

1924.  
 COMMISSIONER  
 OF  
 INCOME  
 TAX  
 v.  
 MELLOR.

assessment for super-tax for that particular year, since it could only be based on his total income for the previous year which would only include the profits which he actually received for the year ending September 30, 1921, according to the share he had then in the firm.

Costs will follow the event.

Costs to be taxed as on the Original Side. Only one counsel is certified.

J. G. R.

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### CRIMINAL REVISION.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

1924.

EMPEROR v. SHIVPUTRAYA DURDUNDAYA AND ANOTHER (ACCUSED)<sup>a</sup>.

April 2.

*Criminal Procedure Code (Act V of 1898), section 439—Conviction by Magistrate under section 326 of the Indian Penal Code—Alteration, on appeal, to conviction under section 323—Effect—Power of High Court in revision.*

The accused was convicted by a Magistrate of an offence punishable under section 326 of the Indian Penal Code; but the Sessions Judge, on appeal, altered the conviction to one under section 323 of the Code. The Government of Bombay having applied in revision for restoration of the conviction under section 326,

*Held*, that the order of the Sessions Judge must be taken as an acquittal of the accused of the offence under section 326 of the Indian Penal Code, and the High Court could not, therefore, under section 439 of the Criminal Procedure Code, convert that finding of acquittal into one of conviction.

THIS was an application under criminal revisional jurisdiction against conviction and sentence passed by C. B. B. Clee, Sub-divisional Magistrate, F. C., at Belgaum, varied on appeal, by C. E. Palmer, Sessions Judge of Belgaum.

The accused were convicted by a Magistrate for an offence punishable under section 326 of the Indian

<sup>a</sup> Criminal Application for Revision No. 329 of 1923.

Penal Code and sentenced to suffer rigorous imprisonment for two years and pay a fine of Rs. 200 each.

On appeal, the Sessions Judge altered the conviction to one under section 323 of the Code and reduced the sentence of imprisonment to one of six months.

The Government of Bombay applied to the High Court for alteration of the conviction to one under section 326 of the Indian Penal Code, and for enhancement of sentences.

*S. S. Patkar*, Government Pleader, for the Crown.

*G. S. Mulyaonkar*, for the accused.

*K. H. Kelkar*, for the complainant.

MACLEOD, C. J.:—The two accused were charged before the First Class Magistrate with having committed an offence under section 326, Indian Penal Code, and on conviction were sentenced to two years' rigorous imprisonment each, and, in addition, to a fine. On appeal, for reasons which are not very apparent, the Sessions Judge altered the conviction to one of voluntarily causing simple hurt to the complainant and reduced the sentence in each case to six months' rigorous imprisonment. On the application of Government under section 439, Criminal Procedure Code, a rule was issued for the enhancement of the sentences, and also for the convictions under section 323, Indian Penal Code, being altered to convictions under section 326, Indian Penal Code. We must take it that on the order of the Sessions Judge the accused were acquitted of the offence under section 326, so that under the powers given to the Court under section 439, Criminal Procedure Code, we cannot convert a finding of acquittal into one of conviction. It was argued on the authority of a Punjab case<sup>(1)</sup> that "acquittal" in section 439 means a complete acquittal on all the charges framed but we

<sup>(1)</sup> *Bhola v. King-Emperor* (1904) P. R. No. 12 of 1904 (Cr.)—[Ed.]

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cannot agree with that view. Unless we set aside the conviction and direct a retrial we can only enhance the sentence up to the limit which is admissible under section 323, Indian Penal Code. On a consideration of all the circumstances of the case, and specially the fact that a very serious assault was committed by the accused, we think the sentences must be enhanced to a period of one year's rigorous imprisonment in each case, in spite of the fact that the period of imprisonment directed by the Sessions Judge has already expired. The period already suffered will be taken into account when enforcing the enhanced sentences.

*Sentences enhanced.*

R. R.

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### CRIMINAL REVISION.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

1924.

IN RE AMARSANG SHIVSANGJI<sup>\*</sup>.

*April 2.*

*Criminal Procedure Code (Act V of 1898), section 145—Dispute regarding immoveable property—Magistrate can grant right of way over property in dispute.*

There is no reason why a Magistrate, in proceedings initiated under section 145 of the Criminal Procedure Code, should not grant a right of way to one of the parties over the property in dispute.

*Asit Mohan Ghosh v. Sarat Chandra Ghosh*<sup>(1)</sup>, not followed.

THIS was an application under criminal revisional jurisdiction against an order passed by D. D. Desai, Magistrate, First Class, at Dhandhuka.

The plaintiffs were in possession of a house-site (described as A) in a village. Amarsang and others

<sup>\*</sup> Criminal Application for Revision No. 57 of 1924.

<sup>(1)</sup> (1913) 17 C. W. N. 793.