CRIMINAL APPELLATE

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR v. ISMAIL KHADIRSAB.*

1928
January 23

Criminal Procedure Code (Act V of 1898), sections 417, 237—Appeal against an order of acquittal—Murder—Offence of fabricating false evidence—High Court in upholding acquittal can convict accused of minor offence—Indian Penal Code (Act XLV of 1860), sections 302, 193.

The accused was charged with an offence of murder, but he was acquitted of it, and he was ordered to be set at liberty though there was evidence to show that he had fabricated evidence to ward off suspicion from himself. The Government of Bombay having appealed against the order of acquittal :—

Held, that the accused could not on the facts be convicted of murder; but that still he was guilty of the offence of fabricating false evidence for which he could be convicted on appeal.

Begu v. *Emperor*,[1] followed.

THIS was an appeal by the Government of Bombay against an order of acquittal passed by A. F. Kindersley, Sessions Judge of Kanara.

The accused was charged with the offence of murdering his wife named Fatima. The wife suspected that the accused was carrying on an intrigue with the mother of his daughter-in-law. This suspicion was the cause of frequent quarrels between the two.

The accused and his wife slept together on the night of March 31, 1927. The next morning the wife was found missing. Later on in the morning the accused in the company of one Sheriff Hassan and the local Kazi went to the river side in search of Fatima. When they reached the river, the accused pointed out a place where a dead body was floating, and inquired of his companions whether he had better put wet clothes on the bank. The Kazi disapproved of the suggestion and asked the accused to inform the police. Thereafter they all returned. The accused then placed some wet clothes on the river bank. He next informed the police

*Criminal Appeal No. 573 of 1927.

(1) (1925) 27 Bom. L. R. 707; 6 Lah. 226.

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that his wife had gone out at cock-crow, saying that she was going to the river to wash clothes, and had not returned and that when he went in the morning in search of her, he found some wet clothes on the bank but could not find his wife. He added that she had probably slipped while washing the clothes and fallen into the river. When the police went to the place indicated they found the wet clothes on the bank and the dead body floating in the river.

The accused was subsequently charged with the offence of murdering his wife. He was tried by the Sessions Judge of Kanara, who acquitted him of the offence and ordered him to be set at liberty.

The Government of Bombay appealed against the order of acquittal.

P. B. Shingne, Government Pleader, for the Crown.

D. R. Manerikar, for the accused.

The appeal was heard by Fawcett and Mirza, JJ., on January 19, 1928. Their Lordships after hearing arguments came to the conclusion that the order of acquittal was correct; but they adjourned the case for argument as to whether or not there should be a conviction of the accused under section 193 of the Indian Penal Code by the High Court in exercise of its powers under section 423 (1) (*a*) of the Criminal Procedure Code.

The case was accordingly argued on the further point on January 23, 1928.

FAWCETT, J.:—We have heard the Government Pleader and Mr. Manerikar for the accused. The first question is whether we have power to convict the accused of an offence under section 193 of the Indian Penal Code, although he was not charged with that offence in the trial in the Sessions Court.

The first issue under this head is whether clause (*a*) of sub-section (1) of section 423 of the Criminal Procedure Code merely authorises an Appellate Court to find the accused guilty of the offence, with which he was charged and for which he was tried but of which he was acquitted, or whether it empowers an Appellate Court to convict an accused of some other offence. No doubt, as remarked in Boy's Code of Criminal Procedure, Vol. II, p. 563, the words "find him guilty" may be said to most naturally mean "find him guilty of the offence, the acquittal in regard to which is being reversed." But the learned author goes on to say: "is there any reason why the same principles should not be applied here as apply to appeals by a convict?" Under clause (*b*) of sub-section (1) the Appellate Court can "alter the finding," that is, alter the conviction under a certain section to one under another, and of course for that purpose it may avail itself of the provisions of section 237 of the Criminal Procedure Code. If we adopt the first of these two alternative constructions, the strict result will be that an Appellate Court, on an appeal from an acquittal by the Local Government, cannot even convict an accused of a minor offence covered by the offence, with which the accused was charged. I refer, of course, to a case falling under sub-section (1) of section 238 of the Criminal Procedure Code. It would involve that a person who had been charged with, but acquitted of, murder could not, on appeal by the Local Government, be convicted of the offence of voluntarily causing grievous hurt by a cutting instrument, or culpable homicide not amounting to murder. So far as I am aware, it has never been held that the Appellate Court in an appeal under section 417 is barred from convicting an accused of such a minor offence; it would obviously be embarrassing to the administration of justice, if the Court was forced to

