APPELLATE CRIMINAL.

Before Lort-Williams and Jack JJ.

1935

Jan. 24;
Feb. 18.

ABDUL KHAN

v.

EMPEROR.*

Approver—Case against approver, if must be tried subsequently—Retrial —Retrial on charges on which the accused was acquitted, if legal—Code of Criminal Procedure (Act V of 1908), ss. 337, 403.

Per JACK J. There is no rule of law that an approver must be tried subsequently to the other accused in the case, nor can it be deduced from the provisions of section 337(3) of the Code of Criminal Procedure that a person, to whom a pardon has been tendered, should be kept in custody till the end of the trial.

It is regarded as settled law that, where no express limitation is stated, an order of retrial applies to all charges framed by the original court and, where the accused has been acquitted on one of the charges, that acquittal is no bar to his being tried again notwithstanding the provisions of section 403 of the Code of Criminal Procedure.

Nazimuddin v. *Emperor* (1) and other cases referred to.

Per LORT-WILLIAMS J. Where, at the original trial with two charges of murder and conspiracy to murder, the jury returned a verdict of not guilty on the first and guilty on the second and the accused preferred an appeal from his conviction, the appellate court had no power under section 403 of the Code of Criminal Procedure to interfere with the order of acquittal on the charge of murder, in the absence of an appeal therefrom.

Krishna Dhan Mandal v. *Queen-Empress* (2), *Queen-Empress* v. *Jabanulla* (3) and *Nazimuddin* v. *Emperor* (1) dissented from.

CRIMINAL APPEAL.

The material facts of the case and the arguments in the appeal appear from the judgments.

Mahammad Manawar for the appellant.

Anilchandra Ray Chaudhuri for the Crown.

Cur. adv. vult.

*Criminal Appeal, No. 337 of 1934, against the order of H. G. Waight, Sessions Judge of Burdwan, dated March 10, 1934.

(1) (1912) I. L. R. 40 Calc. 163. (2) (1894) I. L. R. 22 Calc. 377.
(3) (1896) I. L. R. 23 Calc. 975.

1935

Abdul Khan v. *Emperor.*

JACK J. In this case, the accused was tried, on charges of murder and conspiracy to murder, under sections 302 and 302/120B of the Indian Penal Code.

He was acquitted on the charge under section 302, but convicted on the charge under section 302/120B.

On appeal to this Court against his conviction under section 302/120B this Court ordered as follows :—

> The verdict of the jury and along with it the conviction and sentence of the appellant are set aside and we direct that the appellant be tried according to law.

Primâ facie this order would only appear to refer to the conviction of the accused and have no reference to his acquittal. The order was presumably passed under the provision of section 423 (*1*) (*b*) of the Code of Criminal Procedure, which states that an appellate court may—

> In an appeal from a conviction, (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or (ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (iii) 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.

What are to be reversed or altered are the finding and sentence of conviction and had the matter been *res integrae*, I would have been inclined to hold that the appellate court has no jurisdiction under section 423 (*1*) (*b*) to interfere with an order of acquittal. However, it has been laid down that, in such cases where no express limitation is stated, an order of retrial applies to all the charges framed by the original court and, where the accused has been acquitted on one of the charges, that acquittal is no bar to his being tried again notwithstanding the provisions of section 403 of the Code of Criminal Procedure. This has been regarded as settled law in the case of *Nazimuddin* v. *Emperor* (1) in which the case of *Krishna Dhan Mandal*

(1) (1912) I.L. R. 40 Calc. 163.

1935

Abdul Khan v. *Emperor.*

Jack J.

v. *Queen-Empress* (1) and *Queen-Empress* v. *Jabanulla* (2) are referred to. The same view was taken in the case of *Jamiruddi Biswas* v. *King-Emperor* (3). There is certainly something to be said for this view, for to hold otherwise would, in some cases, lead to anomalies, and it would seem that if, owing to misdirection, the verdict of the jury cannot be accepted, the verdict of acquittal may be tainted just as much as the verdict of conviction. Moreover, it might be said that section 403 has no application, as the retrial of the accused on remand owing to misdirection, is part of the same trial, which is not concluded till the appeal is heard and determined.

