CRIMINAL REVISION.

Before Costello and M. C. Ghose JJ.

1935

Feb. 25.

ALEF SHAIKH

v.

EMPEROR.*

Enhancement of sentence—Rule against conviction—Notice, fresh, if necessary—Jury—Verdict—Going behind, if permissible—Misdirection—Code of Criminal Procedure (Act V of 1898), s. 439 (b).

It is not necessary nor is it required by law to serve a further notice on the accused (petitioners) in a revision case, when after perusal of the record at the hearing of that Rule the High Court consider it necessary to enhance their sentence and ask the accuseds' counsel to show cause *immediately* why their sentence should not be enhanced and do enhance it after a short adjournment and after hearing what accuseds' counsel has to say on their behalf, even though the Crown after service of the rule has not thought fit to enter appearance therein.

Though section 439 (*b*) of the Code of Criminal Procedure provides that a convicted person, in showing cause why his sentence should not be enhanced, is entitled to show cause against his conviction, he is not entitled to go behind the verdict of the jury and show that the conviction was wrong upon the evidence.

Since in an appeal the accused cannot go behind the verdict of the jury, but can only show that there was a misdirection by the judge or that the jury misunderstood the law as laid down by the judge, an accused (petitioner) cannot go behind the same in showing cause against enhancement of sentence in a conviction in a jury trial.

Khodabux Haji v. *Emperor* (1) referred to.

CRIMINAL RULE obtained by the accused.

The facts of the case and the arguments in the Rule appear in the judgment.

J. P. Mitter and *Praphullakumar Chatterji* for the petitioners.

No one for the opposite party.

*Criminal Revision, No. 1184 of 1934, against the order of M. K. Kirpalani, Sessions Judge of Khulna, dated Aug. 23, 1934, modifying the order of Bishnupada Ray, Assistant Sessions Judge of Khulna, dated July 12, 1934.

(1) (1933) I. L. R. 61 Cal. 6.

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GHOSE. J. The four petitioners in this case were tried by a jury in the court of the Assistant Sessions Judge of Khulna, on charges under sections 147, 304 read with section 34 and section 323 of the Indian Penal Code. The jury by a unanimous verdict found all the four accused men guilty under section 147, second part of section 304 and section 323 of the Indian Penal Code. Accepting that verdict the trial judge sentenced the petitioner, Alef Shaikh, to rigorous imprisonment for two years, and the other three petitioners to rigorous imprisonment for one year each.

In appeal, the learned Sessions Judge upheld the conviction under section 304 of the petitioners, Alef Shaikh and Abdul Rajak Shaikh, and he set aside the conviction of Ismail Shaikh and Sabdu Shaikh under section 304. He upheld the sentences of Alef and Abdul Rajak and reduced the sentence of Ismail and Sabdu to rigorous imprisonment for six months.

This Rule was issued on two grounds, namely, (*i*) that the court of appeal below was wrong in convicting the petitioners, Alef and Abdul Rajak, under section 304 read with section 34 of the Indian Penal Code and (*ii*) that the court of appeal below should have held that the learned trial judge misdirected the jurors while dealing with the charge under section 147 of the Indian Penal Code.

Upon hearing the learned counsel on behalf of the petitioners, who has taken us through all the relevant part of the record, we are satisfied that there was no misdirection by the trial judge on the charge of rioting and that the court of appeal below was right to hold that the petitioners, Alef and Abdul Rajak, were guilty of culpable homicide under section 304.

Upon a consideration of the record, we thought it necessary to ask the learned counsel to show cause why the sentence on the petitioners should not be enhanced. The learned counsel suggested a long adjournment so that a notice might be served on the petitioners themselves. This, in our opinion, is unnecessary and not required by the law. The petitioners are already before the Court represented by a learned counsel and

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he is in possession of all the papers, upon which he may argue on the question of the enhancement of the sentence. We allowed an adjournment over the week end so that he might prepare all the points carefully to show cause why the sentence should not be enhanced.

It was urged by the learned counsel that since section 439 (*b*) of the Code of Criminal Procedure provides that a convicted person, in showing cause why his sentence should not be enhanced, is entitled to show cause against his conviction, the petitioners are entitled to go behind the jury's verdict and show upon the evidence that the conviction was wrong. This argument appears to us to be unfounded. It is true that, in showing cause against enhancement of sentence, they are entitled to show cause why they should be acquitted. But, in showing cause against their conviction, the petitioners must proceed according to the provisions of section 423 (*2*), which provides that the court shall have no authority to alter or reverse the verdict of a jury, unless the court is of opinion that such verdict is erroneous owing to a misdirection by the judge to the jury or to a misunderstanding on the part of the jury of the law as laid down by him. Since, in an appeal, the accused person cannot go behind the verdict of the jury, but can only show that there was a misdirection by the judge or a misunderstanding on the part of the jury of the law as laid down by the judge, it cannot be said that a petitioner, in showing cause against enhancement of sentence in a conviction in a jury trial, can go behind the same. In this connection I may refer to the case of *Khodabux Haji* v. *Emperor* (1), which was decided by us in May, 1933.

We are satisfied that there is no misdirection in the charge given by the trial judge to the jury. There was indeed an error, when he was explaining the effects of section 34, but that error was in favour of the accused persons and not against them. It cannot be said that the accused men were in any manner prejudiced by the charge of the trial judge.

(1) (1933) I. L. R. 61 Calc. 6.

The facts found by the court of appeal below are that the petitioner, Alef Shaikh, instituted a mortgage suit against one Paresh. He on the 11th July, 1932, attached the land before judgment and thereafter in January, 1934, he obtained possession of the land in satisfaction of the decree. But two months before the attachment, *viz.*, in May, 1932, Paresh, the mortgagor, had given a lease of the land to one Rambaran of the prosecution party and the said Rambaran continued in possession. After the petitioner, Alef, got symbolical possession in January, 1934, he and his partisans, on the 26th February, 1934, went upon the land with weapons. Their appearance in force was sufficient to drive Rambaran and his men away from the land. But the petitioners pursued the men to another field and they so severely assaulted one Rasik that he died on the spot. The learned judge found that the petitioners, Alef and Abdul Rajak, took part in the beating of Rasik, which resulted in his death. The deceased was a man of about twenty-six years of age. He received a lacerated wound $1\frac{1}{2}''$ long, scalp deep, on the head. The blow on the abdomen ruptured his spleen, which was enlarged and he died of the shock of the injuries.

Having regard to the circumstances, we are of opinion that the sentences are inadequate. The petitioner, Alef Shaikh, is an old man and Abdul Rajak is a very young man. But, considering the grave offence which they committed in beating a man to death, we think that the sentence passed on them should be enhanced to three years' rigorous imprisonment each.

Ismail Shaikh and Sabdu Shaikh have been convicted of rioting: their sentence of six months is enhanced to one year's rigorous imprisonment.

COSTELLO J. The Rule must be discharged with the variation of sentence indicated by my learned brother.

Rule discharged.

G. S.