CRIMINAL REVISION.

Before Mr. Justice Mosely.

THE KING *v.* NGA BA SAING.*

1939

June 2.

Finality of judgment—Appeal by accused summarily dismissed—Recommendation for enhancement of sentence—Accused to show cause against enhancement—Accused cannot show cause against conviction—Criminal Procedure Code, ss. 369; 439 (5) (6).

Where an appeal by an accused person against his conviction and sentence had been summarily dismissed by the High Court, but subsequently proceedings in revision were opened on the recommendation of the District Magistrate for enhancement of the sentence, the accused, in showing cause against such enhancement cannot be heard to show cause against his conviction under sub-section (6) of s. 439 of the Criminal Procedure Code.

To allow the accused to show cause against his conviction under such circumstances would offend the ordinary principle of finality of judgment as embodied in s. 369 of the Code. Sub-section (6) of s. 439 refers only to sub-section (5) thereof and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are opened against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction.

Crown v. *Dhanna Lal*, I.L.R. 10 Lah. 241 ; *Crown* v. *Sher*, I.L.R. 8 Lah. 521 ; *Emperor* v. *Abdul Qayum*, I.L.R. 55 All. 725 ; *Emperor* v. *Jorabhai*, I.L.R. 50 Bom. 783 ; *Hook* v. *Administrator-General, Bengal*, I.L.R. 48 Cal. 499, referred to.

Emperor v. *Mangal*, I.L.R. 49 Bom. 450, dissented from.

MOSELY, J.—The respondent, Nga Ba Saing, was convicted under the second part of section 307 of the Penal Code and sentenced to five years' rigorous imprisonment. The learned District Magistrate, Sagaing, has submitted the case in revision with the recommendation that the sentence be enhanced. The accused had preferred an appeal (No. 267 of 1939), before this, and that appeal was summarily dismissed about a month before receipt of the District Magistrate's recommendation.

The respondent, when called upon to show cause against enhancement of sentence, has endeavoured, in

* Criminal Revision No. 178B of 1939 from the order of the District Magistrate, Sagaing, in Criminal Regular Trial No. 10 of 1939 of the Headquarters S.P. Magistrate of Sagaing.

1939

THE KING v. BA SAING.

MOSELY, J.

addition, to show cause against his conviction, and the first question to be considered in this case is whether that can be done, having regard to the fact that the accused's appeal has already been dismissed.

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered, it is the practice of this Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision case are heard at one and the same time. I do not know of any previous case in this Court where a recommendation for enhancement of sentence has been made after the decision of the appeal, and there is certainly no reported case in the Rulings of this Court on the subject. There is, however, considerable authority in the Indian High Courts for the view that in such a case the accused person cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence.

The High Court's powers in revision are laid down in section 439 of the Criminal Procedure Code. Sub-section (1) enacts that the High Court may exercise any of the powers conferred on a Court of Appeal by certain sections, of which the only one in point, section 423 (1) (*a*), lays down that the appellate Court in an appeal from an order of acquittal may, *inter alia*, find the accused guilty and pass sentence on him according to law, and section 439, sub-section (1), goes on to provide that the Court may enhance the sentence. This power to enhance the sentence is subject to sub-section (2), namely, notice to the accused person, and to sub-section (3) in regard to the maximum enhancement in certain cases. Sub-section (4) prevents a finding of acquittal being converted into a conviction.

Sub-section (5) says that where under this Code an appeal lies and no appeal is brought no proceedings by

1939

THE KING v. BA SAING.

MOSELY, J.

way of revision should be entertained at the instance of the party who could have appealed. This sub-section prevents a revision application being treated as an appeal when no appeal has been brought.

Sub-section (6), which is the one in question in this case, says :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

This last sub-section was only added when the Code was revised in 1923. It is important to note that the initial words are "Notwithstanding anything contained in this *section*", and not "Notwithstanding anything contained in this *Code*."

