Taj Khan And Ors. vs Rex on 14 November, 1951

Equivalent citations: AIR1952ALL369, AIR 1952 ALLAHABAD 369

JUDGMENT

Wali Ullah, J.

1. The question referred to the Pull Bench is this :

> "Can a High Court in an appeal from conviction under Section 323, Penal Code, alter the conviction of the appellant to one under Section 302, Penal Code, with which he had been charged and, in exercise of its revisional jurisdiction, after having previously given notice for enhancement of the sentence, enhance the sentence of imprisonment to one of death or transportation for life."

2. The circumstances in which this reference to the Full Bench has come to be made may be briefly indicated. Eight persons in all were put upon their trial for offences under Section 148 and Sections 302, 325 and 323 read with Sections 149, Penal Code. As the result of the trial by the Sessions Judge, five of the accused persons were acquitted altogether i.e., of all the charges, while the three appellants were acquitted only of the charges under Section 148 and Sections 302 and 325 read with Section 149, Penal Code. They were, however, convicted of an offence under Section 323, Penal Code, and were sentenced each to rigorous imprisonment for one year.

3. The three appellants filed an appeal in this Court challenging their conviction under Section 323, Penal Code. It is criminal Appeal No. 937 of 1949, while Bundu Khan, one of the victims of the assault, made an application in revision praying that this Court may in exercise of its powers under Section 439, Criminal P. C., find the appellants guilty under Section 302, Penal Code read with Section 34, Penal Code and enhance their sentences. The appeal as well as the revision were heard together by a Bench of this Court. The learned Judges constituting the Bench, on the facts, reached the conclusion that the appellants had the common intention of giving a beating to Bundu Khan and his helpers and that, therefore, each of them was responsible for the result of the entire attack under Section 34. Penal Code. They were of the opinion that the appellants might be found guilty under Section 302 read with Section 34 or Section 304 read with Section 34, Penal Code, for causing the death of one Chota and under Section 325 read with s. 84, Penal Code, for causing grievous injuries to Bundu Khan.

3a. A question, however, arose whether it was open to the Court to alter the finding of the learned Sessions Judge and find the appellants guilty under Section 302, Penal Code, and to enhance the sentence. In view, however, of the conflict of opinion in this Court as well as of some other High Courts, as also in view of the general importance of the question, the Bench considered it desirable to refer the question mentioned above to a larger Bench.

4. The determination of the question referred to us depends primarily on the interpretation of certain provisions of Sections 423 and 439, Criminal P. C. Section 423, Criminal P. C. deals with "the powers of appellate Court in disposing of appeal," while Section 439, Criminal P. C. deals with the High Court's power of revision. Section 423 (1) inter alia, provides that :

> An appellate Court may-
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> (a) in an appeal from an order of acquittal, reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial or (2) alter the finding maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) ,with or without such reduction and with or without altering the finding alter the nature of the sentence, but, subject to the provisions of Section 106, Sub-section (8) not so as to enhance the same; (c) In an appeal from any other order, alter or reverse such order."

Section 439 reads:

> (1) 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, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 .....and may enhance the sentence .....(4) Nothing in this section.....shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction."

5. At the very outset, it should be made clear that an appeal from an order of acquittal--an original or appellate order of acquittal--passed by any Court other than a High Court, lies only to the High Court.

6. It is clear from the provisions of Section 423(1)(a) set out above that in an appeal from an order of acquittal, the High Court, which is the only Court competent to entertain such an appeal and that only at the instance of the Provincial Govt. can reverse such order i.e., that it can set aside that order completely and thereafter it can either direct further enquiry or commitment or a retrial as the circumstances of the Case may require. It can also find the accused guilty and pass sentence on him according to law. Here it should be carefully noted that the words used by the Legislature are "reverse such order."

There is no reference here to "alteration" of a finding of any kind. It must be noted that the two words "alter" and "reverse," as used in Section 423, have not the same meaning either in the dictionary or in law, Murray's 'New English Dictionary' defines the word "alter" as meaning, "to

make (so a thing) otherwise or different in some respect; to make some change in character, shape, condition, position quantity, value etc., without changing the thing itself for another; to modify, to change the appearance of."

The word "reverse," however, is defined as meaning "to revoke, abrogate, annual (a decree, act measure etc.), especially in legal use, with reference to judgments, decrees, forfeitures etc."

7. Coming to Section 423(1)(b) which deals with the powers of an appellate Court in an appeal from a conviction, it is first of all to be noted that these powers can be exercised not only by the High Court, but also by other Courts which are Courts of criminal appeal e.g. Court of Session, Court of District Magistrate etc. This is a point which should not be lost sight of while interpreting the provisions of Section 453(1)(b). The powers of an appellate Court here are of three kinds: (1) Court may reverse the finding and sentence i.e., it may set aside the conviction and the sentence and then either acquit or discharge the accused or order him to be retried by a Court subordinate to such Court or committed for trial. As the Legislature has used the word "reverse" here, it is clear that the order of the trial Court has to be set aside completely and in its place, a different order is to be substituted. (2) Instead of completely setting aside the finding and sentence recorded by the trial Court, the appellate Court may merely alter the finding, but subject to the condition that the sentence is maintained or reduced but not enhanced. It is open to the Court to reduce the sentence, no matter whether the finding has or has not been altered. (3) The Court may, whether there is any interference by it under sub-head (2) or not, alter the nature of the sentence. There is, however, the all important overriding condition that subject to the provision of Section 106, Sub-section (3), the Court has no power to enhance the sentence.

8. In the interest of clarity, it is necessary to take an illustration. Suppose a person A stands his trial for more offences than one. As the result of the trial, he is convicted of one offence, but acquitted of the other or others. He files an appeal against his conviction and sentence. As there is an order of acquittal in favour of the accused, it is also open to the Provincial Government to file an appeal against him in regard to the order of acquittal. The appeal against the order of acquittal must of necessity be filed in the High Court. Both the appeals will have therefore to be heard and decided by the High Court. When such is the case, no difficulty need arise. But if there is no appeal against the order of acquittal of one charge, the question arises whether it is open to the appellate Court while hearing the appeal from a conviction to set aside the order of conviction as recorded by the trial Court and to substitute in its place its own order of conviction on the charge of which he was acquitted by the trial Court.

