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It seems to us that the view that has been adopted in this connection by the Deputy Collector is erroneous ; because, though, no doubt, an application was presented by the petitioner for the execution of the decree in question, yet the decree was not caused to be executed against the opposite party. What was done was simply that an application for the execution of the decree was presented, and a notice was thereupon issued, calling upon the opposite party to show cause why the decree should not be executed ; and the Deputy Collector, being of opinion that the decree had already been satisfied, ordered that it should not be executed. We think that, under the circumstances, no offence under section 210 of the Indian Penal Code could have been committed.

In this view of the matter, we think that the order of the Deputy Collector, dated the 2nd of January 1895, sanctioning the prosecution of the petitioner for an offence under section 210 of the Indian Penal Code, should be revoked ; and we accordingly direct that the rule be made absolute.

No. 1335.—For the reasons already stated, this rule should also be made absolute.

H. W. *Rules made absolute.*

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Banerjee.

QUEEN-EMPRESS *v.* JABANULLA (AND ANOTHER.) *

1896
June 25.

Appeal in Criminal Case—Criminal Procedure Code (Act X of 1882), section 423—Power of the Appellate Court—Altering a finding of acquittal into one of conviction.

The Appellate Court can, under the provisions of section 423 of the Criminal Procedure Code, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court.

THE appellants were charged with offences punishable under section 148, section 302 read with section 149, and section 326 of

* Criminal Appeal No. 318 of 1896, against the order passed by R. H. Greaves, Esq., Sessions Judge of Sylhet, dated the 13th of April 1896.

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the Penal Code by the Sessions Judge of Sylhet. The assessors were of opinion that the appellants were guilty of an offence under section 148 only, but the Sessions Judge disagreed with the assessors and convicted the appellants of an offence under section 326 and acquitted them of the offence under section 148. They appealed to the High Court.

Mr. *P. L. Roy* and *Mahomed Habibulla* for the appellants.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

Mr. *P. L. Roy*.—The evidence is not sufficient to prove that an offence under section 326 of the Penal Code was committed. [THE COURT.—We are inclined to think that there ought to have been a conviction under section 148.] The appellants have been acquitted by the Sessions Judge of the offence under section 148, and there being no appeal by the local Government against that order of acquittal this Court cannot interfere with it. The power conferred on the Appellate Court by section 423, clause (*b*) of the Criminal Procedure Code to alter the finding must be held to be subject to the restriction that it cannot find the appellant guilty of any offence of which he has been acquitted by the Court below. The last paragraph of section 439 supports this view.

The *Deputy Legal Remembrancer*.—Section 423 of the Criminal Procedure Code distinctly confers on the Appellate Court the power to alter the finding of the lower Court and maintain the sentence. There is no such restriction placed upon the power conferred by this section as there is upon that conferred by section 439. The High Court, acting under section 423, can convert a finding of acquittal into one of conviction and maintain the sentence.

The following judgments were delivered by the High Court (O'KINEALY and BANERJEE, JJ.)

O'KINEALY, J.—The circumstances out of which this case has arisen are as follows: The appellants with a large number of men armed with spears and *latties* went near the house of a man named Ayat Ullah and abused him, and Safat Ullah, the deceased, spoke to them, and then a man from the party of the appellants named Najib Ullah directed him to be beaten. It

is said that the appellant Abdul Hakim speared Safat Ullah in the chest, and the appellant Jaban Ullah speared him on the left side as he was falling. Safat Ullah was speared through the heart and died instantaneously.

The appellants were charged with offences punishable under sections 148, 302, 149 and 326 of the Indian Penal Code, and there was an additional charge laid against the appellant Abdul Hakim for an offence punishable under section $\frac{302}{149}$ of the Code.

The assessors in the Court below found the appellants guilty of an offence punishable under section 148 of the Code, and they held that the common object was to take possession of or measure some land. The Sessions Judge was of opinion that this common object was not made out. He found, however, that the appellants were the persons who actually killed Safat Ullah, and convicted them of an offence under section 326, namely, of causing grievous hurt by a dangerous weapon. He acquitted them of the offence under section 148.

In appeal it has been argued before us that the evidence on the record is not sufficient to support the conclusion arrived at by the Sessions Judge, namely, that the appellants are the persons who actually caused the death of the deceased, and that as they have been acquitted by the Sessions Judge of the offence under section 148 they must be acquitted.

We do not share the difficulty experienced by the Sessions Judge as regards the common object. Here we have a large body of men armed with dangerous weapons crossing a broad river and marching to the house of an obnoxious individual, and there, under the directions of a leader, attacking Safat Ullah and killing him. It seems to us that, at the moment at least at which they obeyed the directions of the leader, their common object was to cause hurt, and that they are liable under sections 149 and 326.

Then it is said that we have no power under section 423 of the Procedure Code to alter the finding and deprive the appellants of the benefit already conferred upon them by an acquittal in respect of the offence under section 148.