It would seem clear, therefore, that sub-section (6) can only refer to sub-section (5) of the section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Had it been otherwise, it could have been contended in the case of an accused to whom notice had been issued and who had not appealed or in a non-appealable case had not applied for revision of his conviction, that he could not question the correctness of his conviction, and that was in fact decided under the old Code in *Emperor* v. *Chinto* (1). It would seem, therefore, that sub-section (6) is intended to operate as an exception to what is otherwise laid down in the section itself.

(1) (1908) I.L.R. 32 Bom. 162.

1939

THE KING v. BA SAING.

MOSELY, J.

It is only by virtue of the provisions of this sub-section that the accused can show cause against his conviction, and, as I have said, under the words of the section itself it would seem that the accused is not entitled to do so where his appeal has been previously dismissed.

It is laid down elsewhere in the Code that judgments once passed cannot be altered or revised except as provided for by this section.

Section 369 of the Code says:

"Save as otherwise provided by this Code . . . no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

This section must be read with section 430 of the Code, where it is said that "Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417" (appeals against an acquittal by the Government) "and Chapter XXXII" of which section 439 is a part.

It appears, therefore, to me that the order of this Court in appeal must be regarded as final, and that the accused person cannot now be heard to show cause against his conviction.

Another view was taken incidentally in *Emperor* v. *Mangal Naran* (1), where it was remarked that it was the practice of the Bombay High Court to issue notice against enhancement in revision after the disposal of the appeal, and that the accused then still had the right to show cause against his conviction, though any attempt to set aside his conviction would not have much chance of success.

This view, however, was dissented from in *Emperor* v. *Jorabhai Kisabhai* (2), a case on all fours with the present one, where it was said that such a case where

(1) (1925) I.L.R. 49 Bom. 450. (2) (1926) I.L.R. 50 Bom. 783.

the appeal had already been heard on the merits was not provided for in sub-section 6, and was outside the purview of that sub-section. It was also remarked that to allow cause to be shown against the conviction would be to re-hear the appeal on the merits, and that that would be a proceeding which is against the ordinary principle of finality of judgments, such as has often been referred to by the Privy Council, for instance, in *Hook* v. *The Administrator-General of Bengal* (1).

This ruling was followed in *Crown* v. *Sher* (2). In that case a petition by the accused for revision of his conviction and sentence was dismissed, whereupon the Crown presented an application in revision for enhancement of the sentence. It was held there that the accused was no longer entitled under section 439, sub-section (6), to reopen the question of his guilt in the face of the previous finding by the High Court.

The Crown v. *Dhanna Lal* (3), a similar case, also followed *Emperor* v. *Jorabhai Kisabhai*.
It was said there :

"Sub-section (6) was meant to give an accused person to whom a notice of enhancement of sentence was issued and who has not appealed, or if no appeal lay, has not applied for revision of his conviction, an opportunity to question the correctness of his conviction if it was proposed to enhance his sentence."

Another case on all fours with the present one is *Emperor* v. *Abdul Qayum* (4) which also followed the decision in *Jorabhai*'s case.

It does not appear to me to make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and, if necessary, the evidence.

(1) (1921) I.L.R. 48 Cal. 499, 508, P.C.
(2) (1927) I.L.R. 8 Lah. 521.
(3) (1928) I.L.R. 10 Lah. 241.
(4) (1933) I.L.R. 55 All. 715.

1939

THE KING v. BA SAING.

MOSELY, J.

As to the merits of the case for enhancement, I am afraid that I cannot see any. This was a case of an assault with a *dah* by one ex-convict on an ex-convict, apparently arising out of a sudden quarrel. It is true that the person assaulted was unarmed. He had six injuries, two of which were on the head. The other four were on the hand, arm and fingers, and might have been caused when the complainant was defending himself. The evidence given only referred to the first blow struck. Both the accused and the complainant appear to have been drunk at the time. The main ground of the learned District Magistrate's recommendation for enhancement was that the accused person had made a previous attempt to murder the same man, Maung Po An, but I find that the previous case in which this accused, Nga Ba Saing, was convicted (Criminal Regular Trial No. 98 of 1935 of the Subdivisional Magistrate, Myinmu) was a case of an assault against a totally different person, Maung San Htaik, who gave a different father's name. It does not appear to me to be necessary to take any steps to enhance the sentence, and that will be ordered accordingly.