APPELLATE CRIMINAL

Before Sir C. M. King, Knight, Chief Judge, and Mr. Justice E. M. Nanavutty

1936 *January*, 8

RAM JAS (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Criminal Procedure Code (Act V of 1898), sections 369, 419, 420 and 421—Jail appeal, summary dismissal of—Appeal through counsel, whether competent.

Once an appeal presented by a convict from jail has been summarily dismissed, it is not open to the same prisoner to file another appeal through a counsel. *Case law discussed.*

Mr. *Matin Uddin*, for the appellant.

The Government Advocate (Mr. *H. S. Gupta*), for the Crown.

KING, C.J. and NANAVUTTY, J.:—These appeals have been laid before us for deciding the question whether an appeal through counsel can be heard after an appeal presented by the appellant from jail has been summarily dismissed. We have heard the learned counsel for the appellants as also the learned Government Advocate. In support of the contention that the summary dismisssal of a jail appeal is no bar to the subsequent entertainment of another appeal presented by the same prisoner through a counsel, reliance has been placed upon a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Hulai and another* v. *King-Emperor* (1), as also upon a single Judge decision of the Lahore High Court reported in *Mathra Das* v. *The Crown* (2). In this latter ruling, it was held that section 561-A of the Code of Criminal Procedure was in no way limited or governed by section 369 and the High Court had power to reconsider the question of sentence in the ends of justice. Reliance was also placed by the learned counsel for the appellants upon a ruling of the Patna

*Criminal Appeal No. 577 of 1935, against the order of M. Humayun Mirza, Sessions Judge of Barabanki, dated the 28th of September, 1935.

(1) (1916) 3 O.L.J., 526. (2) (1927) A.I.R., Lah., 139.

High Court reported in *Assistant Government Advocate* v. *Upendra Nath Mukerji* (1). In our opinion this ruling does not bear upon the question that is before us for consideration. A Full Bench ruling of the Lahore High Court reported in *Mohammad Sadiq* v. *The Crown* (2), was also cited by the learned counsel for the appellants in support of their contention. That ruling, however, has also no bearing upon the question before us, because that was a case in which an appeal was filed through a counsel, but for some reasons the counsel was not heard and the appeal was dismissed without hearing the counsel, and the learned Judges of the Lahore High Court held that in such a case when the appeal had been dismissed without giving the appellant or his pleader a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the High Court had inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same. This ruling, therefore, does not touch the question which is before us for consideration. Reliance was also placed upon an old ruling of the Allahabad High Court reported in *Emperor* v. *Bhawani Dihal* (3). In this case a person convicted by a Magistrate of the 1st class and sentenced to a term of rigorous imprisonment submitted an appeal to the Sessions Judge through the Superintendent of the District Jail and an appeal on his behalf was also separately presented by a local vakil. The Sessions Judge summarily rejected the jail appeal on the 2nd of April, 1906, and on the 7th of April, 1906, on the basis of his order of the 2nd of April, 1906, he summarily dismissed the appeal filed through the vakil without calling upon the pleader to argue the appeal presented by him. It was held that the order of the 2nd of April, 1906, was insufficient to support the dismissal of the appeal filed

(1) (1931) A.I.R., Pat., 81. (2) (1925) A.I.R., Lah., 355.
(3) (1906) A.W.N., 203.

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on the 24th of March, 1906, through a pleader. It was also held that, in view of the ruling of the Allahabad High Court reported in *Queen-Empress* v. *Nannhu* (1), the Sessions Judge should have briefly stated his reasons for dismissing the appeal and that the appellant's vakil ought to have been heard on the merits before the appeal presented by him was dismissed. This ruling also does not touch the question before us as the appeal had been presented by the vakil before the jail appeal had been summarily dismissed.

On the other hand, the learned Government Advocate has relied upon a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Ganga Din* alias *Nanga* v. *King-Emperor* (2), in which Mr. Justice DANIELS, who was then Judicial Commissioner of Oudh held that a judgment passed on an appeal under section 420 of the Code of Criminal Procedure by an appellant who is in jail and a judgment on a similar appeal filed through a Counsel under section 419 of the Code of Criminal Procedure stood both on the same level; and that the one was just as much a binding and final judgment as the other; and the appeal filed through Counsel after the rejection of the jail appeal was incompetent and had to be rejected. This view was followed by another learned Judge of the late Court of the Judicial Commissioner of Oudh reported in *Ram Autar and another* v. *King-Emperor* (3), in which it was held that where an accused had sent his petition of appeal through jail and it had been dismissed by the High Court, it was not competent for the High Court to entertain a subsequent appeal filed through a Counsel, and the view taken by Mr. Justice DANIELS, in the ruling cited above was approved of. The same view was taken by two learned Judges of this Court in Criminal Appeal No. 545 of 1927 decided on the 16th of November, 1927,

(1) (1895) I.L.R., 17 All., 241. (2) (1922) 9 O.L.J., 1.
(3) (1924) 11 O.L.J., 536.