So far as this Court is concerned, the decision of the majority of the Full Bench in the case of Zamir Qasim v. Emperor, 1944 ALL. L.J. 203, lays down that a Court of appeal is empowered.

under Section 428 (1) (b), Criminal P. C., to alter a finding of acquittal into one of conviction. So far as this Court is concerned, the position is therefore clear that, in the illustration taken above it is open to the appellate Court, while disposing of the appeal from a conviction filed by the accused, to set aside, if it is so inclined, the finding of acquittal recorded by the trial Court and, in its place, to record a finding of conviction against the appellant on the charge of which he was acquitted by the

trial Court, or of any other charge, subject to the provisions of the Code. The appellate Court, however, cannot, in doing so, enhance the sentence.

9. The position becomes very much more complicated if, while the appeal filed by the convicted person is pending in the High Court, one other factor intervenes. If the High Court, either suo motu or, on the application of a party, issues notice to the appellant to show cause why the conviction be not altered from one under Section 323 to one under Section 302, Penal Code, the question arises whether it is open to the High Court to set aside the conviction of the appellant as recorded by the trial Court and convict him of the charge of which he was acquitted by the trial Court and then enhance the sentence passed upon him. So far ad the Full Bench decision in Zamir Qasim's case, (1944 ALL. L.J. 203 F. B.) (ubi supra) is concerned' it affords us no help in deciding this question. The only question referred for decision to the Full Bench in that case was:

> "Whether a Court of appeal is empowered under Section 423(1)(b)(2) to alter a finding of acquittal into one of conviction."

10. This question was answered by all the five Judges. The larger question, which arises in the present case, was expressly reserved in that case by Iqbal Ahmad C.J. at page 203, where his Lordship observed that that question did not arise in that case and so he refrained from expressing any opinion on it. Similarly at p. 240, Dar. J., who agreed with the opinion of the learned Chief Justice, observed that it was not necessary to express any opinion on the larger question i.e., the question whether the High Court can, or should, by combining its appellate and revisional powers change a finding of acquittal into one of conviction and then enhance the sentence and thus achieve by combining the two powers what it is prohibited from doing by exercise of powers singly.

The third learned Judge, Ismail, J. who also concurred in the majority decision, observed thus at p. 214:

> "In some cases it may not be possible to alter the finding; for example from under Section 325, I. P. C. to Section 302, I. P. C. Although the Court of appeal may be satisfied that the appellant is guilty of the capital offence, it cannot convict him of that offence, without enhancing the sentence which the Sub-section does not authorise." (Italics are mine).

11. Here, the learned Judge has given a clear indication of the view held by him that, although normally it might be open to the appellate Court under Section 423(i)(b)(2) to alter a finding of acquittal into one of conviction, yet in some cases it might not be possible to do so and this was for the reason that, in those cases, if alteration of the finding were permitted, it would necessarily involve the enhancement of the sentence, otherwise the sentence would become illegal.

12. It is interesting to note that in the well-known cases of Queen-Empress v. Jabanullah, 23 cal. 915, where the Court held:

> "The appellate Court can, under the provisions of Section 423, of Criminal P. C. in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by the Court,"

one of the learned Judges, Banerji, J. construing Section 423 (1) (b) observed at p. 979 thus:

> "Section 423, Clause (b), has no such restriction imposed upon it. There is, under that clause, only one restriction to the power of the appellate Court on an appeal from a conviction, and that is, that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the appellate Court's altering the finding. Thus if an accused person is charged with having murdered A and also With having caused grievous hurt to him, and is acquitted of the former offence, but convicted of the latter and sentenced to seven years rigorous imprisonment by the first Court, the appellate Court cannot, on the appeal of the accused, alter the finding into one of guilty of murder, because, as it cannot enhance the sentence, the result will be that a person convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for seven years--a sentence which is not in accordance with law.
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> That, however, is not the case here and so we need not consider it further. But, in a case like this, in which no such condition arises, I think the appellate Court can, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of any offence of which he may have been acquitted by that Court." (Italics are mine).

13. It follows, therefore, that in an appeal from a conviction, alteration of the finding from one of acquittal to that of conviction, held to be permissible by the Full Bench in Zamir Qasim's case, 1944 ALL. L. J. 208 (F. B.) is not to proceed beyond a case where, even" after alteration of the finding, the sentence imposed by the trial Court can be validly maintained. In the present ease, what is sought to alter is a finding of acquittal into one of conviction on a charge under Section 302, Indian Penal Code. It must be held that the High Court, as a Court of appeal, has no power to effect such an alteration of the finding as it is not possible for it to alter the finding and at the same time to maintain the sentence. If the finding of acquittal on the charge of murder under s 302, I. P. C. is set aside, the sentence imposed by the trial Court which was for rigorous imprisonment for a term of one year under Section 323, I. P. C. will have to be enhanced to death or transportation for life. That will involve a violation of the provisions against enhancement of the sentence by the appellate Court. In short, therefore, the power of altering the finding, so as to involve the enhancement of sentence, has not been conferred on the appellate Court by Section 423 (i) (b) (2), Criminal Procedure Code.

14. The next question is: what is the effect of the combination of the powers possessed by the High Court under Section 423, Sub-clause (1), Sub-clause (b) and Section 439, Criminal P. C. Under Section 439 Sub-clause (1) it is undoubtedly within the power of the High Court in a proper case, to enhance the sentence. Under Section 439 (4), however, it is provided that, in the exercise of its revisional powers, it is not open to the High Court to convert a finding of acquittal into one of

conviction. Whether the acquittal made by the trial Court is "partial" i.e. only in respect of one of several offences with which the accused is charged at the trial, or "total", in either ease, the prohibition imposed by Sub-clause (4) of this section remains.

In this connection, reference may be made to the case of Kishan Singh v. Emperor, 50 ALL. 722: 26 ALL. L. J. 1099, (P. C.), where their Lordships of the Privy Council have pointed out that the High Court, in the exercise of its revisional jurisdiction, has no jurisdiction to convert a finding of acquittal into one of conviction no matter whether the conviction is in respect of one charge only or of all the charges. In that case, the accused had been charged under Section 302, Indian Penal Code with murder, but was convicted only under Section 304, Indian Penal Code. It was held by the Privy Council that there was an acquittal on the charge under Section 302 and that therefore the High Court, in the exercise of its revisional powers, acted without jurisdiction in converting the finding of acquittal on the charge of murder into one of conviction and in sentencing the accused to death. It follows, therefore, that the enhancement of sentence which is permitted by Section 439, Criminal P. C., is an enhancement of sentence which can be legally effected without the necessity of altering the findings recorded by the trial Court. The broad question, whether it is possible for the High Court to exercise its appellate powers under Section 423 (1) (b) (2) along with its revisional powers under Section 439, Criminal P. C., has been made clear by the decision of their Lordships of the Privy Council in the case of Chunbidya v. Emperor, 1935 ALL. L.J. 602 (P.c.) where it was held "When the High Court has before it on appeal the record of a criminal proceeding the High Court can, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its powers of revision and enhance the sentence."

