REVISIONAL CRIMINAL

Before Mr. Justice Thom and Mr. Justice Bennet

1933
April, 21

EMPEROR *v.* ABDUL QAYUM*

Criminal Procedure Code, sections 369, 430—*High Court Rules, chapter I, rule* 1(*xvii*)(*d*)—*Revision for enhancement filed after dismissal of appeal by High Court—Revision entertainable—Jurisdiction.*

An application for the enhancement of sentence was made on behalf of the Local Government after the dismissal of a jail appeal by a single Judge of the High Court. The sentence which had been passed was illegal, as it was less than the minimum sentence directed by the Indian Penal Code to be passed for the offence committed. The question was whether, after the appellate powers had already been exercised on the jail appeal, it was open to the High Court to consider the enhancement of the sentence in revision.

Held, that in accordance with the exception provided for by section 430 of the Criminal Procedure Code the High Court could exercise the power of enhancement, notwithstanding the fact that the jail appeal had been decided, and that in exercising the power of enhancement the Court was not in any way violating the provisions of section 369 of the Criminal Procedure Code, because the provisions of section 369 must be read subject to the provisions of section 430.

Further, according to rule 1(*xvii*)(*d*), chapter I of the High Court Rules the powers of enhancement under chapter XXXII of the Criminal Procedure Code could be exercised by a Bench alone and that jurisdiction could not be exercised by the single Judge who decided the jail appeal. It was accordingly open to the Bench to exercise the powers of enhancement vested in the Court.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *K. N. Laghate*, for the opposite party

THOM and BENNET, JJ. :—This is an application by the Local Government for the enhancement of sentences

*Criminal Revision No. 715 of 1932, by the Local Government from an order of S. M. Ali Muhammad, Additional Sessions Judge of Etawah, dated the 21st of July, 1932.

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of three years passed under sections 392 and 307 of the Indian Penal Code concurrently by the learned Sessions and Subordinate Judge of Etawah on one Abdul Qayum. It is clear in the first place that the sentence is illegal as it is contrary to the provisions of section 397 of the Indian Penal Code. That section lays down that "If, at the time of committing robbery or dacoity, the offender . . . . attempts to cause death . . . . to any person, the imprisonment with which such offender shall be punished shall not be less than seven years." In the present case it was found by the learned Sessions Judge that the accused had caught a small girl in the streets of Etawah at night and forcibly carried her to a well and took off her nose-ring of gold and her silver *jhanjhan* and her *dhoti* with a border coloured pink and he threw the small girl into a well and ran away. The girl is aged 9 or 10 years and she remained in this well all night, supporting herself in the water on a pile of bricks which had fallen into the well and also by clinging to the places where the wall of the well had broken down. In the morning people took her out of the well and she made a report that she was robbed, that she knew the appearance of the man who robbed her, that he was a Muhammadan and that he lived in a house in front of which a horse was tethered and that she could point out the house. The sub-inspector asked her to point out the house and she pointed out the house of the accused. This occurrence took place on the night of the 21st-22nd of October, 1930, and it was not till a year later, on the 3rd of October, 1931, that the accused came to give himself up. He made an attempt at an *alibi* which failed.

Certain points have arisen in this case. There was a jail appeal made by the accused to this Court and that jail appeal was dismissed by one of the members of this Bench on the 4th of August, 1932. Under the rules of this Court the seal should not be affixed until the period of sixty days for filing an appeal through counsel had passed. The seal was not affixed until that period had

