

PRIVY COUNCIL

CHUNBIDYA AND OTHERS *v.* KING-EMPEROR

[From the High Court at Allahabad]

J. C.*
1934December, 6

Criminal Procedure Code, sections 423, 439—Revisional power—Appeal to High Court against conviction—Enhancement of sentence.

In the exercise of its revisional powers under section 439 of the Code of Criminal Procedure, 1898, a High Court, upon having the record of a criminal proceeding brought to its notice by an appeal from the conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced, and having heard and dismissed the appeal can forthwith enhance the sentence under that revisional power although precluded by section 423 from doing so in the appeal.

Petition for special leave to appeal dismissed.

PETITION for special leave to appeal.

On August 14, 1933, the petitioners and others were convicted by the Additional Sessions Judge of Cawnpore at Banda under section 148 and section 302 of the Penal Code, read with section 149, for rioting armed with deadly weapons and with murder, and were sentenced to transportation for life.

They appealed to the High Court of Allahabad. The appeal came before THOM and KISCH, JJ., on February 20, 1934, when, before considering the evidence, the Court directed that the appellants should be given notice calling upon them to show cause why the sentences should not be enhanced.

The case subsequently came before THOM and HARRIES, JJ., as "Criminal Revision Petition No. 195 of 1934 connected with Criminal Appeal No. 855 of 1933." After hearing the arguments the learned Judges dismissed the appeals, and with regard to the present petitioners enhanced the sentences to death.

1934 December 6. *Sidney Smith*, for the petitioners: The High Court had no jurisdiction to enhance the sentences, having regard to the course followed.

*Present: Lord ATKIN, Lord ALNESS, and Sir SHADI LAL.

The Code of Criminal Procedure expressly provides by section 423 that upon an appeal against a conviction the sentence cannot be enhanced. It is only under the revisional power given by section 439 and upon the proceeding in the lower court being brought to its notice that the Court can enhance a sentence. The words in the section "or which otherwise comes to its notice" do not include the case where the Court has notice only by the petition of appeal. Even if they do, it is only after hearing the appeal that the Court can call upon the appellant to show cause why the sentence should not be enhanced. A contrary view would be incongruous, having regard to the express provision of section 423: *Emperor v. Mangal* (1). It is conceded that the course followed in this case was in accordance with the practice in other High Courts. By the Code of 1872 all appellate courts had power to enhance the sentence. The Codes of 1882 and 1898 took away that power and enacted that it is only by the High Court acting in revision that enhancement can be ordered. Section 439 should not be construed so as to impinge upon that important alteration in criminal procedure. [Reference was made also to *Kishan Singh v. The King-Emperor* (2).]

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Wallach for the Crown: The clear words of section 439 cannot be given the limited meaning contended for. By section 439, sub-section (6) a convicted person showing cause against an enhancement of sentence is entitled also to show cause against his conviction. A postponement of notice to enhance until after the hearing of the appeal might therefore involve going into all the facts again. In a petition for special leave to appeal by Beri Singh and others heard and rejected by the Board on October 22 last, the shorthand note shows that the then petitioners put forward the same contention as the present petitioners and relied unsuccessfully upon *Emperor v. Mangal* (1). [He was stopped].

Sidney Smith replied.

(1) (1924) I.L.R., 49 Bom., 450. [Recently disapproved. See *Emperor v. Babu Pandurang* (1934) I.L.R., 58 Bom., 392].

(2) (1928) I.L.R., 55 I.A., 392.

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The judgment of their Lordships was delivered by Lord ATKIN:

This is an application for special leave to appeal from a judgment of the High Court of Judicature at Allahabad. The question arose in this way. The petitioners were tried before the Additional Sessions Judge of Cawnpore on a charge of murder, and they were in fact convicted of murder. It is unnecessary to go into the facts of the case except to say that the particular act of which they were found guilty was that, with other people, they assaulted the deceased and, after having beaten him severely, laid him down and cut off his foot with an axe and left him there to bleed to death. The Sessions Judge having convicted the petitioners of murder, sentenced them to transportation for life, and they thereupon appealed to the High Court.

On appeal to the High Court the High Court, purporting to exercise their powers under the revision section (439 of the Code of Criminal Procedure), gave notice to the accused to show cause why the sentence should not be enhanced, and, after hearing them, ordered the sentence to be increased in the case of the four petitioners and ordered them to be sentenced to death instead of transportation for life. What has been urged before their Lordships is that inasmuch as the case came before the High Court on appeal, and inasmuch as under the provisions as to appeal the High Court dealing with appeals has no power to enhance the sentence, the High Court has no power to resort to its further powers of revision which give it power to enhance the sentence. That appears to their Lordships to be a mistake. The distinction seems to be fairly plain. The powers relating to appeals under section 423 of the Criminal Procedure Code are given to the appellate court, and the appellate court may include a court subordinate to the High Court, and the appellate court as such has no power to enhance a sentence, differing from the provision which was in the old Criminal Procedure Code of 1872. On

the other hand, the powers of enhancing of sentence in revision are given to the High Court alone, and the powers of revision are given to the High Court 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.

Their Lordships are clearly of opinion that when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so. In this case the High Court did choose to exercise its revision powers. Mr. Sidney Smith points out that the notice which actually was served was headed in the criminal appeal; but it is quite plain that the subsequent proceedings were in fact in revision, and it was made plain that the Court was exercising its revision power. That being so, it appears that the Court had complete jurisdiction to act as they did, and their Lordships therefore, in the exercise of the ordinary rules which govern criminal appeals, see no reason at all in this particular case why any leave to appeal should be granted.

In those circumstances, they will humbly advise His Majesty that the petition be dismissed.

Solicitors for petitioners: *Hy. S. L. Polak & Co.*

Solicitor for the Crown: *Solicitor, India Office.*

PRIVY COUNCIL

MAHADEO PRASAD SINGH AND OTHERS v.
KARIA BHARTI

[On appeal from the High Court at Allahabad]

Limitation Act (IX of 1908), schedule I, article 144—Religious institution—Math property—Alienation—Suit by de facto mahant—Limitation—Adverse possession.

J. C.*
1934
December, 18

*Present: Lord ATKIN, Lord ALNESS, and Sir SHADI LAL.