

APPELLATE CRIMINAL.

Before Mr. Justice Fforde and Mr. Justice Addison.

FAZAL KHAN, Appellant,

versus

THE CROWN, Respondent.

Criminal Appeal No. 705 of 1926.

Criminal Procedure Code, Act V of 1898, section 439—Acquittal—meaning of—power of High Court on revision side to alter a conviction under section 304 to one under section 302 of the Penal Code.

Where a person has been tried under section 302 of the Penal Code and convicted under section 304, this does not mean for the purposes of section 439 of the Code of Criminal Procedure that he has been acquitted. Acquittal means a complete acquittal and discharge of all the allegations and facts charged, and not an acquittal on one charge and a conviction on another.

Held therefore, that the High Court was competent on the revision side to alter the conviction of an accused person under section 304 to one under section 302 of the Penal Code.

Bhola v. Emperor (1), *In re Bali Reddi* (2), and *Queen v. Bayard* (3), followed.

Emperor v. Shoo Darshan Singh (4), disapproved.

Appeal from the order of H. F. Forbes, Esquire, Sessions Judge, Attock, at Campbellpur, dated the 28th April 1926, convicting the appellant.

JUDGMENT.

FFORDE J.

FFORDE J.—The appellant was tried under section 302 of the Indian Penal Code of having murdered a young girl called *Mussammatt Sakina Jan* by stabbing her a number of times with a spear. The learned Sessions Judge somehow came to the conclusion that the offence was not murder, and he convicted the appellant under the first part of section 304 of the

(1) 12 P. R. (Cr.) 1904.

(3) (1892) 2 Q. B. 181.

(2) (1913) I. L. R. 37 Mad. 119. (4) (1922) 20 All. L. J. 190; 65 I. C. 858

Indian Penal Code and sentenced him to rigorous imprisonment for ten years. He appealed through jail, and the matter came before Broadway J. who directed that notice should issue to the appellant calling on him to show cause (1) why the conviction should not be altered to one under section 302 of the Indian Penal Code and a sentence of death passed, and (2) why the sentence under section 304 of the Indian Penal Code should not be enhanced.

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Mr. Balkishan Mehra appears on behalf of the respondent in the revision matter. The case is a perfectly clear one. The convict admitted that he stabbed *Mussamat* Sakina Jan three times with a spear. The medical evidence shows that there were in fact five incised wounds, one of them, $1\frac{1}{2}'' \times 1''$, penetrating the chest cavity, and another penetrating the abdominal cavity. From the latter wound the large intestine was protruding. The covering of the heart was cut opposite the chest wound, and the pulmonary artery on the right side was also cut. It is quite clear from these injuries, and from the convict's own admission, that he either intended to kill the girl or that he intended to inflict such injuries as he knew were likely to cause death.

Upon the evidence which was before the trial Court he should, in my opinion, have been convicted of an offence under section 302 of the Indian Penal Code. The case was clearly one of murder and nothing else, and by no possible construction of the Penal Code could it be held to fall within the provisions of section 304. Mr. Balkishan Mehra who has been assigned for the defence on the hearing of the revision application (the Crown not being represented) has, relying upon *Emperor v. Sheo Darshan Singh* (1), argued that the conviction cannot be altered to one

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under section 302, as this would have the effect of converting a finding of acquittal under that section to one of conviction. In my opinion, to alter the conviction from one under section 304 to one under section 302 and to pass an appropriate sentence under the latter section, does not amount to altering an acquittal into a conviction. Where a person has first been tried under section 302, and convicted under section 304, this does not mean, for the purposes of section 439 of the Code of Criminal Procedure, that he has been acquitted under the former section. This Court in *Bhola v. Emperor* (1) has held that acquittal means a complete acquittal and discharge of all the allegations and facts charged, and not an acquittal on one charge and a conviction on another. If further authority is required for this proposition it is to be found in *Crown v. Bali Reddi* (2). In *Queen v. Bayard* (3), it was held that the words "acquitted upon an indictment" mean "acquitted of all the misdemeanours charged in the indictment."

For the reasons given above I find myself unable to accept the view taken by the learned Judges of the Allahabad High Court in *Emperor v. Sheo Darshan Singh* (4).

I would, accordingly, alter the conviction to one under section 302, Indian Penal Code, but as the Crown has not appeared to prosecute this revision, and as the respondent is a youth of only 18 years of age, I do not think it is necessary to impose the death penalty. I would accordingly impose the lesser punishment of transportation for life.

ADDISON J.

ADDISON, J.—I concur.

A. N. C.

(1) 12 P. R. (Cr.) 1904.

(3) (1892) 2 Q. B. 181.

(2) (1913) I. L. R. 37 Mad. 119. (4) (1922) 20 All. L. J. 190; 65 I. C. 858.