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expired from the order of the Sessions Judge which was dated the 21st of July, 1932. The letter to the Additional Sessions Judge stating that the appeal is dismissed is dated the 5th of October, 1932. Previous to that, on the 4th of October, 1932, the present application for enhancement was filed by the learned Government Advocate. The point which has been argued before us is that, according to the learned counsel for the accused, as the appellate powers of this Court have already been exercised on the jail appeal, therefore it is not open to this Court to consider the enhancement of the sentence on revision. No direct authority was shown for this proposition. The contrary has been held in *Emperor* v. *Jorabhai Kisabhai* (1). In that case an appeal by a convicted person to the Bombay High Court was dismissed and the conviction was confirmed and on an oral application made immediately afterwards by the Government Pleader the Appellate Bench issued a notice to the accused to show cause why his sentence should not be enhanced. An objection was taken on behalf of the accused that enhancement would amount to reviewing or revising the judgment already delivered and that at least the accused had under section 439(6) of the Code of Criminal Procedure a right to have his appeal reheard on the merits in regard to his conviction. The court held that the accused had no right to have his appeal reheard on the merits and that section 439(6) would not apply to the case and the court further held that the exercise of the powers of enhancement did not amount to reviewing or revising the judgment already delivered. Reference was made to *Emperor* v. *Kale* (2), but in that case it was merely held that this Court had no power to revise an order of this Court upholding a conviction on appeal, the application in revision being directed to the reversal of that finding and asking this Court to hold that the conviction was incorrect.

(1) (1926) I.L.R., 50 Bom., 783. (2) (1922) I.L.R., 45 All., 143.

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Learned counsel argued that section 369 of the Code of Criminal Procedure would apply to the present case and would prevent the exercise of powers of enhancement. That section provides that a court shall not alter its judgment or review the same, except for a clerical error, when the judgment has been signed. It is argued that the judgment of the learned single Judge of this Court fixed the sentence at three years' rigorous imprisonment and that the enhancement of that sentence in this Court would be a review or alteration of that judgment. We do not consider that this is correct and our reason for so considering is that section 430 of the Code of Criminal Procedure provides that "Judgments and orders passed by an appellate court upon appeal shall be final, except in the cases provided for in section 417 and chapter XXXII." Learned counsel argued that this would not cover the present case because he said that the exception would not apply to the exercise of the powers of enhancement in the present case. We consider that the exception does cover the power of enhancement. In exercising the power of enhancement we consider that we are not in any way violating the provisions of section 369, because the provisions of section 369 must be read subject to the provisions of section 430. In the present case it is also clear that chapter XXXII dealing with the powers of enhancement refers to a jurisdiction which could not have been exercised by the learned single Judge. Under the rules of this Court, chapter I, rule 1 (xvii)(*d*), a single Judge cannot exercise the jurisdiction of enhancement and that jurisdiction can only be exercised by a Bench of this Court. Accordingly, the order of the learned single Judge disposing of the jail appeal cannot be taken to have been an exercise of the jurisdiction of this Court under chapter XXXII so far as the power of enhancement is concerned. We therefore consider that it is open to this Bench to exercise the powers of enhancement vested in this Court. The law clearly provides

in section 397 of the Indian Penal Code that the sentence passed on the accused person who has been found guilty of attempting to cause death at the time of committing robbery cannot be less than seven years.

Accordingly we accept this application in revision. We sentence the accused Abdul Qayum to seven years' rigorous imprisonment concurrently under sections 392 and 307 of the Indian Penal Code. It was urged that no charge was made under section 397 of the Indian Penal Code, but it is not necessary that that section should appear on the charge sheet, as it is not a substantive offence.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

PARSHOTAM LAL JAITLY (DEFENDANT) *v.* HENLEY'S TELEGRAPH WORKS (PLAINTIFF)*

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Civil Procedure Code, order XXX, rules 1, 6—Suit against a firm—Partner signing vakalatnama on behalf of firm—Written statement filed on behalf of firm—Sufficient to constitute appearance and contest by the partner—Civil Procedure Code, section 115—"Case decided"—Order debarring the partner from taking part in defending the suit.

In a suit brought against a firm a written statement was field on behalf of the firm by *K*, a partner, and a vakalatnama appointing advocates on behalf of the firm was signed by *J*, another partner. At a later stage of the suit *J* instructed another advocate to file an application on his behalf that *J* had not been impleaded in the suit, which was consequently defective and liable to dismissal. This application was dismissed by the court. The question was then raised whether *J* was entitled to take part in and conduct the defence of the suit, and the court passed an order that as *J* had not put in a written statement and contested the suit he could not now be entitled to take part in

*Civil Revision No. 38 of 1933.