

REVISIONAL CRIMINAL.

Before Teh Chand J.

THE CROWN AND MST. NUR

(COMPLAINANT) Petitioners

versus

MOHAMMAD KHAN—Respondent.

Criminal Revision No. 1593 of 1932.

Criminal Procedure Code, Act V of 1898, Section 562 (3) (as amended by Act XVIII of 1923)—First offender—released on probation—Revision—Power of High Court to inflict sentence of imprisonment—Enhancement of sentence—Section 439.

Held, that since the addition of sub-section (3) to section 562 of the Criminal Procedure Code, the High Court has power, on appeal or when exercising its powers of revision, to set aside the order of the trial Magistrate under section 562 and in lieu thereof to pass sentence on the offender according to law, provided that it cannot inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

And, that it can no longer be argued that the High Court has no jurisdiction under section 439 of the Code of Criminal Procedure to pass a sentence of imprisonment in a case in which the Magistrate has taken action under section 562.

Emperor v. Mst. Kesar (1), relied on.

Emperor v. Ghasita (2), and *Emperor v. Nur Khan* (3), not followed.

Case reported by Mr. C. King, District Magistrate, Attock, at Campbellpur, with his No. 4056-E of 30th November, 1932, under section 438, Criminal Procedure Code, for orders of the High Court.

MOHAMMAD AMIN KHAN, for (Crown), BHAGWAT DAYAL, for (Complainant), Petitioners.

MOHAMMAD TUFAIL, for Respondent.

(1) (1926) 92 I. C. 591.

(2) (1915) I. L. R. 37 All. 31.

(3) (1919) 20 Cr. L. J. 99.

TEK CHAND J.—The petitioner Mohammad Khan was convicted under section 354, Indian Penal Code, and directed under section 562, Criminal Procedure Code, to execute a bond for Rs. 500 with one surety in the same amount, to keep the peace for nine months. His appeal was dismissed by the Additional District Magistrate with the remark that “the sentence was a very lenient one.” On being moved by the complainant the District Magistrate has reported the case to this Court under section 438, Criminal Procedure Code, with the recommendation that the order under section 562 be set aside and a substantial sentence of six months’ rigorous imprisonment imposed.

The facts found by the trial Magistrate and the Additional District Magistrate are that Fateh Khan, nephew of *Mussammat* Nur, complainant, was suspected of having illicit intimacy with *Mussammat* Shahzadan, wife of Mohammad Khan, petitioner. On the 18th May, 1932, Fateh Khan and *Mussammat* Shahzadan were seen talking to each other by *Mussammat* Sahib Bi who communicated this information to Mohammad Khan. In the afternoon Mohammad Khan met *Mussammat* Nur near the well of the mosque where she had gone to water her cattle and made a criminal assault on her with intent to outrage her modesty. He caught her by the arms, felled her to the ground, got over her, lifted her shirt and pulled her breasts. She raised a hue and cry, which attracted P. W. Mauli, Dalli and Walayat to the scene and they rescued her.

There can be no doubt that the assault was of a very daring nature and was committed publicly and in broad day-light near the village mosque. The

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learned trial Magistrate thought that a sentence of imprisonment or fine was not called for as Mohamad Khan, petitioner, had received provocation at the hands of Fateh Khan a nephew of the complainant. This, however, (even if the facts were as alleged) afforded no justification whatever for the petitioner to criminally assault *Mussammat Nur*. As pointed out rightly by the learned District Magistrate *Mussammat Nur* was absolutely innocent and had no connection whatever with the alleged misdeeds of her nephew, Fateh Khan. The petitioner is a full grown man of twenty-five and his act in publicly outraging the modesty of *Mussammat Nur* in this high-handed manner merited a substantial sentence of imprisonment.

Mr. Mohammad Tufail has argued that this Court has no jurisdiction, under section 439 of the Code of Criminal Procedure, to pass a sentence of imprisonment in a case in which the magistrate has taken action under section 562. He urges that in such a case no "sentence" had been passed by the Court below and, therefore, no question of "enhancing the sentence" arose. In support of this contention he cited *Emperor v. Ghasita* (1), and a decision of the Judicial Commissioners of Nagpur reported as *Emperor v. Nur Khan* (2). The argument is without force in view of the amendment made by Act XVIII of 1923, by which sub-section (3) was added to section 562, specifically empowering the High Court on appeal, or when exercising its powers of revision, to set aside the order of the trial Magistrate under section 562 and in lieu thereof to pass a sentence on the offender according to law, provided

(1) (1915) I. L. R. 37 All. 31.

(2) (1919) 20 Cr. L. J. 99.

of course that the High Court cannot, under this subsection, inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted. The cases referred to by Mr. Mohammad Tufail were decided under the old Code and have become obsolete in view of the amendment of 1923. It may be mentioned that in *Emperor v. Mst. Kesar* (1), the Allahabad High Court refused to follow *Emperor v. Ghasitu* (2), holding that it was no longer good law. I therefore, overrule this objection.

I agree with the learned District Magistrate that this was not a case in which the offender should have been let off merely on execution of a bond under section 562 and that a sentence of imprisonment should have been imposed. I think, however, that the sentence of six months' rigorous imprisonment proposed by the District Magistrate is excessive. In my opinion, in the peculiar circumstances of the case, the ends of justice will be met by sentencing the petitioner to rigorous imprisonment for three months.

I accept the petition for revision and set aside the order of the Magistrate under section 562, Criminal Procedure Code, and in lieu thereof sentence Mohammad Khan to rigorous imprisonment for three months.

The District Magistrate is directed to take steps to carry out this order.

N. F. E.

Revision accepted.

(1) (1926) 92 I. C. 591.

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