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RUSTOMJI ARDESHIR v. ASSISTANT DEVELOPMENT OFFICER, BANDRA

Wassoodew J.

relevant evidence to be led, must be set aside and the case remanded for decision on the main question involved as stated in the order proposed by my learned brother.

Appeal allowed and case remanded.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

EMPEROR *v.* RAMJI VALA (ORIGINAL ACCUSED).*

1940 *January* 23

Criminal Procedure Code (Act V of 1898), ss. 423 (2), 439 (2), 439 (6)—Conviction on jury trial—Appeal by accused—Notice to enhance sentence—Right of accused to challenge facts—Court can look at evidence to determine sentence.

The Court on a notice to enhance sentence in considering whether the conviction was justified cannot go behind the verdict of the jury on facts, but in considering the notice to enhance the Court can look at the whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed on the accused.

On a notice to enhance the sentence passed on an accused convicted on a trial with a jury the accused cannot challenge the verdict of the jury on facts.

Khodabux Haji v. *Emperor*,[1] followed.

Emperor v. *Ramchandra*,[2] referred to.

Having regard to the fact that the offence was a serious one and that the accused thrust, without justification, a Vindhna, a pointed instrument, into the back of the complainant, the High Court enhanced the sentence to five years' rigorous imprisonment from the sentence of three years' rigorous imprisonment imposed on the accused by the Sessions Judge.

CRIMINAL APPEAL from an order of conviction and sentence passed by D. V. Vyas, Sessions Judge, Surat.

Attempt to murder.

At about 6-45 in the evening of December 31, 1938, Abdulnabi Nazirmia, a school teacher in Machhad in the Jalalpore Taluka of the Surat District, left the school in order to go home. As he was proceeding, Ramji Vala

*Criminal Appeal No. 396 of 1939 (with Criminal Review No. 385 of 1939).

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(accused) met him and abused him for writing reports against him, finally driving a Vindhna, a sharp instrument, into his back, the instrument ultimately emerging in front.

The accused was afterwards charged with having attempted to murder Abdulnabi (complainant) and with having voluntarily caused grievous hurt to him with a dangerous weapon.

At the trial which was with the aid of a jury, the jury returned a unanimous verdict of guilty against the accused under s. 326 of the Indian Penal Code. Accepting the said verdict, the learned Sessions Judge convicted the accused and sentenced him to suffer three years' rigorous imprisonment.

The accused appealed through jail. On November 6, 1939, the High Court admitted the appeal and at the same time ordered notice to issue to the accused to show cause why the sentence should not be enhanced.

R. B. Kantawala (appointed), for the accused, in review only.

No appearance for the accused in appeal.

R. A. Jahagirdar, Government Pleader, for the Crown (in both Review and Appeal).

BEAUMONT C. J. This is an appeal by the accused against his conviction by the Sessions Judge of Surat under s. 326 of the Indian Penal Code, and on admission this Court gave notice to the accused to show cause why his sentence should not be enhanced.

The case was tried by the learned Sessions Judge with a jury, and Mr. Kantawala for the accused has claimed the right in this appeal to go behind the verdict of the jury on questions of fact. The question whether, on a notice to enhance sentence passed on an accused convicted on a trial with a jury, the accused can challenge the verdict of the jury on facts, does not seem to have been considered by this Court.

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Under s. 423, sub-s. (*2*), of the Criminal Procedure Code, it is provided that nothing therein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. So that in an appeal against a conviction on the verdict of a jury, the Court cannot interfere with the verdict on questions of fact. But an Appeal Court has no power under s. 423 to enhance a sentence. That power is given in revision by s. 439, which provides in sub-s. (*1*) that in revision the High Court may exercise any of the powers conferred on a Court of Appeal and may enhance the sentence. Then in sub-s. (*6*) of s. 439 it is provided that notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (*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 opening words of that sub-s. "notwithstanding anything contained in this section" probably refer to sub-s. (*5*), which provides that where an appeal lies and no appeal is brought, proceedings in revision shall not lie at the instance of the party who could have appealed. That was the view taken by Mr. Justice Fawcett in *Emperor* v. *Jorabhai*.[1] Mr. Kantawala contends on behalf of the accused that he has a right to show cause against his conviction under sub-s. (*6*), and that that right is not curtailed by the provisions of s. 423, sub-s. (*2*). But, in my opinion, that is not the right view. The provision in s. 439, sub-s. (*6*), that the accused shall be entitled to show cause against his conviction, to my mind, means that he can show cause in accordance with law. He cannot claim for example, in revision proceedings to call fresh evidence. He can only, in my opinion, challenge his conviction in accordance with

