

1913

EMPEROR  
v.  
NAZIR  
KHAN.

It is not clear from these papers whether the applicant has served the four months' rigorous imprisonment to which he was sentenced. If he has not, he must surrender to his bail and serve out the unexpired portion of his sentence.

*Application dismissed.*

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.*

EMPEROR v. SAILANI.\*

1913  
October, 22.

*Criminal Procedure Code, sections 403, 423, 439—Previous acquittal on charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under section 304 of the Indian Penal Code—Revision.*

S. and R. were charged with causing simple hurt to K. The case was compounded and both the accused were acquitted. K, later on, died of the injury caused by S. and R. The Magistrate, thereupon, sent up R. for trial before the Sessions under section 304, but discharged S., as he found that the injury caused by him did not in any way contribute to K.'s death. The Sessions Judge directed the Magistrate to commit S. also, and he was committed accordingly. *Held* that there was no legal bar to the trial of S. under section 304 of the Indian Penal Code, and to his conviction under that section if the evidence enabled the court to apply either section 34 or 114 of the Indian Penal Code to the case. A commitment can only be set aside on a point of law and as no such point arose in this case High Court did not interfere.

Two persons, Sailani and Ram Ghulam, were put on their trial for causing simple hurt to one Kesri. That case was compounded, and both the accused were acquitted. Subsequently Kesri died, and on a post mortem examination it was discovered that his death was due to an injury which he received in the course of the assault referred to above. Thereupon both persons were *challenged* under section 304 of the Indian Penal Code for causing the death of Kesri. The Magistrate committed Ram Ghulam to take his trial under section 304, but held that the injury caused by Sailani to the back of the head of Kesri did not in any way contribute to his death and that he could only be considered guilty of causing simple hurt—of which he had already been acquitted. The Sessions Judge, however, directed that Sailani should also be committed to his court under section 304. Against this commitment Sailani applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant, submitted that inasmuch as the accused had been acquitted on certain facts of a charge of simple hurt an order for commitment for culpable

\* Criminal Revision No. 894 of 1913 from an order of F. S. Tabor, Sessions Judge of Shahjahanpur, dated the 1st of September, 1913.

homicide not amounting to murder on the same facts was unsound and improper.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown, submitted that sections 423 and 439 of the Code of Criminal Procedure conferred on the High Court the power of ordering a re-trial. The accused could be committed to the sessions for trial under section 304, Indian Penal Code, inasmuch as sections 34 and 114 of the Code applied.

BANERJI and RYVES, JJ:—Sailani and Ram Ghulam were originally put on their trial for causing simple hurt to one Kesri. That case was compounded, and in consequence both the accused persons were acquitted. Subsequently Kesri died, and a post mortem examination revealed the fact that his death was due to an injury which he received in the course of the assault made on him by Sailani and Ram Ghulam. The police *challenged* both these persons under section 304 of the Indian Penal Code for causing the death of Kesri. The Magistrate committed Ram Ghulam to take his trial under section 304, but held that the injury which was caused by Sailani to the back of the head of Kesri did not in any way contribute to his death and that at the utmost Sailani could only be convicted of causing simple hurt under section 323 of the Indian Penal Code. As he had already been acquitted on that charge the learned Magistrate refused to commit him. The learned Sessions Judge on perusal of the record directed that Sailani also should be committed to the Sessions for trial under section 304 of the Indian Penal Code. From that order this application for revision has been presented before us. It appears to us that there is no legal bar to the trial of Sailani on a charge under section 304. Whether he can be convicted under that section will depend on the evidence in the case and if it is proved by that evidence that he is as much responsible for the death of Kesri as Ram Ghulam, that is to say, if the evidence enables the court to apply either section 34 or section 114 of the Indian Penal Code to the case. That is purely a question of fact to be determined by the court at the trial. A commitment can be set aside only on a point of law. As no such point arises in this case, we are unable to set aside the order of commitment. The application is, accordingly, rejected.

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*Application rejected*