15. It would be noticed however that that was a case in which there was no question of the alteration of a finding, much less a question of the alteration of a finding of acquittal into one of conviction. The High Court having dismissed the appeal; proceeded to enhance the sentence in the exercise of its revisional powers.

16. To the same effect, is the decision of their Lordships of the Privy Council in Emperor v. Dahu Raut, 62 Ind. App. 129 (P.c.)

17. It would thus appear that the High Court, being vested with both kinds of powers, may exercise its appellate powers as well as revisional powers provided of course that the conditions under which each kind of power can be exercised are observed. Those conditions are all set out in Sections 423 and 439, Criminal P. C. As shown above, under Section 423, the High Court cannot enhance the sentence, while under Section 439 the High Court cannot alter a finding of acquittal into one of conviction. In a case, however, when the powers conferred on the High Court under these two sections cannot be combined, without infringing one or the other condition attached to the exercise of these powers, it seems to me clear that the two kinds of powers cannot be combined. It follows that the High Court, as an appellate Court, cannot alter the trial Court's finding of acquittal into one of conviction on the charge of murder and then in the exercise of its revisional powers, enhance the sentence.

18. Now I shall refer to some of the decisions of this Court in which the question of simultaneous exercise by the High Court of the combined powers under the two sections has been considered. First of all, there is the case of Sia Rain v. Chhote Lal, cri. Ref. No. 128 of 1941, decided by Allsop and Verma JJ. on 25-8-1941. In deciding the reference the learned Judges had occasion to consider the scope of Sections 423 and 439, Criminal P. C. After considering the decision of the Privy Council in Kishan Singh's case (50 ALL. 722 P.c. (Ubi supra) and two other later cases of the High Court, (1) Emperor v. Jagannath Gir, 1937 ALL. L. J. 547 and (2) Raghunath v. Emperor, 1933 ALL. L. J. 1377, the learned Judges observed:

> "Under the provisions of Section 423, Criminal P. C., a Court in appeal against a conviction may alter the finding provided it does not enhance the sentence. On the other hand under the provisions of Section 439 a Court in revision may enhance a sentence provided it does not convert an acquittal into a conviction.
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> We are quite satisfied that the Legislature never intended that these two sections should be combined together in such a way as to entitle a Court to convert a finding of acquittal into a finding of conviction and thereby enhance the sentence. The two sections are perfectly plain. In an appeal from a conviction the Court must not do any thing to the prejudice of the appellant. In an application in revision it may enhance a sentence provided it does not change the finding. We think that there is no difficulty in understanding the principles which were in the mind of the Legislature. We suppose that a Court in revision can enhance a sentence provided it does not pass a sentence greater than what could have been passed under the section under which the lower Court convicted. Under Section 423 it can change the finding provided it does not enhance the sentence." (Italics are mine).
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> Again, with reference to the Privy Council decision in Kishan Singh's case, the learned Judges went on to observe :
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> "We think that their Lordships meant that the finding could not be converted in such a way as to justify an enhancement of sentence which would not have been justifiable if there had been no alteration of the finding. That we think Is the law upon the point."

19. It seems to me that the view which has commended itself to ma in this case finds strong support from the observations made by the learned Judges in the case above mentioned.

20. The next case to which reference may be made is that of Mohammad Sharif v. Bex, A.I.R. (37) 1950 ALL. 380, decided by Agarawala and P.L. Bhargava JJ. In this case, She appellant was charged with an offence under Section 302, I. P. C. He was however, convicted of an offence under Section 304 only and sentenced to rigorous imprisonment for five years. He filed an appeal in the High Court. While admitting the appeal, a learned Judge of this Court issued notice to him to show cause why the sentence imposed upon him be not enhanced. Thus both the appeal and the revision came on for hearing together before the Bench. On the facts, the learned Judges came to the conclusion

that the appellant was really guilty of an offence under Section 302, Penal Code. A question then arose whether this Court had power to convert the finding of acquittal under Section 302, Penal Code into a finding of conviction under that section and then to enhance the sentence imposed upon the appellant. The learned Judges, on a consideration of the relevant provisions of the Criminal Procedure Code, reached the conclusion that the High Court as a Court of Appeal had no power to alter the finding of acquittal into one of conviction under Section 302, Penal Code, because it was not possible for the Court to alter the finding and at the same time to maintain the sentence.

21. Next, the Bench considered the question whether the appellate powers of the High Court could be exercised in conjunction with the provisional powers of the Court under Section 439, Criminal P. C., so as to enable the Court to convert the finding of acquittal into one of conviction and then to enhance the sentence. The Bench eventually reached the conclusion that the view taken by Allsop and Verma JJ., in the unreported decision of Sia Bam, (or. Ref. No. 128 of 1941, D/-25-8-41 (ALL.)), (ubi supra) was correct. It was held that this Court had no power to alter the finding of acquittal under Section 302, Penal Code, into one of conviction and then to enhance the sentence.

22. The view taken in the case of Mohammad Sharif, (A. I. R. (37) 1950 ALL. 380), (ubi supra) was adhered to by the same Bench in the case of Raghunath Singh v. State, A. I. R. (37) 1950 ALL. 471.

23. Next, I may refer to the case of Rex v. Raghubir, (1950) ALL. L. J. 871, decided by Sapru and V. Bhargava JJ. The facts of this case were very similar to those of Mohammad Sharif v. Bex, (A. I. R. (37) 1950 ALL. 380), (ubi supra).

