PRIVY COUNCIL.

J. C. 1928 July, 2.

KISHAN SINGH *v.* THE KING-EMPEROR.

[On appeal from the High Court at Allahabad.]

Criminal Procedure Code, section 439 (4)—*Charge of murder —Conviction of culpable homicide—Revision—Jurisdiction on revision—Privy Council practice—Conviction by court without jurisdiction.*

The appellant was tried by a Sessions Judge on a charge of murder under section 302 of the Indian Penal Code. He was convicted under section 304 of culpable homicide not amounting to murder, there being power by section 238 (2) of the Code of Criminal Procedure so to convict him upon the charge under section 302; he was sentenced to five years' rigorous imprisonment. No acquittal of the charge under section 302 was recorded. The Local Government did not appeal, but applied for revision on the grounds that the appellant should have been convicted of murder, and that the sentence was inadequate. The High Court thereupon convicted the appellant of murder and sentenced him to death.

Held that the finding at the trial was to be regarded as an acquittal on the charge of murder, and that consequently section 439 (4) of the Code of Criminal Procedure precluded the High Court from having jurisdiction upon revision to convict on that charge; that though upon an appeal by the Local Government the High Court would have had before it the same materials, yet, the order having been made without jurisdiction, an injustice had been done to the appellant, bringing the case within the restricted jurisdiction exercised by the Judicial Committee in criminal matters; that the case should not be remitted to the High Court to consider whether the sentence on the conviction under section 304 should be enhanced, but that the order of that Court should be set aside and the order of the Sessions Judge restored.

* *Present* :—Lord HAILSHAM, L. C., Viscount HALDANE, Lord ATKIN, Sir JOHN WALLIS, and Sir LANCELOT SANDERSON.

In re Bali Reddi (1), commented on; *Emperor* v. *Sheo Darshan Singh* (2), and *Emperor* v. *Shivputraya* (3), approved.

APPEAL (No. 49 of 1928) by special leave from an order of the High Court (October 31, 1927) on proceedings in revision, whereby the conviction of the appellant by the Sessions Court of the offence of culpable homicide not amounting to murder (under section 304 of the Indian Penal Code) was altered to a conviction of the offence of murder (under section 302), and the sentence of five years' rigorous imprisonment was altered to a sentence of death.

The facts and the material provisions of the Code of Criminal Procedure appear from the judgement of the Judicial Committee.

1928. June, 12. *Wallach* for the appellant:—The High Court had no jurisdiction to make the order appealed from. First, because the appellant had in effect been acquitted of the charge of murder, and by section 439 (4) of the Code of Criminal Procedure the High Court could not convert that finding into one of conviction: *Emperor* v. *Sheo Darshan Singh* (2). Secondly, because the Local Government could have appealed under section 417 of the Code; section 439 (5) consequently prevented any proceedings by way of revision from being entertained.

Dunne, K. C., and *Kenworthy Brown* for the respondent:—Section 439 (4) applies only where there has been a complete acquittal, otherwise the powers of the High Court on revision would be much cut down: *In re Bali Reddi* (1). It is submitted that the view taken in *Emperor* v. *Sheo Darshan Singh* (2) and *Emperor* v. *Shivputraya* (3) was erroneous. It is not material that

(1) (1913) I. L. R., 37 Mad., 119. (2) (1922) I. L. R., 44 All., 332.
(3) (1924) I. L. R., 48 Bom., 510.

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there was no appeal, because under section 439 the High Court had jurisdiction of its own motion to exercise all the powers given to a court of appeal. But even if the High Court had no jurisdiction to make the order, there has been no failure of justice, since upon an appeal the same results would have followed, and at the date of the revision proceedings the time for appealing had not expired. Consequently the present matter does not fall within the limited class of cases in which the Judicial Committee will interfere in criminal proceedings. The High Court in any event had jurisdiction to enhance the sentence, the maximum punishment under section 304 of the Indian Penal Code being transportation for life. If, therefore, the Board consider that the order cannot stand, it is submitted that the case should be remitted to the High Court as in *Sayyapureddi* v. *The King-Emperor* (1).

Wallach replied.

July, 2. The judgement of their Lordships was delivered by Sir LANCELOT SANDERSON :—

By His Majesty's Order in Council, dated the 22nd of March, 1928, special leave to appeal against a judgement of the High Court of Judicature at Allahabad, dated the 31st of October, 1927, was granted to the appellant.

On the 18th of June, 1927, the appellant, Kishan Singh, was charged by a Magistrate of the First Class as follows :—

"That you on or about the 20th day of March, 1927, at Bharthwa did commit murder by intentionally causing the death of Kuber Singh and Shoran Singh and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session. And I hereby direct that you be tried by the said court on the said charge."

