

that it should be replaced by words mentioning the actual period which it was intended to represent.

In this view of the law it is unnecessary for us to deal with the contention urged on behalf of the respondent that sufficient cause has been shown for setting aside the abatement. We accordingly dismiss the appeal with costs.

A. N. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Campbell.

WALLU—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 30 of 1923.

1923

May 31.

Criminal Procedure Code, Act V of 1898, sections 236, 237 (1) and 238 (2)—whether on appeal a conviction for murder can be altered to one under one of the sections of the Penal Code dealing with offences against property.

Held, that where an accused person has been charged only with murder and has been convicted and the conviction is set aside by the High Court on appeal that Court cannot alter the conviction to one under one of the sections of the Penal Code dealing with offences against property.

Queen-Empress v. Yusuf (1), followed.

Criminal Procedure Code, 1898, sections 236, 237 (1) and 238 (2), referred to.

Appeal from the order of D. Johnstone, Esquire, Sessions Judge, Ferozepore, dated the 14th October 1922, convicting the appellant.

COOPER, for Appellant.

DES RAJ Sawhney, Public Prosecutor, for Respondent.

1928

WALLU
v.
THE CROWN.

The judgment of the Court was delivered by—

CAMPBELL J.—The appellant Wallu has been convicted under section 302 of the Indian Penal Code of the murder of a boy named Haku and has been sentenced to transportation for life.

The offence is alleged to have been committed on the 2nd July 1922 on which day Haku was last seen alive. His body was discovered in the canal on the 3rd July at a place about 3 miles from Mohanke village where he and the appellant lived. The medical man who conducted the *post-mortem* examination was unable to give any opinion as to the cause of death because putrefaction was too far advanced. He deposed that there were a faint blue mark on the right side of the neck, 2 slight bruises on the left side of the face, a scratch on the right ear and another blue mark on the front of the chest and he said that as the above marks on the body indicated violence and struggle, death might have been due to suffocation or strangulation. This, however, the deposition of the witness made clear, was a mere guess. The final conclusion was as stated above that owing to advanced putrefaction no opinion could be formed about the cause of death.

The learned Sessions Judge has held the following facts to be proved :—

1. The appellant found the deceased Haku playing with 3 other companions, gave him a melon and took him away on the promise of giving him more.
2. The appellant and Haku were afterwards seen together near the canal by one Sundar and after that Haku was never seen alive again.
3. Melon seeds were found in the deceased Haku's stomach at the *post-mortem* examination.
4. The appellant's shoes were found near the canal bridge hidden in some reeds.
5. Haku when taken away by the appellant was wearing 3 ornaments, and these were not on his dead body.
6. The appellant subsequently had knowledge of the place in which these ornaments were concealed and

himself dug them up during the police investigation at a hut where he and some of his family lived.

We express no opinion on these findings, but assuming them to be correct we do not think that they exclude every reasonable hypothesis other than that Haku's death was caused by the appellant. If the appellant can be held to have robbed the deceased it does not follow necessarily that he afterwards killed him. It is not impossible that the deceased fell into the canal without the agency of the appellant, and there is no evidence of the actual cause of death.

The sole charge framed against the appellant was one under section 302 of the Indian Penal Code, and it would not, in our opinion, be open to us to alter the conviction under section 302 to a conviction under one of the sections dealing with offences against property. The appellant might perhaps have been charged under section 236, Code of Criminal Procedure, with the offence of robbery as well as with the offence of murder, but he was not so charged, and the essentials of the two offences are so widely different that we do not think that section 237 (1) and still less section 238 (2), could be applied. In this view we are supported by the decision of the Allahabad High Court in *Queen-Empress v. Yusuf* (1).

Whether the appellant is to be retried on another charge is a question which must be decided by the District Magistrate of his district. We say no more than that our present order of acquittal on the charge of murder shall not prevent another trial upon a charge under one of the sections of Chapter XVII, Indian Penal Code.

We accept the present appeal, set aside the conviction and sentence, and acquit the appellant of the charge under section 302, Indian Penal Code.

C. H. O.

Appeal accepted.

1923

WALLU
v.

THE CROWN.