The learned Judges substantially agreed with the view of the law taken by the Bench in the case of Mohammad Sharif v. Rex, and it was held :

> "The High Court cannot simultaneously exercise the appellate power under Section 423 Criminal P. C., to alter a finding and revisional power under Section 439 of the Code to enhance the sentence. This, however, does not mean that there cannot be a simultaneous exercise of the appellate power under Section 423 and the revisional power under Section 439 of the Code in any case whatsoever "

24. Another decision of this Court, to which our attention has been invited in the course of arguments, is that of Dulli v. Emperor, 16 ALL. L. J. 918, decided by Piggott and Walsh JJ. In this case, the appellant Dulli stood his trial for murder under Section 302, along with some other offences. The learned Sessions Judge acquitted him of the charge of murder under Section 302, but convicted him of offences under Sections 325 and 382, Penal Code. Dulli filed an appeal in this Court against his conviction, while the Court issued notice to him to show cause why the order of acquittal should not be set aside and the sentence enhanced. The Bench hearing the appeal came to the conclusion that Dulli was certainly guilty of murder and therefore liable to punishment under Section 302, Penal Code. The question then arose whether it was open to the Court to convict the appellant of the offence under Section 302 by altering the finding of acquittal and then to enhance the sentence passed upon him. The learned Judges observed :

> "We have before us an appeal by Dulli against his conviction as well as the notice of enhancement issued by this Court. It is, therefore, open to us to exercise any of the powers conferred by Section 423 (1) (b) Criminal P. C., as well as any of the powers specified under Section 439 of the same Cods. It has repeatedly been held by various High Courts that an appeal against a conviction opens out the entire case, and that the appellate Court, being empowered to alter the finding by Section 423 (1) (b) above referred to may record a conviction in respect of an offence of which the trial Court has found the accused not guilty.
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> It is quite true that under this section, considered by itself, the finding can only be altered without enhancement of the sentence ; but the power to enhance the sentence is separately conferred upon this Court by Section 439, Criminal P. C. It follows that, in the case now before us, there can be no question that we have authority to record a conviction under Section 302, Penal Code and to pass an appropriate sentence."

25. The learned Judges eventually dismissed the appeal altered the conviction of the appellant from one under Section 325, Penal Code, to one under Section 302 of the same Code and enhanced the sentence to transportation for life.

26. It is curious that Dulli's case is not referred to in the judgment of any of the three cases, Mohammad Sharif v. Bex, (A.I.R. (37) 1950 ALL. 380) ; Baghunath Singh v. State, (A. I. R. (37) 1950 ALL. 471) and Bex v. Raghubir, (1960) ALL. L. 3. 871). It must, however, be noted that no reasons have been given by the learned Judges in support of the view taken by them. Further, many aspects of the crucial question, which have been discussed in this case, do not appear to have been brought to the notice of the learned Judges. With great respect, therefore, I am not able to share the views expressed by that Bench.

27. It may be noted that the view taken in the case of Dulli v. Emperor, (16 ALL. L. 3. 918), appears to have been followed without question in the case of Lakhan Singh v. Emperor, A. I. R. (21) 1934 Oudh 200, by Nanavutty J.

28. I may refer now to some decision of other High Courts to which our attention has been invited by learned counsel in this case. Reference may be made to the case of J ado Rahim v. Emperor, A. I. R. (25) 1938 sind 202, decided by Davis J.C. and Lobo J. In that case, the appellant, Jado, son of Bahim, was tried for the offence of murder of his wife. He was acquitted of the murder charge, but was convicted of an offence under Section 304, Part I, Penal Code. He was sentenced to ten years' rigorous imprisonment. The appellant filed an appeal against his conviction and sentence, while the Court issued notice to him to show cause why his sentence should not be enhanced. When the appeal as well as the revision came on for hearing the question arose whether the High Court could convert the finding of acquittal into one of conviction and then enhance the sentence.

On a consideration of the provisions of Sections 428 and 439. Criminal A. I. R., as well as the relevant ease law, the learned Judges expressed themselves thus at page 205 ;

"It is difficult to read into Section 423(1)(b) the power to convert an acquittal into a conviction on an appeal against a conviction We think the words "alter the finding, maintaining the sentence" occurring in Section 423(1)(b)(2), must be read as a whole and we could not in this case, for instance, alter the finding from one of a conviction under Section 304 to one of a conviction under Section 302, Penal Code, and maintain the sentence, because, we could not, for an offence under Section 302, Penal Code, maintain a sentence of ten years' rigorous imprisonment.

And even if the Judge in this case had imposed a sentence of transportation for life, we do not think we could for that reason have altered the finding from a conviction under Section 304 to a conviction under Section 302, Penal Code and then as a Court of revision have enhanced the punishment to one of death under Section 302, Criminal A. I. R., because we do not think the exercise of these powers can turn upon chance. We do not think the exercise of these powers can depend upon the chance that in a case under Section 304(1), the Judge has imposed the maximum penalty under the lection. We think the better view to take is that Clause (b) of Section 423 (1), Criminal A. I. R., does not apply to oases of acquittal, partial or total, but to oases of conviction and that Clause (a) applies to oases of acquittal: and that if the appellate powers of Court are exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under Section 423 (1)(a) and not on appeal against a conviction under Section 423 (1) (b), Criminal A. I. R., which is the case here."

29. The view expressed by the learned Judges in this case strongly supports the view taken by me above.

30. Next, I may refer to two decisions of the Rangoon High Court; The first case is that of On shwe v. The Crown, A. I. R. (11) 1924 Bang. 98, decided by May Gang and Duckworth JJ.

Here, there was an appeal by the convicted person in the High Court. There was also a notice for enhancement of the sentence issued by the High Court. On a consideration of the provisions of Section 423 and 439, Criminal P. C., it was held '"Where there is an appeal by a prisoner, and in addition the High Court takes seisin of the case under its revisional jurisdiction, the conviction of a lesser offence, where the prisoner has been suitably charged, can be converted into one under Section 302, Penal Code, and the sentence enhanced accordingly under the combined provisions of Section 423 and 439."

31. It may be observed that there is hardly any discussion of the points involved in a case where the combined powers conferred on the High Court by Sections 423 and 439, Penal Code, are to be used. There is only a reference to an old case of the Punjab Chief Court and to the case of K. Bali Beddi v. Emperor, 37 Mad. 119.

32. The next case of the Rangoon High Court is Emperor v. Kan Thein, A. I. R. (18) 1926 Rang. 154, decided by Carr and Duckworth JJ. It was held:

> "Where a man charged with murder has been convicted of a minor offence, the High Court can, while acting both as a Court of appeal and a Court of revision, convict him of murder and sentence him to death, but if it is acting solely as a Court of revision, it cannot convert the acquittal of murder into conviction."

33. In this case, the judgment was delivered by Duckworth J. The learned Judge has specifically referred to the view expressed by him in the earlier case of On Shwe v. The Grown, (A.I.R. (11) 1924 Hang. 93) (ubi supra) and has affirmed his earlier view. The other learned Judge, Carr J., expressly stated that he did not commit himself to the acceptance of the view taken in On Shwe's case. In the result, therefore, not much help can be derived from the decisions of the Rangoon High Court.

