had already been unanimously acquitted? I venture to think that whatever it is, it certainly is not commonsense.'

16. Quite apart, however, from the question whether the narrower interpretation, namely, that in an appeal from a conviction, the case of which the accused has been acquitted is no longer before the Court of Appeal results in an undesirable result or whether it is commonsense or not that if an appeal is filed, the whole case with regard to which there is no appeal before the Court is commonsense or not, it seems to me clear that the plain meaning of the provision of law is that in an appeal from a conviction, the Court of Appeal cannot interfere with the order of acquittal. The words we have to consider are:

'The Court may in an appeal from a conviction 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.' The words 'conviction', 'finding' and 'sentence' are obviously inter-connected. The sentence which can be reversed is a sentence on the finding of 'guilty'. There has been no sentence as regards acquittal and therefore there is no question of reversing the sentence as regards the finding of 'acquittal'. Reading the words 'reverse the finding and sentence' in an ordinary way, it seems to me to be clear that the legislature means 'reverse the finding of guilty and reverse the sentence on the basis of that finding.' This view is fortified when we remember the preceding word 'conviction'. The three words 'conviction' 'finding' and 'sentence' read together make clear and good sense, namely, that there is an appeal from conviction, that the conviction is based on a finding of 'guilty' and the sentence is based on that finding. It is this finding of 'guilty' and this sentence based on that finding which the Appellate Court is empowered to reverse. Nothing else can be reversed. The necessary conclusion is that the finding of 'not guilty' cannot be touched.

17. It is also misleading to think that Sub-section (2) of Section 423, Criminal P. C., which speaks about the alteration of reversing the verdict of a jury gives any

justification of putting a wider interpretation. It has to be remembered that Sub-section (2) of Section 423 does nowhere authorise the Court to do anything beyond what is there in Clause (b). Sub-section (2) only puts a limitation on the exercise of that power. To say, therefore, that the court on the basis of Sub-section (2) can reverse the verdict of a jury and that means 'can reverse the entire verdict of a jury' is really begging the question.

18. All doubts, however, in this matter are set at rest by the decision of the Privy Council in -- 'AIR 1928 PC 254 (A)'. In that case, the appellant had been tried by a Sessions Judge under Section 302, Penal Code on a charge of murder. He was convicted under Section 304 of culpable homicide not amounting to murder, and sentenced to five years' rigorous imprisonment. No acquittal of the charge under Section 302 was recorded. The Local Government did not appeal but applied for revision on the grounds that the appellant should have been convicted of murder, and that the sentence was inadequate. The High Court thereupon convicted the appellant of murder, and sentenced him to death. The Privy Council set aside the judgment and order of the High Court and restored the judgment and order of the learned Additional Sessions Judge. In laying down the law their Lordships referred to a decision of the Allahabad High Court in the case of -- 'Emperor v. Sheo Darshan Singh' AIR 1922 All 487 (H) in these words:

'The headnote of the Allahabad case is as follows:

'An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly. Held, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction.' The learned Judges in giving the judgment said as follows: 'We cannot, however, change the conviction into a conviction of murder. Sheo Darshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by

an appeal by the Government against the acquittal.'

Their Lordships are of opinion that the above is a correct statement of the law; it is indeed no more than a repetition of the provision of the material sections of the Code of Criminal Procedure.'

19. By these words their Lordships of the Privy Council clearly laid down that the only method by which it would be possible to obtain a conviction of murder in a case where there had been an acquittal by the Judge would be by an appeal by the Government against the acquittal. In my judgment on the authority of the Privy Council decision we are bound to hold that in an appeal from a conviction the Court of Appeal cannot set aside an order of acquittal and order retrial on a charge of which the accused has been acquitted.

20. I think it proper to mention that this view of the law was taken by a Bench of this Court in -- 'Nitya Gopal v. Emperor' : AIR1935 Cal120 and Lord-Williams, J. in -- '39 Cal W N 677 (F)'.

21. Nothing has been stated before me in support of the grounds for transfer. I see no reason to think that the accused would not get a fair trial before the Assistant Sessions Judge and I am of opinion that the prayer for transfer should be refused.

22. My opinion, therefore, is that this Rule should be made absolute in part and that the retrial of the accused under Section 304, Penal Code cannot take place in law and the learned Sessions Judge in ordering the retrial must be held not to have ordered for retrial under Section 304, Penal Code and that the retrial should be only on the charge under Section 326, Penal Code of which he was convicted.

23. The application for transfer is refused.