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a conclusion of that kind. If, then, an appellate Court can convict an accused of an offence other than that in regard to which he has been acquitted in a case falling under section 238, I can see no logical reason why he cannot also be convicted of another offence, in a case falling under the provisions of section 237. Both sections are on the same footing, and I do not think that the first construction I have mentioned is a correct one to apply to this clause (*a*). Apparently, there is no specific authority on this point; but certainly so far as regards the applicability of section 238, I think the practice has been all along in favour of the second construction. I agree with the view taken in *Kauromal* v. *Emperor*[1] that (p. 1059) " it must be presumed that the Appellate Court under section 423 would at least have the power of the original Court which tried the case under section 237 provided no prejudice was given to the defence."

The next point is whether this Court can convict the accused of the alleged offence under section 193 of the Indian Penal Code, in view of the fact that the opinion of the assessors has not been taken as to it. In *Emperor* v. *Appaya Baslingappa*[2] it was held that the Sessions Judge could not convict an accused, who was charged with abetment of murder, of an offence under section 201 of the Indian Penal Code, viz., causing the disappearance of evidence of the murder; and this ruling was mainly based upon the provisions of section 309 of the Criminal Procedure Code which require the Sessions Court to take the opinion of the assessors and record such opinion. It is said by Marten J. (p. 1320) :—

" In the view I take, it is imperative for the Judge to take the opinion of the assessors on the charge it is proposed to convict the accused on. It is not, I think, open to the Judge to put merely the charge of murder to the assessors, and when they have given their opinion on that charge and that charge only,

(1) (1924) 25 Cr. L. J. 1057. (2) (1923) 25 Bom. L. R. 1318.

then on his own motion and without asking any further opinion of the assessors, to find the accused guilty of something quite different."

Those remarks are, obviously, entitled to great weight; but they were made in 1923, and since then we have the decision of the Privy Council in *Begu* v. *Emperor*,[1] where their Lordships upheld the action of a Sessions Judge in convicting the accused of an offence under section 201 of the Indian Penal Code, although the only charge against them was one of murder under section 302 of the Indian Penal Code. No doubt, the objection about the opinion of the assessors not being taken may not have been urged before their Lordships, and may not have been present to their Lordships' minds, when they delivered their judgment. But, on the other hand, I do not think that this Court is entitled to say that a point of that importance was overlooked, especially as an objection was raised before their Lordships in regard to the opinion of the assessors not being properly taken and recorded under section 309 of the Criminal Procedure Code. In *Mata Prasad* v. *Nageshar Sahai*,[2] their Lordships laid down that it is not open to the Courts in India to question any principle enunciated by the Privy Council. Therefore, in my opinion, the decision in *Emperor* v. *Appaya*[3] can no longer be taken as good law.

Then, Mr. Manerikar has quite rightly drawn our attention to the remarks of Mr. Justice Ranade in *Queen-Empress v. Karigowda*,[4] where he says (p. 68) :—

"The High Court, exercising its jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal complained of by Government."

In that case, there had been another acquittal, i.e., on a charge of an offence under section 211 of the Indian Penal Code, and in the arguments on appeal it was

[1] (1925) 27 Bom. L. R. 707; 6 Lah. 226.
[2] (1925) 47 All. 883.
[3] (1923) 25 Bom. L. R. 1318.
[4] (1894) 19 Bom. 51 at pp. 68, 69.