34. The last case which has been referred to in the course of arguments is Bawa Singh v. Emperor, A. I. R. (28) 1941 Lab 465, decided by a Pull Bench of three learned Judges of the Lahore High Court. In this case the question directly arose whether it is open to the appellate Court in an appeal from conviction by a convict who has been charged, say for example, under Section 302, but convicted under Section 304, Part I, to alter the conviction from one under Section 304, Part 1, to one under Section 302 and then in the exercise of the powers conferred by Section 439 (1), to enhance the sentence to one of death It was held:

> 'The word 'alter' in Section 423 (1) (b) (2) means to change one finding to another finding and therefore the words "alter the finding", in Section 423 (1) (b) (2) mean that the finding can be altered to any other finding that the Court considers "proper on the findings of fact at which it arrives in appeal,"
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> "As regards the High Court, the matter stands on a different footing. In its appellate jurisdiction, the High Court can alter the 6nding to any that it considers suitable. As soon as it has clone so, it can, under the provisions of Section 439 (1), in its revisional jurisdiction, enhance the sentence to any sentence it considers suitable."

35. Dalip Singh J., who delivered the leading judgment observed at page 468:

> "There is no need to imagine that any restriction is put upon the nature of the finding to be given by the appellate Court. It is true that a restriction is imposed in Section 423 (1) (b), but the restriction is only as to the sentence which the appellate Court as such is not given power to enhance. The appellate Court, whatever finding it gives as to she nature of the offence committed by the accused, is obliged to maintain the sentence at the point at which it was fixed by the trial Court. In other words, all that is taken away from the appellate Court is the power of enhancing the sentence, but no restriction is placed on the power of the appellate Court to change the finding to any that it considers suitable to the purpose"
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> "As regards the High Court, the matter stands on a different footing. In its appellate jurisdiction the High Court can alter the finding to any that it considers suitable. As soon as it has dons so, it can, under the provisions of Section 439 Clause (1), in its

> revisional jurisdiction enhance the sentence to any sentence it considers suitable. That the High Court can so combine its appellate and revisional jurisdiction is to my mind set at rest by the ruling of their Lordships in Chunbidya v. Emperor, 67 All. 156".

36. It would be observed that the learned Judge based his decision on the crucial question viz., whether the appellate powers of the High Court under Section 423 and its revisional powers under Section 439 could be combined so as to enable it to alter a finding of acquittal into one of conviction and then to enhance the sentence on the decision of their Lordships of the Privy Council in the case of Chunbidya v. Emperor, 57 ALL. 156 : 1935 ALL, L. J. 602. The facts of the case, Chunbidya v. Emperor, were, however, very different. There was no question of an alteration of a finding of acquittal into one of conviction In that case, the accused had been convicted by the Sessions Judge of murder and were sentenced to transportation for life. They thereupon appealed to the High Court. The High Court issued notice to the accused to show cause why the sentence should not be enhanced and after hearing them enhanced their sentence from transportation for life to death. It was argued before their Lordships that the High Court after having exercised its appellate powers in dealing with the appeal, could not go on to exercise its revisional powers to enhance the sentence. This contention was repelled and it was held that the High Court acted within its jurisdiction when it dismissed the appeal, but, in the exercise of its revisional powers, enhanced the sentence.

37. It is clear from the judgment of their Lordships of the Privy Council that no occasion arose in that case to consider the crucial point which arises in a case like the present, namely the point whether after altering the finding of acquittal into one of conviction, as an appellate Court, the High Court, can proceed immediately to enhance the sentence in the exercise of its revisional powers. In a case like the present, the expression "alter the finding, maintaining the sentience," as it occurs in Section 423 (1) (b) (2) must be read as a whole. Alteration of the finding cannot be divorced from the maintenance of the sentence. An alteration of the finding is subject to the condition precedent of the maintenance of the sentence. With great respect, therefore, I am not able to share the view held by the Full Bench of the Lahore High Court. It seems to me that many important aspects of the question did not receive full consideration in that case, e.g., the power to enhance the sentence under Section 439 (1) was explicitly made subject to the condition that it could not be exercised by alteration of the finding of acquittal into one of conviction.

38. No other case of any High Court, which directly decided this question, has been brought to our notice.

39. For the reasons give above, I am clearly of opinion that the answer to the question referred to us must be in the negative.

40. Harish Chandra J.--The case has been fully and, if I may say so with respect, very ably considered by my learned brother Agarwala in his judgment. He has also given the facts of the case which it would be unnecessary for me to repeat. After giving the matter my best considerations I am, however, inclined to agree generally with the reasoning of my learned brother Desai and the conclusion arrived at by him, namely, that it is open to the High Court to exercise its power of

revision under Section 439 in combination with its appellate power under Section 423 of the Code of Criminal Procedure so as to alter the finding of the lower Court by substituting for the conviction recorded by it a conviction for another offence although he may have been acquitted of that offence by that Court either by an express order or by implication; and at the same time to enhance the sentence passed upon the appellant.

41. That the High Court can combine its powers under Sections 423 and 439 under certain circumstances is not denied. For instance, the High Court may while dismissing an appeal enhance the sentence passed upon the appellant by the Court below. The question is whether the powers can or cannot be combined when the High Court while acting under Section 423 (1) (b) (2) alters the finding of the Court below and substitutes for the conviction recorded by that Court a conviction for an offence of which he has been acquitted by it. I cannot find any real difference between the two classes of cases. It is said that the power given to the High Court under Section 423 (i) (b) (2) to alter the finding is subject to the condition that the sentence must be maintained. This is no doubt true so far as Section 423 is concerned, but when the High Court simultaneously exercises the power given to it by Section 439. I do not see why it should not have the power of enhancing the sentence at the same time.

The power given by Section 423, Criminal A. I. R., to the appellate Court to dismiss an appeal implies a power to maintain the conviction as well as the sentence passed upon the appellant by the Court below. Section 423 read by itself does not authorize the Court while dismissing the appeal to enhance the sentence. But when the power of the High Court under Section 423 is combined with its power under Section 439 it is possible for it to enhance the sentence while dismissing the appeal and maintaining the conviction I cannot read in Section 423 any limitation with respect to the exercise of the power given to the High Court under Section 439. The view that Section 439 cannot be brought into aid to enhance the sentence when the Court acting under Section 423 (1) (b) (2) has altered the conviction so as to convert a finding of acquittal into one of conviction is to my mind not based upon the wordings of either Section 423 or 439. No doubt, sub-s. (4) of Section 439 provides;

> "Nothing in this section .... shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction."

But from this it cannot be argued that the High Court cannot exercise its power under Section 439 when, acting as an appellate Court, it at the same time converts a finding of acquittal into one of conviction. All that Sub-section (4) of Section 439 seems to indicate is that that section cannot be called into aid by the High Court to convert a finding of acquittal into one of conviction. But, to my mind, it does not in any way fetter the discretion of the High Court to do so acting under some other provision of law, e.g. Section 423 (1) (b) (2) and there seems to be nothing in that sub-section to justify the inference that the power given to the High Court under Section 439 cannot be combined with its power under Section 423 when, acting as an appellate Court, it alters the finding so as to convert a finding of acquittal into one of conviction.