That this view is regarded as settled law appears from the fact that in this case the fact of previous acquittal on the charge of murder was not made a ground of appeal, and I have only dealt with this matter as a preliminary point because my learned brother was of the opinion that, unless the case could otherwise be disposed of favourably to the accused, a reference should be made on this point to a Full Bench. I am, however, of opinion that no reference is necessary in view of the order I propose to make inasmuch as I think there is a good deal to be said for the appellant in reference to the charges against him in spite of his despicable conduct in making a confession involving others in the crime of murder, a confession which he now denies, having made, or rather he says he was tutored to make a statement, and cannot recall what he stated. The co-accused were acquitted and he himself was acquitted in the first trial on the charge of murder. They were all, however, convicted on the charge of conspiracy to murder, and his case was only sent back for retrial on the ground that the learned judge, not having properly considered his confession under the provisions of section 24 of the Evidence Act, might have wrongly admitted it in evidence. This would have been no ground whatever for a retrial on the

(1) (1894) I. L. R. 22 Calc. 377. (2) (1896) I. L. R. 23 Calc. 975.
(3) (1912) 16 C. W. N. 909.

charge of murder, of which he was acquitted, and could only be a ground for retrial on the charge of conspiracy to murder of which he was convicted.

Apart from his retracted confession, which was disbelieved by the jury which acquitted him on the murder charge, there was no more evidence against him on the charge of conspiracy to murder than against his co-accused who were acquitted on retrial on this charge.

When these facts are taken into consideration along with the grounds which have been urged in appeal in this case I think the appellant ought to be acquitted on both charges.

The facts of the case are briefly as follows:—On the morning of the 30th of March the headless body of Dr. Aktar Ali Khan of Kulut was found at Raigram near the cart road from Raigram to Kulut. Dr. Aktar Ali had started on the previous evening at about 5-30 p.m. to ride on a pony from Nadanghat to Kulut a distance of about 7 miles. He was last seen proceeding northwards along the road at about 7 or 7-30 p.m. that evening. The head was found 5 or 6 cubits from the body. There was a gold ring on one of his fingers and there were gold studs in his shirt. There were a number of wounds on the right hand, one on the right forearm and one on the left hand, also a punctured wound on the chest below the armpit—$1'' \times 3'' \times 1\frac{1}{2}''$.

An investigation was started and on the 22nd of April, the appellant was arrested (according to the prosecution) in the village Bhagra at the house of one Sahadat Khan at about 2 or 2-30 a.m. by constable Abdul Rajab, who produced him before Sub-Inspector Radhikanath Sarkar about 3 or 3-30 a.m. at Piplai about $\frac{1}{2}$ a mile distant. The Sub-Inspector was proceeding to Kalna court and says that 10 or 15 minutes after the production of Abdul Khan he came to know that he would make a statement. On the way, 2 or 3 hours later (while the Sub-Inspector was waiting for a bus) at Majhergram the accused made a formal statement to the Sub-Inspector, who then took him to Kalna

1935

Abdul Khan
v.
Emperor.

Jack J.

and made him over to the Court Sub-Inspector there to have his statement recorded by the magistrate before whom he was produced at 11-58 a.m. The magistrate, after due warning, recorded a confession made by him. He was subsequently made an approver, a conditional pardon being tendered to him. Thereafter, a number of other people were arrested. At the trial the accused when examined as a witness said he knew nothing about the case and denied that he had consciously made any confession. This led to his trial and to the trial after remand from which he now appeals.

In appeal it is urged that the learned judge ought to have rejected his confession as inadmissible inasmuch as it was not made voluntarily. This was a matter for the discretion of the judge and it cannot be said that the judge has wrongly exercised his discretion in this case. Then it is urged that there is non-direction inasmuch as the learned judge did not point out to the jury that the magistrate who recorded it, though telling the accused that the confession would be used in evidence, did not warn him that it would be used in evidence against him. It is possible that the accused was in fact under the impression that it would be used only against the other accused, though this is not probable, because no pardon had been tendered to him at that time and no other accused had been arrested.

A more important point raised for the defence is that the learned judge did not draw the attention of the jury to the fact that, whereas in the confession it is stated that the deceased was killed at a place adjoining the eastern bank of the Duntia tank, the prosecution case is that the murder took place to the south of the tank where the body was found decapitated with a large quantity of blood on the ground nearby. This point is certainly not noted in the heads of charge and, if the jury had any hesitation in believing the retracted confession, it is just possible that the omission to remind them of this discrepancy might have turned the scale against the accused, who already had

3 jurors in his favour. It is curious that though the map shows the place where the body was found to be south of the middle of the tank, according to the inquest report the body was found south of the eastern bank of the tank and thus more in accordance with the confession.

On behalf of the defence it is also urged that the appellant has been prejudiced in that he should have been tried subsequently to the persons with whom he is alleged to have conspired. There appears to be no rule of law that he should be tried subsequently; and such a rule cannot I think be deduced from the provision in section 337 of the Code of Criminal Procedure that a person to whom a pardon has been tendered should be kept in custody till the end of the trial. This rule was never intended to apply where the ci-devant approver has been actually tried for the offence and acquitted; he is no longer in the position of the person who has accepted a provisional tender of pardon to whom alone section 337 applies.