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and in Criminal Appeal No. 444 of 1928 decided on the 12th of October, 1928.

In *Khiali and another* v. *Emperor* (1), it was held by two learned Judges of the Allahabad High Court that when a petition of appeal was sent by a convict through the Superintendent of Jail and was summarily rejected, it was not open to the same convict to present a second petition of appeal through a counsel, and the ruling of the Bombay High Court reported in *Queen-Empress* v. *Bhimappa* (2), was followed. Similarly two learned Judges of the Madras High Court *In re Kunhammad Haji* (3) held that neither section 369 nor section 439 of the Code of Criminal Procedure empowered the High Court to revise or review the judgment of one or more of its Judges in a Criminal Appeal or Revision and that the dismissal by the vacation Judge of appeal by a convict from jail against a conviction could not be regarded as a nullity or otherwise than as a bar to the hearing of an appeal preferred a second time by the same accused against the same conviction through a Counsel and that when an appeal had once been disposed of, the Court was *functus officio* and could not hear the appeal again.

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The view taken by the High Courts of Madras, Bombay and Allahabad was followed in a Full Bench decision of the Court of the Judicial Commissioner of Sind in *Shahu and others* v. *Emperor* (4). In this case it was held that an order passed under section 421 of the Code of Criminal Procedure, dismissing an appeal filed under section 419 of the said Code was *prima facie* final and that such an order could not be vacated under the provision of section 561-A of the Code of Criminal Procedure unless it was proved that either of the conditions precedent to the passing of the order as laid down by section 421 had not been fulfilled and that was a question of fact depending on the circumstances of each

(1) (1922) 20 A.L.J., 739.
(2) (1895) I.L.R., 19 Bom., 732.
(3) (1925) I.L.R., 46 Mad., 382.
(4) (1935) 155 I.C., 736.

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case. It was further held that there was no dismissal of a criminal appeal for default of appearance by a party as in a civil case and therefore when an appeal was summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under section 421 of the Code of Criminal Procedure, it was *prima facie* a judgment within the meaning of section 369 of the said Code, and that a Court of competent jurisdiction might decide a case rightly or wrongly; and it was not open to the same Judges much less to other Judges of co-ordinate jurisdiction to review that decision.

This view was also upheld by the High Court of Patna in a case reported in *Pem Mahton* v. *King-Emperor* (1). In this case the facts were as follows: An accused person presented a petition of appeal from the conviction and sentence passed on him, through the officer in charge of the jail in accordance with the provisions of section 420 of the Code of Criminal Procedure, and the appeal was dismissed by the High Court; subsequently another memorandum of appeal was presented to the High Court through an advocate and was admitted by the Bench which had dismissed the jail appeal. In these circumstances it was held that the High Court had no power to entertain an appeal from the conviction and sentence passed on the appellant after the dismissal of the appeal which he had preferred from jail and that neither the Bench which had admitted the appeal nor the Bench before which it came for final hearing had power to review or revise the order of dismissal.

The same view of the law was taken by a Bench of two learned Judges of the Calcutta High Court in *Dahu Raut* v. *Emperor* (2). In this case it was held that the Criminal Bench of the High Court, when it had signed its judgment, had no power to alter or review it, even if made without jurisdiction, except to correct a

(1) (1935) I.L.R., 14 Pat., 392. (2) (1934) I.L.R., 61 Cal., 155.

clerical error. The only remedy, in such circumstances, was to move the Local Government to exercise the Royal prerogative, where the accused had been prejudiced. It was further held that section 561-A of the Code of Criminal Procedure did not in any way add to the powers of the High Court; it merely declared that such inherent powers as the High Court might possess should not be deemed to be limited or affected by anything contained in the Code.

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The Lahore High Court in *Raju and another* v. *The Crown* (1), took a similar view and held that section 561-A of the Code of Criminal Procedure did not confer upon the High Court any new powers but merely declared that such inherent powers as the Court might possess should not be deemed to be limited or affected by anything contained in the Code, and that the High Court therefore had no power to alter or review its own judgment in a criminal case, once it had been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error. It was further held that there was no conflict between section 561-A and section 369 of the said Code.

Thus it would appear that the High Courts at Calcutta, Madras, Bombay, Allahabad, Lahore and Patna as well as the Court of the Judicial Commissioner of Sind have unanimously held that once an appeal presented by a convict from jail had been dismissed, it was not open to the same prisoner to file another memorandum of appeal through a counsel, and after carefully considering the rulings cited above, we are also of the same opinion. We, therefore, hold that the appeals now presented through counsel are incompetent and must be rejected and we order accordingly.

Appeal dismissed.

(1) (1929) I.L.R., 10 Lah., 1.