42. One argument against the exercise of the powers given to the High Court under Sections 423 and 439 simultaneously in the circumstances mentioned above is that in doing so it will be reviewing its

own order. Under Section 423 the High Court can alter the finding without enhancing the sentence. Once it has done so it cannot, it is said, at the same time review its own its own order and enhance the sentence. In my view no question of a review of its own order by the High Court arises in these circumstances. The two powers are exercised by the High Court simultaneously and it does not matter by what psychological process the exercise of such powers is combined. Admittedly the High Court while dismissing an appeal can exercise its revisional power and a enhance the sentence. It has never been suggested that this is wrong although if the same reasoning is applied, the High Court would in doing so be also reviewing its own order. For when the High Court dismisses an appeal under Section 423 the order passed by it implies that both the conviction and the sentence are maintained. Thereafter they became final and if the High Court acting under Section 439 at the same time enhances the sentence it can in the same way be said to be reviewing its own order. But as I have just pointed out the simulteneous exercise by the High Court of the two powers in such circumstances has never been regarded as illegal and if the High Court can while dismissing an appeal enhance the sentence it should certainly have the power to enhance the sentence while altering the finding and converting a finding of acquittal into one of conviction under Section 423 (1) (b)(2).

43. The contention that the power given to the High Court under Section 439 to enhance the sentence is subject to the condition that the sentence should be enhanced as not to exceed the maximum provided by law for the offence of which he has been found guilt by the Court below does not seem to be based upon anything contained in the section itself. Then again the contention that the revisional power of the High Court is generally limited to questions of law is also not supported by the language of Section 439. For when the High Court has given any convicted person an opportunity of showing cause why his sentence should not be enhanced it is required by that section itself (Sub-section (6)) to go into the facts of the case and to consider whether the convicted person has or has not been properly convicted.

44. A further argument against the combination of the two powers by the High Court is that it would be to the disadvantage of the appellant. For it is suggested Chat when an accused person has appealed against his conviction it would be unjust if an order is passed which makes his position worse. But on an appeal by a convicted person it is open to the High Court acting under Section 439 to give him notice and call upon him to show cause why his sentence should not be enhanced and thereafter to dismiss the appeal and to enhance his sentence. It has never been suggested that this procedure is incorrect and there seems to be no reason why it would be incorrect to enhance the sentence of an appellant when the High Court acting under Section 423 has altered the finding and convicted him for an offence of which he had been acquitted by the Court below.

45. The view of this Court in regard to the question now before us has been divided. In Dulli v Emperor, 16 ALL L. J. 918 a Bench of this Court held that it is open to the High Court to alter the finding and to enhance the sentence at the same time. In Sia Ram v. Chhotey Lal, Cri. Ref. no. 128, of 1941, D/- 25-8-1941 a Bench of this Court took a different view of the matter. It does not, however, appear that the decision in Dulli's case was brought to the notice of the learned Judges who decided Sia Ram's case. They have, however, not discussed the matter at any length and have not brought out the distinction between the two classes of cases. They merely say that they were

satisfied that the Legislature never intended that the two powers should be combined in such a way as to entitle a Court to convert a finding of acquittal into a finding of conviction and thereafter enhance the sentence. They observe:

> "In an appeal from a conviction the Court mast not do anything to the prejudice of the appellant. In an application in revision it may enhance a sentence provided it does not change the finding.
>
> With all respect I would point out that this view is not based on a correct reading of Section 439. Section 439 does not provide that the High Court may enhance a sentence provided it does not change the finding. All that it says is that nothing in that section would be deemed to authorize the High Court to convert a finding of acquittal into one of conviction. The language is very guarded and seems to contemplate the possibility of a finding of acquittal being converted by the High Court into one of conviction in exercise of a power given to it by some other provision of law, while exercising its revisional power under Section 439. This case was followed in Mohammad Shrift. Bex, A. I. R. (37) 1950 ALL. 380 by a Bench of this Court of which one of us was a member. Their Lordships observe:
>
> "As we have already Been, the High Court, in exercise of its appellate powers, has no power to alter a finding so as to enhance the sentence imposed by the trial Court and in exercise of its revisional powers the Court is empowered only to enhance the sentence. The Legislature could never have intended that the two powers should be combined and exercised simultaneously,"

They, however, admit that:

> "There may be a ease where the High Court, having examined the record of a criminal proceeding brought to its notice by an appeal from the conviction therein, may call upon the appellant to show cause why the sentence imposed upon him be not enhanced, and having heard and dismissed the appeal may proceed to enhance the sentence in exercise of its revisional powers, although precluded by Section 423, Criminal P. C. from doing so in the appeal."

46. But they too did not attempt to point out any real distinction between the case in which they admit the possibility of the High Court combining the two powers and the case which they were dealing with. They, however, agreed with the view expressed in the unreported case of Sia Bam. (or. Ref. No. 128/1941, D/. 25-8-1941).

47. The same view was followed by the same Bench in another case, Baghunath Singh v. State, A. I. R. (37) 1950 ALL. 471.

48. The last case of this Court in which the same question arose was Bex v. Raghubir, 1950 ALL. L. J. 871 and was decided by Sapru and V. Bhargava JJ. The view of Sapru J. is based mainly on the

consideration that the High Court by combining its revisional power under Section 439 with its appellate power under Section 423 would be deemed to be reviewing its own order, which is not permissible under the law. I have already discussed this point in an earlier part of this judgment where I said that I was unable to find a distinction between a case in which the High Court combined the two powers and enhanced the sentence of a convicted person while dismissing his appeal and a case in which it combined the same powers and enhanced the sentence passed upon a convicted person after altering the finding, so as to convert an order of acquittal into one of conviction acting under Section 423 (1) (b) (2). V. Bhargava J., however, points out that the High Court while dismissing the appeal of a convicted person cannot be said to have passed an order maintaining the conviction and sentence and that by enhancing the sentence in such circumstances it cannot be said to be reviewing its own order. No doubt, the appellate Court while dismissing the appeal of a convicted person need not say in so many words that the conviction and sentence passed upon him are maintained. But an order dismissing an appeal is in effect an order maintaining the conviction as well as the sentence. It is no longer possible after an appeal has been-dismissed by the High Court for any one to move it again for an alteration or reversal of the conviction and sentence recorded by the trial Court and such conviction and sentence after the dismissal of the appeal becomes final. We have to consider the real intention of the provisions contained in Section 423 and should not be guided by mere words and in this view of the matter there seems to me to be no distinction between the two classes of cases. If a combination of the two powers in the one class is legal there is no reason why it should be regarded as illegal in the other class of cases.

