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should be sent back to the lower Court to be re-heard, i.e., it will be for that Court to decide whether in its discretion the petitioner should be dispaupered or not. The petitioner will have his costs of this revision petition.

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APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice King.*

P. RATNASABAPATHY GOUNDAN (FIRST ACCUSED),

APPELLANT,

v.

THE PUBLIC PROSECUTOR, MADRAS (NIL),

RESPONDENT.*

1936,
February 15.

*Code of Criminal Procedure (Act V of 1898), ss. 423 and 439—
Accused convicted as a result of a verdict of the jury—
Appeal by accused—Revision petition by Crown for en-
hancement of sentence—Right of convicted person, in showing
cause against conviction, to go into the facts of the case—
“Notwithstanding anything contained in this section”, in
sub-sec. (6) of sec. 439 of Code—Meaning of—Trial
Judge—Right of, to express his opinion to the jury—
Limits of.*

An accused person was convicted in a trial by a jury of the offence of robbery and he appealed to the High Court under section 423 of the Code of Criminal Procedure. A criminal revision petition was filed by the Crown for enhancement of sentence under section 439 of the Code. On a submission made on behalf of the accused that, because of the opening words of sub-section (6) of section 439, namely, “not-

* Criminal Appeal No. 400 of 1935 and Criminal Revision Case No. 844 of 1935. (Criminal Revision Petition No. 777 of 1935.)

withstanding anything contained in this section", which includes section 423, a convicted person is entitled in showing cause against his conviction to go into the facts of the case even though he has been convicted as a result of the verdict of a jury.

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Held: (i) A convicted person in showing cause against his conviction under sub-section (6) of section 439 has only the same right as he has when he comes before the Court by way of an appeal under section 423, and his position is not different merely because an enhancement of sentence is sought for by the Crown.

Khodabux Haji v. Emperor, (1933) I.L.R. 61 Cal. 6, followed.

(ii) The words, "notwithstanding anything contained in this section", in sub-section (6) of section 439 of the Code, cannot by implication override the express and imperative provisions of the earlier section, namely, section 423 of the Code.

(iii) A trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to be necessary to do so provided that he warns the jury that his opinion is in no way binding on them and that it is the jury's opinion on the facts of the case alone which matters.

APPEAL against the conviction of and sentence passed by the Court of Session of the Coimbatore Division in Case No. 41 of its Calendar for 1935 and petition under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to enhance the sentence passed on the first accused in Sessions Case No. 41 of 1935 on the file of the Court of Session of the Coimbatore Division.

Nugent Grant, V. L. Ethiraj, T. M. Kasthuri and N. Somasundaram for appellant in criminal appeal.

Public Prosecutor (L. H. Bewes) for the Crown in criminal appeal and criminal revision petition.

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N. Somasundaram for respondent in criminal revision petition.

Cur. adv. vult.

BEASLEY C.J. BEASLEY C.J.—The JUDGMENT of the Court was delivered by the first accused in Sessions Case No. 41 of 1935 in the Sessions Court of Coimbatore. The appellant was convicted of an offence punishable under section 392 of the Indian Penal Code, namely, robbery, as a result of the unanimous verdict of the jury. He was sentenced to rigorous imprisonment for two years by the learned Sessions Judge.

Five other accused were charged with the appellant under section 120-B read with section 384 of the Indian Penal Code; and the appellant was also charged with accused 1 to 4 and the sixth accused with extortion, section 384 of the Indian Penal Code, and with the same accused with dacoity, section 395 of the Indian Penal Code. The appellant was acquitted on the other charges by the learned Sessions Judge and all the other accused were acquitted on all the charges.

[Portion of the judgment omitted as not being necessary for this report.]

The learned Sessions Judge took a definite view of the case as his charge to the jury shows. That charge was very strongly favourable to the defence and extremely hostile to the case for the Crown. Indeed he expressed his own opinion very strongly against the zamindar's evidence, his story and the case for the Crown, and left the jury in no doubt whatever about his views of the case. We may pause here and say that a trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to

be necessary to do so, provided that he warns the jury that his opinion is in no way binding upon them and that it is the jury's opinion on the facts of the case alone which matters. This warning the learned Sessions Judge frequently gave to the jury. The jury, however, as they were quite entitled to do, accepted the zamindar's evidence and unanimously found the appellant guilty of robbery. The learned Sessions Judge accepted the verdict. The first accused now appeals ; and as he has been convicted by a jury, the provisions of section 423 of the Code of Criminal Procedure apply to this case. Therefore, the appellate Court by reason of sub-section (2) is not authorized to alter or reverse the verdict of the jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. The appellate Court accordingly cannot go into the facts of the case except to see whether there has been any misdirection by the Judge. Mr. Grant for the appellant has found himself in an exceedingly difficult position in view of the fact that the learned Sessions Judge's charge to the jury was so entirely favourable to the appellant as he has from the first frankly admitted. He, however, contended that the appellate Court is entitled to go into the facts of the case and reverse the findings of the jury, because a criminal revision case has been filed by the Crown for enhancement of sentence calling upon the High Court to exercise its powers of revision under section 439 of the Code of Criminal Procedure. By virtue of sub-section (2) of that section no order under the section shall be made

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to the prejudice of the accused unless he has had an opportunity of being heard either personally or by a pleader in his own defence and, under sub-section (6), such convicted person in showing cause shall be entitled also to show cause against his conviction. Under sub-section (1) the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by, *inter alia*, section 423 of the Code. Mr. Grant argued that because of the opening words of sub-section (6), namely, "notwithstanding anything contained in this section", which includes section 423, a convicted person is entitled in showing cause against his conviction to go into the facts of the case, even though he has been convicted as a result of the verdict of a jury. Sub-section (2) of section 423 is imperative and Mr. Grant's contention, therefore, is that by implication sub-section (6) of section 439 of the Criminal Procedure Code overrides the express terms of the former section. We find it impossible to accept such an extreme contention and, had it been intended by the Legislature to override the provisions of an earlier section, such an intention would have been expressly stated. In our view, a convicted person in showing cause against his conviction under sub-section (6) of section 439 of the Code has only the same right as he has when he comes before the Court by way of an appeal under section 423. The same view has been taken in the only reported case in which the same point was considered, namely, *Khodabux Haji v. Emperor*(1). It was there argued that the words "notwithstanding anything contained in this section" obliterated the

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

plain language of sub-section (1) of section 439 in which is incorporated amongst others section 423. The Calcutta High Court, however, declined—and in our opinion quite rightly—to accept that argument and held that in all cases where the question of enhancement of sentence is before the Court the position is just the same as if the matter had come before the Court by way of appeal or revision at the instance of the convicted person himself. It is indeed difficult to find any reason why the position should be otherwise merely because an enhancement of sentence is sought for ; and, as we have already said, the words “notwithstanding anything contained in this section” cannot by implication override the express and imperative provisions of an earlier section. We are therefore against the appellant’s contention upon this point.

[Portion of the judgment omitted as not being necessary for this report.]

In our view, the appeal cannot succeed and must be dismissed. With regard to the enhancement of sentence, we can see no reason for increasing it. The criminal revision case must therefore also be dismissed.

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