He was tried on the said charge by the Additional Sessions Judge of Aligarh, with the aid of four assessors,

(1) (1920) I.L.R., 44 Mad., 297; L.R., 48 I. A., 35.

and on the 31st of July, 1927, the learned Judge delivered his judgement. He recited the finding of the assessors as follows :—

"All the assessors are unanimously of the opinion that the accused was guilty under section 304, Indian Penal Code, and in their opinion the story about the *rath* was a false one and the accused had shot down Kuber Singh as he had seen him cohabiting with his own wife. They were also of opinion that both Shoran Singh and Kuber Singh were shot by Kishan Singh with his gun and the *gandasa* story was a got-up one and the *gandasa* was never used by the accused in order to kill Shoran Singh. They were also of the opinion that in the struggle which ensued between Kishan Singh and Shoran Singh the gun went off and shot Shoran Singh."

The learned Judge concluded his judgement by saying :—

"Agreeing with all the assessors I find the accused guilty under section 304, Indian Penal Code, for committing both the said murders. I sentence him to three years' rigorous imprisonment for the murder of Kuber Singh under section 304, Indian Penal Code, and I sentence him to five years' rigorous imprisonment for the murder of Shoran Singh with his gun under section 304, Indian Penal Code, both the sentences to run concurrently."

Although the learned Judge in the above-mentioned part of his judgement spoke of the "murder of Kuber Singh" and "the murder of Shoran Singh," it is clear that the sentence was passed under section 304 of the Indian Penal Code. That section deals with culpable homicide not amounting to murder, and it must, therefore, be taken for the purposes of this appeal that the offence of which the appellant was found guilty by the learned Judge was culpable homicide not amounting to murder.

The charge, as already stated, was that the appellant had committed an offence punishable under section 302 of the Indian Penal Code, viz., murder.

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It is, however, provided by section 238 (2) of the Code of Criminal Procedure that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable under section 304 of the Indian Penal Code, viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder, and that he was convicted of the offence punishable under section 304 of the Indian Penal Code.

On the 23rd of September, 1927, the Government Advocate, on behalf of the Local Government, filed an application for revision of the judgement of the learned Additional Sessions Judge of Aligarh.

The grounds of the application were as follows :—

(1) That on the evidence the accused should have been convicted under section 302, Indian Penal Code.

(2) That the sentence passed on the accused is inadequate.

The application concluded as follows :—

"It is, therefore, prayed that the conviction be allowed and the sentence passed on the accused be enhanced."

The learned counsel, who appeared for the respondent, argued that the word "altered" should be read instead of the word "allowed," whereas the learned counsel for the appellant suggested that the word "revision" should be read instead of the word "conviction."

It is not necessary to consider this matter further, for their Lordships are of opinion that, having regard to the terms of the first ground, there is no doubt but that the main object of the application for revision was to obtain a conviction of the accused in respect of the offence punishable under section 302 of the Indian Penal Code, viz., murder.

The application for revision was decided by the High Court of Judicature at Allahabad on the 31st of October, 1927.

The learned Judges, having considered the evidence, came to the conclusion that there had been a miscarriage of justice in the trial court. They accepted the application and directed that the conviction of the appellant, Kishan Singh, should be altered to a conviction under section 302 of the Indian Penal Code, and they sentenced him to death.

The main argument on which the learned counsel for the appellant relied was that the appellant had been acquitted by the trial Judge of the charge of murder, that the Local Government had not appealed from the acquittal of the appellant in respect of that charge, as they might have done under section 417 of the Code of Criminal Procedure, 1898, that inasmuch as the Local Government had not appealed against the said acquittal,

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the learned Judges of the High Court should not have entertained the application for revision at the instance of the Local Government, and that in any event, if it was open to the High Court to entertain the application for the purpose of enhancing the sentence in respect of the offence punishable under section 304 of the Indian Penal Code, of which the appellant had been convicted, the learned Judges had no jurisdiction to convert the finding of acquittal on the charge of murder into one of conviction.

As already stated, their Lordships are of opinion that the appellant was acquitted by the learned Judge who tried the case, in respect of the charge of murder.

They are further of opinion that the Local Government could have appealed to the High Court against that acquittal in pursuance of the provisions of section 417 of the Code of Criminal Procedure.

It is clear that the Local Government did not appeal against the acquittal.

The procedure adopted by the Local Government was to present an application for revision.

The sections of the Code of Criminal Procedure, which are material to the application for revision, are 435 (1) and 439 (1), (4) and (5).