49. As pointed out by Desai J. a similar view has been taken by several other High Courts and the only other High Court which has taken the same view as that taken by this Court in later cases is the Judicial Commissioner's Court of Sind.

50. I would accordingly answer the question that has been referred by the Bench in the affirmative.

Agarwala, J.

51. The following question has been referred to this Pull Bench :

> "Can a High Court in an appeal from conviction under Section 323, Penal Cede, after the conviction of the appellant to one under Section 302, Penal Code, with which he had been charged and in exercise of its revisional jurisdiction, after having previously given notice of enhancement of the sentence, enhance the sentence of imprisonment to one of death or transportation for life?"

The facts which led to this reference may be briefly stated. Eight persons including the three appellants were prosecuted under Sections 148, 301, 325 and 323 read with Section 149, Penal Code. Five of them, namely, Hoshiara, Sohrab, Essu, Solhar and Umrao were acquitted of all the charges, while the appellants were acquitted of the charges under Sections 148, 302 and 325 read with Section 149, Penal Code and convicted only under Section 323, Penal Code and sentenced to rigorous imprisonment for one year. The appellants came up in appeal to this Court challenging their conviction under Section 323, Penal Code. Bundu Eban, the complainant, applied in revision

for convicting the appellants.

under Section 302 read with Section 84, Penal Code and enhancing their sentence.

52. The prosecution case was that on 30 9-1948, at about noon Ishaq found Taj Khan appellant stealing sugarcane from his field and abused him. Taj Khan also abused in return. There was a fight between the two. In the evening at about 5 o'clock Bundu Khan, father of Ishaq, was returning home from the jungle and passed in front of the house of Bholu, appellant. Bholu asked Bundu Khan why Taj Khan bad been beaten by Ishaq. Bundu Khan said that he did not know anything and would try to find out at home what the matter was.

Bholu shouted to Hoshiara and Sulhar, who were sitting there, that Bundu should be beaten and not allowed to escape. Four other persons, one of them being Yusuf, appellant, arrived on the scene and all the seven belaboured Bundu with lathis. On hearing his shouts, Ghhota, another son of Bundu, arrived there but he was also beaten. The assailants continued to beat Bundu and Chhota even after they had fallen down on the ground. On the arrival of other persons the accused left the place and went away leaving Bundu and Chhota un-conscious. Ishaq took them to the outpost and lodged a report against the three appellants. From there he took the injured persons to the hospital in village Jansath. Ghhota, however, succumbed to his injuries on the way.

63. The post-mortem examination on the body of Chhota revealed that he had received 8 injuries including 4 incised wounds (three being on the head) and 4 contusions on chest, right temple and legs. In the opinion of the doctor he died on account of coma resulting from compression of brain. The skull was fractured at several places.

54. Bunda Khan was also medically examined. He had 9 injuries including a contused would on the head.

55. In defence some of the accused pleaded the right of self-defence and the others pleaded alibi. As already stated, the Sessions Judge accepted the prosecution version against the three appellants and gave the other accused the benefit of doubt. Since Section 149 could not be applied when three persons only were found guilty and the Sessions Judge could not record a finding as to who had inflicted fatal injuries on Chhota and grievous injuries on Bundu Khan, he convicted the appellants for simple hurt alone under Section 323, Penal Code.

56. The Bench, which has made the reference, considered that the accused had a common intention of beating Bundu Khan and his helpers and that, therefore, each of the appellants was responsible for the result of the entire attack under Section 34, Penal Code They came to the conclusion that the accused could be convicted under Sections 302/34 or under Section 304/34, Penal Code for causing the death of Chhota and under Section 325/34, Penal Code for causing grievous injuries to Bundu Khan. The question, however, was whether it was open to the Court to alter the finding of the learned Sessions Judge, to find the appellants guilty under Section 302, Penal Code and to enhance the sentence. In view of certain decisions of this Court holding that the Court) could not at the same time alter the conviction of the appellants under Section 302, Penal Code and enhance their

sentences and in view of the other decisions to the contrary, the Bench considered that the question, already noted above, should be decided by a larger Bench. As a pure question of law has been referred to us, we are not concerned with the view of the Bench on the facts.

57. The question referred to us has to be answered primarily upon a consideration of the provisions of Sections 423 and 439, Penal Code. The former section refers to the powers of a Court hearing an appeal and the latter refers to the powers of the High Court in revision. The material portions of the sections are as follows :

> Section 423 (1)--"The Court may ..... if it considers that there is no sufficient ground for interfering, dismiss the appeal, or (a) in an appeal from an order of acquittal, reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law, (b) in an appeal from a conviction (1) reverse the finding and sentence, and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate, to such appellate Court or commit for trial .... (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of Section 106, Sub-section (3) not so as to enhance the same, (c) in an appeal from any other order, alter or reverse such order."
>
> Section 439 (1)--"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, exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338 and may enhance the sentence;.....
>
> 4. Nothing in this section ..... shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.
>
> 5. Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

58. An appeal against an acquittal can only be filed by the State and not by a complainant or other persons, vide Section 417.

59. In order to find the intention of the legislature one must have recourse, in the first instance to the language of the statute in question. If the meaning be clear, it is not permissible to look to the history of the law before the enactment or to the supposed reasons which led the legislature to pass the enactment. Let us then consider the language of the two sections by itself.

60. Section 423 divides appeals into 3 classes--an appeal from an acquittal, an appeal from a conviction and an appeal from any other order.

We are not concerned with the third class of appeals. We shall, therefore, not refer to it again. In an appeal from an acquittal which can only be made at the instance of the State, the Court can (a) reverse the lower Court's order and direct further enquiry or order that the accused be retried of committed for trial as the case may be; (b) or find the accused guilty and pass a sentence on him according to law. When a person is tried of more than one offences and is convicted of some and acquitted of others it is an acquittal from those others from which an appeal can obviously be filed.

We, shall call this acquittal a partial acquittal for the sake of convenience, although it is not partial at all so far as the particular offence of which the accused has been acquitted is concerned, but it is partial in the sense that the accused has been convicted of some other offence at the same trial. It is well settled that the "acquittal" here includes a partial acquittal, vide Zamir Qasim v. Emperor, A.I.R. (31) 19-14 ALL. 137, and Bawa Singh v. Emperor, A. I. R. (28) 1941 Lah. 465. Further, an acquittal need not be expressed in so many words : it may be implied. When a person is accused of more than one offence and is convicted of only one and nothing is said about the other offences, there is an implied acquittal with regard to the other offences, vide Kishan Singh's case, 50 ALL. 722.