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sought to question the propriety of that acquittal, but Mr. Justice Ranade held that, as Government had only appealed from the other acquittal under section 500 of the Indian Penal Code, this Court ought not to go into the acquittal under section 211 of the Indian Penal Code. That, no doubt, is an authority for the view that this Court should hesitate before raising a point that has not actually been taken in the appeal by Government. But, as has often been pointed out, no Bench of this Court has power to bind all other Benches in future proceedings as to the practice to be adopted in all cases that may come before them. This is purely a point of practice, and, therefore, I do not consider that this particular remark suffices to prevent us considering whether in the interests of justice we should exercise our power of convicting the accused of another offence, if we have that power.

A further point arises whether the provisions of section 195, sub-section (1), clause (*b*), prevent us from exercising jurisdiction in regard to the alleged offence under section 193 of the Indian Penal Code. The answer, I think, is clearly in the negative, because the alleged fabrication of evidence in this particular case was not with the intention of that false evidence being used in a Court of law, but with the intention of its influencing the Police in the investigation into the circumstances under which the accused's wife had met her death; and the mere fact that the question might possibly arise in a Court of law in some future proceedings would not bring the case within the scope of this clause (*b*). In support of the latter statement I may refer to the ruling of this Court in *In re Govind Pandurang*.[1]

I think, therefore, that there is no impediment to our following what has been held to be a proper procedure

[1] (1920) 45 Bom. 668.

in the Privy Council case of *Begu* v. *Emperor*.[1] The only difference is that in *Begu's case*[1] there was a conviction by the Sessions Judge, which was upheld by the High Court on appeal. But in the present case the Sessions Judge did, in fact, expressly hold that the evidence of the Kazi and Sharif Hassan showed that the accused placed wet clothes on the river bank in order to support the theory that his wife had been washing clothes there, and the evidence about it had been one of the points that was discussed as is shown by the Sessions Judge's notes of the arguments for the prosecution and for the defence. In fact, the prosecution relied upon this particular evidence as a ground for saying that the accused was shown to have committed the murder of his wife, and it was an important question in the trial. The assessors, no doubt, did not refer to this particular piece of evidence, but it was before them; and, as I have already pointed out, the fact that their opinions in regard to it were not taken is not an objection that can be considered a bar to a conviction by this Court.

If I thought for one moment that the accused would be prejudiced, I certainly would not exercise the power of ourselves convicting him, but direct a re-trial in regard to this offence. But, in my opinion, there can be no possible question of prejudice. The accused was asked about the evidence of these two witnesses, and he made a statement as to the clothes being seen by him on the river bank, and impeaching the testimony of the Kazi and Sharif Hassan against him. It would, in my opinion, be an unwarrantable waste of time if a fresh trial was ordered, in view of the fact that the accused at the trial knew of the accusation against him and had full opportunity of meeting it, and in view of the fact that the Sessions Judge held it was proved against him. Had his attention been called to *Begu's case*[1] and

[1] (1925) 27 Bom. L. R. 707 : 6 Lah. 226.

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the applicability of section 193, Indian Penal Code, he might have convicted the accused under that section.

Coming to the merits, in my opinion, the evidence clearly proves that the accused himself placed the clothes where they were afterwards found, in order to mislead the Police, to whom he was about to report the fact of his wife being missing, into the opinion that she had been washing clothes at the river bank. The Police had power to investigate the circumstances of the woman's death and the possibility of some offence having been committed in regard to her death, especially in view of the wound on her throat, under sections 154 and 174 of the Criminal Procedure Code; and it is obvious that the accused's intention was that the circumstance of the clothes being upon the bank should cause the officer in charge of the Police investigation to form the opinion upon that circumstance that she had been washing clothes there. That would be an erroneous opinion on the facts that the Sessions Judge and we have found; and it would be an opinion touching a point material to the result of such proceedings, because it was distinctly material to know whether the deceased had been present on the bank of the river washing clothes and so might have fallen into the river, in deciding whether her death was accidental or due to violence. The ingredients necessary for an offence of fabricating false evidence are all here, and the case falls under the second clause of section 193 of the Indian Penal Code. I would convict, therefore, the accused of an offence under that part of section 193 of the Indian Penal Code and sentence him to one year's rigorous imprisonment.

MIRZA, J.—I agree.

Order accordingly.

R. R.