Section 435 (1) relates to the power to call for records of inferior courts and is as follows:—

"435. (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when

calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Section 439 relates to the High Court's powers of revision and sub-sections (1), (4) and (5) are as follows :—

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the court of revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) 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."

Their Lordships are of opinion that in view of the provision contained in section 439, sub-section (4)—that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

Their Lordships' attention was drawn to a decision of the Madras High Court in *In re Bali Reddi* (1), in which, amongst other matters, it was decided that section 439, sub-section (4), must be construed as referring to

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cases where the trial has ended in a complete acquittal. The reason of that decision was that any other construction would be inconsistent with the power to "alter the finding" given to the Court as a court of revision by virtue of its power to exercise the powers conferred on a court of appeal by section 423(*b*).

It should be noted that the facts of the cited case are different from the facts of the present case, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction under sections 147 and 304 of the Indian Penal Code, and the High Court, as a court of revision, had given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in section 439, sub-section (4), refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the sub-section.

The High Court of Allahabad, in the case of *Emperor* v. *Sheo Darshan Singh* (1), decided in 1922, and the

(1) (1922) I. L. R., 44 All., 332.

High Court of Bombay in the case of *Emperor* v. *Shivputraya* (1), decided in 1924, dealing with the provisions of section 439 (4), arrived at a conclusion contrary to that of the Madras High Court in the case hereinbefore cited.

The head-note of the Allahabad case is as follows :—

"An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

"*Held*, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction."

The learned Judges in giving judgement said as follows :—

"We cannot, however, change the conviction into a conviction for murder. Sheo Darshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal."

Their Lordships are of opinion that the above is a correct statement of the law; it is indeed no more than a repetition of the provisions of the material sections of the Code of Criminal Procedure.

It was contended further by the learned counsel for the respondent that it was open to the High Court to entertain the application for revision at all events so far as it was an application that the sentence passed upon the appellant in respect of the offence, of which he had been convicted, should be enhanced; and he asked their Lordships to remit the case to the High Court of Allaha-

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bad in order that the application that the sentence in respect of the offence under section 304, Indian Penal Code, should be enhanced, might be heard and disposed of.

Their Lordships do not express any opinion on the facts of this case, or upon the decisions arrived at by the two courts in India in respect thereof, or upon the adequacy of the sentence passed upon the appellant by the learned Judge who tried the case.

In the circumstances of this case, however, their Lordships have come to the conclusion that it would not be right to remit it to the High Court for further consideration solely upon the question whether the sentence in respect of the offence, of which the appellant was convicted, should be enhanced.

Finally, it was urged by the learned counsel on behalf of the respondent that even though the learned Judges of the High Court had no jurisdiction on the application for revision to convert the order of acquittal on the charge of murder into one of conviction, there had been no injustice done to the appellant, for the Local Government could have appealed to the High Court against the acquittal, that the time for appealing had not expired, and that the High Court upon such appeal would have had before it the same materials as were before the Court on the application for revision, and the appellant could and would have been convicted of murder.

Their Lordships cannot accept that argument. They are of opinion that the learned Judges of the High Court, in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances it is impossible to hold that no injustice was done.

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Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgement of Lord WATSON in *In re Dillet* (1).

This appeal, therefore, should be allowed, the judgement and order of the High Court should be set aside, and the judgement and order of the learned Additional Sessions Judge should be restored, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Banerji.

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February 24

SIBT AHMAD AND ANOTHER (DEFENDANTS) *v.* AMINA KHATUN (PLAINTIFF)*

Muhammadan law—Shias—*Marriage*—Shia *girl married to a* Sunni—*Consent of bride*—*Presumption as to age of puberty*—*Guardian* ad litem—*Costs.*

According to the Muhammadan law applicable to the *Shia* sect, a girl is of full age when she attains the age of puberty, and, in the absence of direct evidence, there is a presumption that that event would occur between the ages of nine and ten years.

Where, therefore, a *Shia* girl of the age of nearly thirteen years was married, with the consent of her father, but without her own, to a boy who was a *Sunni*, and, before she attained the age of twenty-one years, she sued to have the marriage declared illegal and not binding on her, it was *held* that she was entitled to the decree asked for: the consent of the father could not in the circumstances take the place of the consent of the girl herself. *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (2), followed.

* First Appeal No. 497 of 1926, from a decree of Iftikhar Husain, Subordinate Judge of Budaun, dated the 12th of July, 1926.

(1) (1887) 12 App. Cas. 459 (467. (2) (1873) 26 W. R. (C. R.), 26.