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Code. Consequently the principle of *res judicata* cannot apply to the previous proceedings between the parties to this suit, and the decision of the appellate Court was right.

The appeal is dismissed with costs.

PRATT, J.:—I agree.

CRUMP, J.:—I agree.

*Answer accordingly.*

R. R.

### CRIMINAL APPELLATE.

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

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EMPEROR v. MANGAL NARAN\*.

December 17. *Criminal Procedure Code (Act V of 1898), section 439—Criminal appeal—High Court—Disposal of appeal—Notice to enhance sentence—Practice and procedure.*

In a criminal appeal it is desirable that the High Court should first deal with the appeal on its merits. It might then consider whether or not a notice to enhance the sentence should issue under section 439 of the Criminal Procedure Code.

THIS was an appeal from conviction and sentence passed by M. I. Kadri, Additional Sessions Judge at Ahmedabad.

The facts of the case are sufficiently set forth in the judgment.

MACLEOD, C. J.:—The accused in this case was found guilty of (1) kidnapping a girl in order to commit murder under section 364, Indian Penal Code, and (2) having murdered the girl and so having committed an offence under section 302, Indian Penal Code. For the first offence he was sentenced to three years rigorous imprisonment, and for the second offence he was sentenced to transportation for life.

\* Criminal Appeal No. 439 of 1924.

The accused filed a petition of appeal from the jail and when it came before the Court for admission the Court was of opinion that the accused ought to have been sentenced to death. Consequently the following order was made :—“ Admit and issue notice to enhance the sentence, i. e., to sentence of death.”

This order would at first sight seem to be strange, although it may be justified by the addition to section 439 of the Criminal Procedure Code contained in sub-section 6. The Court exercising the powers conferred on a Court of appeal by the relative section of the Code of Criminal Procedure has no power to enhance the sentence. But under section 439: “In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion,...enhance the sentence.”

Then under sub-section 6: “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.”

The previous practice has been to dispose of the appeal first before considering the question whether the sentence should be enhanced in the event of the appeal being dismissed. Generally the cases in which the powers of the Court to enhance the sentence under section 439 have been exercised are those in which the record has been called for by the High Court, or which have been reported to the High Court, or which otherwise come to the knowledge of the High Court on a perusal of the returns from the Subordinate Courts, and in such cases the High Court may, if it thinks fit, issue notice to the accused under section 439, Criminal

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Procedure Code, to show cause why the sentence should not be enhanced. Then it is in accordance with justice that the accused should be entitled to show cause, not only against the sentence being enhanced but also against the conviction. But when a case comes to the knowledge of the Court by an appeal having been filed against a conviction it is not desirable, in my opinion, if the appeal is admitted, to issue a notice at the same time under section 439. It seems to me absolutely incongruous that the Court in the same breath should admit the appeal of the accused, and issue notice calling upon him to show cause why the sentence should not be enhanced, and especially it seems incongruous in a case of this kind, where the sentence proposed to be inflicted in the notice to enhance is the sentence of death. If, after an appeal has been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right to show cause against his conviction, but any attempt to set aside his conviction, would not have much chance of success. However that may be, speaking for myself, I prefer to retain the old practice, namely, first to deal with the appeal, and then to consider whether a notice to enhance should issue. In this case there can be no doubt that the accused was guilty of murder, so the appeal is dismissed.

We have now to consider whether we should proceed with the notice to enhance. If we decide to proceed we should have to send for the accused to be present in Court. Now it is only in very rare cases that we interfere with the order of a Sessions Judge sentencing a man convicted of murder to transportation for life, because the circumstances of the case appeared to him not to demand the sentence of death. I can only remember myself one case in which the sentence of transportation for life was enhanced to sentence of

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death by the High Court. The facts proved in that case were so shocking that it appeared to the Court that the sentence of death was the only sentence that could be imposed on the accused. There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient, and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence.

CRUMP, J.:—I agree in this case that the Sessions Judge would have exercised a wiser discretion had he sentenced this accused person to the extreme penalty for the case was extremely bad of its kind. At the same time I do not think that it is of such an exceptional nature that we should exercise the powers that we possess to enhance the sentence of transportation for life to a sentence of death. I should be most unwilling to do so in any but most exceptional cases. I also agree as to the practice in such matters. To make the admission of the appeal of an accused person the occasion for calling upon him to show cause why his sentence should not be enhanced is, in my opinion, undesirable. It is likely to produce an impression on the mind of an illiterate accused in jail that it is proposed to enhance the sentence because he has appealed. Further, my own experience is that this practice is likely to lead to an inconvenient result because it confounds two matters which should be kept separate. The first point on an appeal is to consider whether the conviction is right or not, and that is one matter. When that matter has been disposed of, the further

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question that arises is as to whether the sentence imposed is not inadequate. But that is entirely a separate question, which speaking for myself, I prefer to keep distinct. Although I do not say that the procedure followed in the present case is in any way contrary to law, I do say that it is not a desirable practice. I agree, therefore, with the remarks of the learned Chief Justice.

*Order accordingly.*

R. R.