1930

BHIKABAI v. MANILAL

Marten C. J.

only to say that this appellate Court was taken through all this evidence with care and in detail by counsel for the respective parties, and that in the result I entirely agree with my brother Patkar that it fails to establish the custom alleged.

I accordingly agree that this appeal should be dismissed, and also with the rest of the order proposed by my brother.

Decree confirmed.

B. G. R.

APPELLATE CRIMINAL.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Madgavkar.

1930. *July 28.*

EMPEROR *v.* KOYA PARTAP, ACCUSED*.

Criminal Procedure Code (Act V of 1898), sections 430, 439, sub-section (6)—Enhancement of sentence—Appeal summarily dismissed—Notice issued for enhancement of sentence—Not open to accused to go into merits.

Where an accused, who has been convicted, appeals to the High Court, and his appeal is dismissed either after hearing or summarily, it is not open to him in showing cause why his sentence should not be enhanced, to go again into the merits as to whether he should have been convicted or not.

Emperor v. *Jorabhai*,[1] explained and followed.

CRIMINAL application for review.

The accused was convicted on April 29, 1930, under section 326 of the Indian Penal Code (Act XLV of 1860) for voluntarily causing grievous hurt to his wife, who died two days thereafter, and was sentenced to one year's rigorous imprisonment. He appealed from jail against the conviction under section 421 of the Criminal Procedure Code, 1898.

On June 9, 1930, the appeal came on for admission before Mirza and Broomfield JJ., and was summarily dismissed. Their Lordships made an order directing that notice should be given to the accused to show cause why the sentence should not be enhanced.

*Criminal Review No. 200 of 1930.

[1] (1926) 50 Bom. 783.

At the hearing of the application, it was contended on behalf of the accused that he was entitled to be heard on the merits as to whether he should have been convicted or not.

B. D. Mehta, (appointed) for the accused.

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

BEAUMONT, C. J. :—In this case the accused was convicted on April 29, 1930, under section 325 of the Penal Code for causing grievous hurt to his wife, who died of the injuries. He was sentenced to one year's rigorous imprisonment. He appealed, and the appeal was summarily dismissed on June 9, 1930—the appeal being an appeal from jail under section 421 of the Criminal Procedure Code. In dismissing the appeal the Court of Appeal directed that notice should be given to the accused to show cause why the sentence on him should not be enhanced.

Now, the first point taken in this appeal is that the accused is entitled to be heard on the merits as to whether he should have been convicted or not, and Mr. Mehta, his pleader, relies on the words of sub-section (6) of section 439. That section provides that the Court may, in revision, amongst other things, enhance the sentence, and sub-section (2) provides :—

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence,"

and then sub-section (6) provides :—

"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."

In my opinion, the accused in this case is not at liberty to be heard on the merits having regard to section 430 of the Code, which provides that judgments and orders passed by an appellate Court upon appeal

shall be final, except in the cases therein mentioned. Under that section, I think, the judgment of the Court of appeal dismissing the appeal on June 9, 1930, is a final order, which this Court is not at liberty to differ from. In sub-section (6) of section 439 the opening words are, "Notwithstanding anything contained in this secton", and not, "Notwithstanding anything contained in this Code," and I think that these words do not entitle the accused to go behind section 430, and to show cause against his conviction, after his appeal has been dismissed. Therefore, I think, that in a case such as this, where an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused in showing cause why his sentence should not be enhanced, to go again into the merits. The point has already been dealt with by this Court in the case of *Emperor* v. *Jorabhai*,[1] and the only distinction between that case and the present one is that that case had been heard on the merits and not summarily dismissed. But, in my view, that distinction is not one of principle.

Now, coming to the merits of the case, the accused was convicted of causing grievous hurt to his wife, and the facts are that he had some dispute with his wife, because she ran away to her father's house and on her return he took up a stick and proceeded to beat her. He says himself in his confession that he gave her two blows with a stick, but the post-mortem examination shows that she suffered from severe injuries caused apparently by some heavy blunt instrument, and she died of these injuries two days afterwards. I quite accept the finding of the Sessions Judge that the accused had not any intention of killing his wife. At the same time it must be appreciated that men are not entitled to beat their

[1] (1926) 50 Bom. 783.

1930

EMPEROR v. KOYA PARTAP

Beaumont C. J.

wives. The prisoner comes of a poor class and if he had chastised his wife moderately but not sufficiently to do her serious damage, probably no more would have been heard of the matter. But, it was a very brutal thing for a man to beat a woman with a heavy stick and hurt her in vital parts of her body causing such injuries that she died in two days.

The sentence which the learned trial Judge imposed on the accused was one year's rigorous imprisonment, and I think certainly that it is too short, and the sentence should be enhanced to three years' rigorous imprisonment.

MADGAVKAR, J. :—I agree. As a party to the decision in *Emperor* v. *Jorabhai*,[1] I would add that the reasoning there is as appropriate to criminal appeals dismissed summarily, as to those dismissed after admission, and I am unable therefore to accept the argument for the appellant, which seeks to distinguish the case on that ground.

K. S. S.

[1] (1926) 50 Bom. 783.

ORIGINAL CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell.

TRUSTEES OF THE PORT OF BOMBAY *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY.*

1930 *January 6.*

Civil Procedure Code (Act V of 1908), section 90, and Order XXXVI, rules 1, 2, 3, 5 (2) (c)—Special case stated for the opinion of the Court—Jurisdiction—Case whether "fit to be decided"—Declaration without relief—Specific Relief Act (I of 1877), sections 42, 45 (d)—Meaning of "legal remedy"—Courts not to interfere where Legislature has constituted a special tribunal to deal effectively with the dispute—City of Bombay Municipal Act (Bom. Act III of 1888), sections 518 and 520.

A dispute arose between the Trustees of the Port of Bombay and the Municipal Corporation of Bombay as to the liability of the Municipality to lay water mains and provide fire hydrants on an estate reclaimed and owned by the Port Trust. Both the parties to the dispute by consent stated a special case for the opinion

*O. C. J. Suit No. 2226 of 1928.