[1] (1926) 50 Bom. 783.

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law, and where the conviction is based on the verdict of a jury, he has no greater right of appeal than he possesses under s. 423, and cannot challenge the facts. That was the view taken by the Calcutta High Court in *Khodabux Haji* v. *Emperor*,[1] and I think that is the right view. We were referred to a decision of this Court in *Emperor* v. *Ramchandra*,[2] in which the Court was dealing with a notice to enhance the sentence in the case of a conviction on the verdict of a jury, and I gather from the report that the Court in that case did go into the facts, but the Court does not seem to have considered whether it was entitled to do so, and the point of law was not discussed. As the Court in that case did not interfere with the conviction and did not enhance the sentence, the case is not an authority on the question.

In my opinion, the Court in considering whether the conviction was justified cannot go behind the verdict of the jury on facts; but, of course, in considering the notice to enhance, the Court can look at the whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed. In the present case we are satisfied that there was no misdirection by the learned Judge and the conviction was justified. The sentence imposed was three years' rigorous imprisonment. The offence was a very serious one. The accused without any justification thrust into the back of the complainant, who is a school master, a *vindhna*, which is a pointed instrument used for tapping toddy trees and, according to the complainant's evidence, the point of the *vindhna* came out by his left nipple. The fact that there was one very serious stab penetrating right through the body is, I think, confirmed by the view of the Civil Surgeon (exhibit 16), who says that there was only one single blow. The Doctor (exhibit 11), who made a superficial examination of the complainant immediately after the attack, seems to have

[1] (1933) 61 Cal. 6.

[2] (1932) 35 Bom. L. R. 174.

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thought that there were two wounds. But I think the view of the Civil Surgeon, who made a more exhaustive examination, though twent-four hours after the offence, is to be preferred. A wound of that nature might very easily have caused the death of the complainant. He was kept in the Civil Hospital for treatment for three weeks.

We think that three years' rigorous imprisonment is too light a sentence, and we therefore enhance the sentence to five years' rigorous imprisonment.

SEN J. I agree.

Sentence enhanced.

Y. V. D.

PRIVY COUNCIL.

J. C. *
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January 25

BASANGOUDA SIDANGOUDA PATIL, PETITIONER *v.* YELLAPPAGOUDA SHANKARGOUDA PATIL, RESPONDENT.

[From the High Court of Judicature at Bombay]

Privy Council—Practice—Special leave to appeal in forma pauperis—*Minor—Next friend possessed of sufficient property to deposit security for costs.*

On the petition of a minor by his next friend for special leave to appeal *in forma pauperis* to His Majesty in Council in a case in which the High Court had, on appeal to it, differed from the Subordinate Judge and granted leave to appeal to His Majesty in Council in the ordinary form, it was found after enquiry that the minor was a pauper and that the next friend was a proper person to act as such and was possessed of property of the value of Rs. 5,850 and that there was no other person willing to act as such.

Leave to appeal was granted, but on the ordinary terms as to deposit of security for costs.

P. V. Subba Row, for the petitioner.

J. M. Parikh, for the respondent.

Solicitor for the petitioner: Mr. *Harold Shephard*.

Solicitors for the respondents: Messrs. *Hy. S. L. Polak & Co.*

C. S. S.

* *Present:* Viscount Maugham, Lord Porter and Sir George Rankin.