But there is no doubt that, in this case, if the trial of the other accused (which ended in acquittal) had taken place before the trial of the appellant, the fact that they had been acquitted on the charge of conspiracy to murder, might possibly have affected the trial in favour of the appellant for the witnesses to conspiracy might have been discredited on the ground that their evidence in the trial of the co-accused had not been believed.

The heads of charge indicate that the learned judge very fairly and adequately placed the law and the evidence before the jury, but his warning about the danger of relying on an uncorroborated retracted confession in support of the charge under section 302 of the Indian Penal Code was hardly sufficiently emphatic. His words are—

> It would be unsafe to convict the accused under section 302 of the Indian Penal Code on the confession alone without any corroboration, unless you are completely satisfied that the matters contained in the retracted confession are true.

1935

Abdul Khan v. *Emperor.*

Jack J.

This warning may not have sufficiently impressed on the jury the necessity for corroboration as to the identity of the accused. At the end of the judgment the learned judge charged them as follows:—

> If you believe the confession to be true, you are entitled to convict the accused under section 302 and under section 302/120B of the Indian Penal Code. I would point out to you that it would be rather unsafe to convict the accused under section 302, Indian Penal Code, on the confession alone without any corroboration of the actual murder. If, however, you disbelieve the confession and disbelieve the evidence of Janu Karikar and Ishahaque then you must return a verdict of not guilty against the accused.

Finally, the confession has a little the appearance of a tutored statement, *e.g.*, this is suggested by the the words "under order of the following men" followed by a list headed "names of persons". This is more like a formal statement than a natural description of what occurred.

The evidence of the witnesses Janu Karikar and Ishahaque was apparently not accepted in the case of the co-accused, and their evidence, together with the retracted confession, is the only evidence against the appellant who, along with the other accused, was in the first instance discharged by the committing magistrate. The motive for the murder is said to be the exactions of the deceased from his tenants and debtors, some of whom had threatened him in consequence and a petition for action under section 107 of the Code of Criminal Procedure against four of the accused had been made shortly before the occurrence, but this did not include this accused. Further, when he was produced before the magistrate to make a confession, there were injuries on his person, and in his statement he said that he was beaten by the police to induce him to confess.

In all the circumstances, I think the non-directions referred to are a sufficient ground for setting aside the conviction and sentence on both the charges and that the evidence is not sufficient to warrant sending

back the case for retrial. The conviction and sentences under sections 302 and 302/120B of the Indian Penal Code are, therefore, set aside and the appellant is acquitted.

LORT-WILLIAMS J. This appellant was tried originally for murder under section 302 of the Indian Penal Code, and conspiracy to murder under section 302/120B of the Indian Penal Code. He was acquitted of the first offence and convicted of the second. He appealed against the conviction. There was no appeal under section 417 of the Code of Criminal Procedure against the acquittal. On appeal to this Court, the verdict of the jury and along with it the conviction and sentence were set aside, and the appellant was directed to be tried according to law. On his second trial he was charged again with offences under section 302 and section 302/120B, and was convicted of both murder and conspiracy to murder, and sentenced to transportation for life under each of the sections.

In my opinion, this procedure was contrary to law. At the original trial there were two verdicts of the jury, one of not guilty upon the charge of murder, and one of guilty upon the charge of conspiracy to murder. Before this Court, on appeal, one only of those verdicts, and the conviction and sentence thereon, was in issue, namely, that under section 302/120B, inasmuch as there was no appeal against the acquittal under section 302. This Court neither did, nor in such circumstances could have, set aside the verdict of acquittal.

Section 403 (*1*) of the Criminal Procedure Code provides that—

> A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

At the time of the second trial the acquittal under section 302 still remained in force.

1935

Abdul Khan v. *Emperor.*

Lort-Williams J.

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.

Section 439 defines the powers of the High Court in revision. Sub-section (*4*) provides that—

> Nothing in this section applies to any entry made under section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

And sub-section (*5*) provides that—

> Where under this Code 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.

It follows that, in my opinion, the cases of *Krishna Dhan Mandal* v. *Queen-Empress* (1), *Queen-Empress* v. *Jabanulla* (2) and *Nazimuddin* v. *Emperor* (3), so far as they support the opposite view, were wrongly decided.

In view, however, of the fact that the appellant must, in any case, be acquitted on the other grounds referred to by my learned brother, upon which I am in agreement with him, it is not necessary now to refer this question to a Full Bench for decision.

Accused acquitted.

A. C. R. C.

(1) (1894) I. L. R. 22 Calc. 377. (2) (1896) I. L. R. 23 Calc. 975.
(3) (1912) I. L. R. 40 Calc. 163.