We are of opinion that the appellants cannot rely upon section 403 on the ground that they have been previously acquitted, because the present appeal is not a second trial, but only a continuation of the first trial. Under section 423 the Appellate Court

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can alter the finding, maintaining the sentence but not enhancing it. The power of the Court to alter the finding, therefore, is not limited in the manner claimed by the appellants. There are no doubt some cases to which this procedure would not be appropriate. That depends upon different considerations.

We, therefore, alter the conviction under section 326 to a conviction under sections 149 and 326, and maintaining the sentence we direct that the appeal be dismissed.

BANERJEE, J.—I am of the same opinion.

The appellants in this case have been convicted by the learned Sessions Judge of Sylhet of the offence of voluntarily causing grievous hurt by dangerous weapons, and they have been sentenced to rigorous imprisonment for six years each.

The learned Counsel for the appellants contends that the evidence is not sufficient to prove that the grievous hurt was caused by the appellants. This contention seems to me to be to some extent well founded ; but it cannot, in my opinion, be of much avail to the appellants. For I think the evidence fully proves that the accused were members of an unlawful assembly ; that the grievous hurt in question was caused in prosecution of the common object of that assembly ; or that at any rate the accused knew that such grievous hurt was likely to be caused in prosecution of that object ; and that having regard to section 149 of the Indian Penal Code the accused have been rightly convicted of the offence of voluntarily causing grievous hurt by dangerous weapons, even if they did not themselves cause such hurt. I should, therefore, under clause (*b*) of section 423 of the Criminal Procedure Code affirm the conviction and sentence, the lower Court's finding of guilty under section 326 of the Indian Penal Code being altered into one of guilty under section 326 read with section 149 of the Indian Penal Code.

It was contended by the learned Counsel for the appellants that we could not alter the finding in that way, as the appellants, who were also charged with rioting under section 148 of the Indian Penal Code, have been acquitted by the learned Sessions Judge of that offence, on the ground that they were not members of an unlawful assembly, and there is no appeal by the Local Government against such acquittal. It was argued that the power

conferred on the Appellate Court by section 423, clause (*b*), to alter the finding, must be held to be subject to this restriction, namely, that it cannot find the appellant guilty of any offence of which he has been acquitted by the Court below; and in support of this argument the last paragraph of section 439 was referred to.

I am unable to accept this argument as correct. The last paragraph of section 439 of the Criminal Procedure Code, relied upon by the learned Counsel for the appellants, cannot be held to limit the powers of a Court of Appeal. It is intended only to limit in certain respects the revisional powers of this Court, which would otherwise have been competent in revision to convert a finding of acquittal into one of conviction. As to the extent of this limitation on the powers of this Court as a Court of Revision, there is some conflict of opinion [see *Queen-Empress* v. *Balwant* (1), *Heera Bai* v. *Framji Bhikaji* (2), *Thandavan* v. *Perianna* (3)]; but it is not necessary to consider the question here.

Section 423, clause (*b*), has no such restriction imposed upon it. There is, under that clause, only one restriction to the power of the Appellate Court on an appeal from a conviction, and that is, that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the Appellate Court's altering the finding. Thus, if an accused person is charged with having murdered *A*, and also with having caused grievous hurt to him, and is acquitted of the former offence but convicted of the latter and sentenced to seven years' rigorous imprisonment by the first Court, the Appellate Court cannot, on the appeal of the accused, alter the finding into one of guilty of murder, because, as it cannot enhance the sentence, the result will be that a person convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for seven years—a sentence which is not in accordance with law. That, however, is not the case here, and so we need not consider it further. But in a case like this, in which no such difficulty arises, I think the Appellate Court can, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of any offence of which he may have been acquitted by that Court.

(1) I. L. R., 9 All., 134. (2) I. L. R., 15 Bom., 349.
(3) I. L. R., 14 Mad., 363.

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This view does not in any way clash with the salutary principle which protects with zealous care orders of acquittal against interference except upon appeal by the Local Government; nor does it tend to throw any difficulty or discouragement in the way of persons seeking to have convictions by which they feel aggrieved set aside by appeal. It is 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.

There is, therefore, no reason for limiting the plain and unrestricted language of section 420, clause (*b*), of the Code of Criminal Procedure in the manner contended for. I may add that the view I take is supported to some extent by the decision of this Court in *Krishna Dhan Mondul* v. *Queen-Empress* (1).

For the foregoing reasons I would alter the conviction into one under section 326 read with section 149 of the Indian Penal Code and maintain the sentence in the case of each of the appellants.

S. C. B.

REFERENCE UNDER COURT FEES ACT.

Before Mr. Justice Ameer Ali and Mr. Justice Sale.

IN THE GOODS OF POKURMULL AUGURWALLAH (DECEASED.)

1896
Sept. 8.

Court Fees Act (VII of 1870), section 19 D—Exemption from Probate duty, —Joint Family—Hindu Law—Conveyance to four members of a joint family governed by the Mitakshara Law as tenants in common—Survivorship.

The deceased, who was a member of a joint Hindu family governed by the Mitakshara law, left a will, of which he appointed his brotners the executors and trustees. The brothers, as executors, applied for probate but claimed exemption from the payment of probate duty on the ground that the property was "joint ancestral property which would pass by

(1) I. L. R., 22 Calc., 377.