61. In an appeal from a conviction the Court may either reverse the finding of guilt, and in this case the sentence will also have to be set aside and the accused may either be acquitted forthwith or discharged or committal for retrial may be ordered. If, however, the Court finds that the accused is not guilty of the offence for which he has been convicted and sentenced, but is guilty of some other offence for which he could have been convicted at the trial, it may do one of the three things, (a) alter the finding while maintaining the sentence at the same time or (b) with or without altering the finding reduce the sentence or (c) with or without altering the finding alter the nature of the sentence but not so as to enhance it. It will thus be seen that in an appeal from a conviction by an accused (though the accused may be held to be guilty of an offence other than the one for which he has been so found by the lower Court) his sentience cannot be enhanced.

There was a difference of opinion on the question whether the power to alter the finding under Section 428 is confined to cases governed by sections 236, 237 and 238, Cr. P. C. or is not so confined. In a Full Bench case of this Court, Zamir Qasim v. Emperor, 1944 ALL. L. J. 203, the majority of the Judges held that the power to alter the sentence under Section 423 was not confined to cases falling within the purview of Sections 236, 237 and 238, Criminal P. C. It was, however, pointed out in this case that a finding cannot be altered so as to convict an accused of an offence for which he was not charged in the trial Court or for which he could not be convicted by the trial Court.

62. It will thus appear that even though the appellate Court alter a finding, the accused is not prejudiced in the least because the sentence cannot be enhanced by the appellate Court. The reason for the restriction on the power of the appellate Court in an appeal from a conviction is that when the Government does not think that the accused should be punished more severely than has been done by the Court below, the accused should not be made to suffer more severely when he has

himself come up in appeal. The point to be noted in this connection, however, is that the power to alter a finding is subject to one condition, namely, that the sentence passed by the Court below is maintained. Prom this, one conclusion automatically follows and it is this that the power of alteration of a finding should not and cannot be exercised when the alteration necessitates a change in the sentence also.

Take the case in which an accused is convicted, by the trial Court under Section 323, Penal Code and sentenced to one year's rigorous imprisonment. He was also charged with an offence under Section 302, Penal Code, but has been acquitted of that charge. If the appellate Court finds that the accused was guilty of an offence under Section 302, Penal Code., the accused must be punished and sentenced either to transportation for life or to death, these two sentences being the appropriate sentences on the conviction of murder. It would, therefore, be anomalous if the Court were to record the conviction under Section 302, Penal Code, and maintain the sentence of one year's rigorous imprisonment. The illegality would be obvious on the face of the record. The power of alter the finding, subject to a condition of maintaining the sentence, imaplies that the power of altering the finding can be exercised only when the sentence can be legally maintained.

This was the view expressed by Ismail J. in Zamir Qasim's case, A I. R. (st) 1944 ALL. 137 (F.B.). His Lordship observed at page 147 :

> "In some oases it may not be possible to alter the finding; for example, from Section 325, Penal Code to Section 302, Penal Code. Although the Court of appeal may be satisfied that the appellant is guilty of the capital offense it cannot convict him of that offence without enhancing the sentence which the sub-section does not authorise."

63. In Queen Empress v. Jabanulla, 23 cal. 975, Banerji. J. observed, "There is under that clause (Clause (b) of Section 423) only one restriction to the power of the appellate Court on an appeal from a conviction and, that is, that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the appellate Court's altering the finding. Thus, if an accused person is charged with having "murdered A, and also with having caused grievous hurt to him; and is acquitted of the former offence but convicted of the latter and sentenced to 7 years' rigorous imprisonment by the first Court, the appellate Court cannot on the appeal of the accused alter the finding into one of guilty of murder, because, as it cannot enhance the sentence, the result will be that a per-

son convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for 7 years--a sentence which la not in accordance with law."

The same view was taken in Bex v. Baghubir, 1960 ALL. L. J. 871.

64. It is true that in not altering the finding, when the lower Court's finding is incorrect, an illegality is permitted to continue. But I can see no useful purpose being served in correcting one illegality by creating another. Furthermore, it is not a question of allowing an illegality to remain. It is a question

of the power of an appellate Court. If the power of the appellate Court to alter a finding is subject to a condition that the sentence be maintained, it seems to me that when the sentence cannot legally be maintained, the power to alter does not exist.

66. Turning now to Section 439, we find that, though in revision the Court has power to enhance the sentence, it has no power to alter an acquittal into a conviction. It follows that a revisional Court has no power to enhance the sentence consequent upon the alteration of an acquittal into one of conviction. As I read Section 439, it appears to me that the power to enhance the sentence is subject to the condition that the finding is not altered so as to involve an alteration of an acquittal into a conviction. Therefore on enhancement of sentence under Section 439 cannot be made upon an alteration of the finding. In other words, enhancement of sentence, authorised by Section 439, is restricted to enhancement' of sentence which can legally be made upon the finding of the Court below.

66. There can be no objection to combining the two powers of the Court, those given under Section 423 in an appeal and those given under Section 439 in a revision, provided that the conditions under which the powers can be exercised are observed. Indeed, when a Court possesses powers under two different sections, it must be able to exercise them either separately or simultaneously. Thus it is that, when there is an appeal from a conviction before the High Court and also a revision, it can dismiss the appeal and enhance the sentence, vide In re, Chunbidya, 62 Ind. App. 36 (P C) and Emperor v. Dahu Raut, 62 Ind. App. 129 (P.C.) In such a case the conditions imposed by Sections 423 and 439 are maintained, that is, there is no alteration of the finding when the sentence is enhanced. But the powers under the two sections cannot be combined divorced from the conditions attaching to them.

67. As already stated, the power to alter the finding is subject to the condition that the sentence is maintained and the power to enhance the sentence is subject to the condition that the finding is not altered. It follows that the High Court has no power to alter the finding and enhance the sentence as well. If it were to do this, it would be disregarding the conditions imposed upon it by the sections which give it the two powers.

68. The matter can be looked at from another angle. Section 439 deals with revisions against the orders of the lower Courts. There can be no exercise of revisional powers against the order of the High Court itself. That would be reviewing its own order which is not permitted. Now in the exercise of the appellate powers under Section 423 the High Court can alter the finding, but, since it has to maintain the sentence, it can only dismiss the appeal. After dismissing the appeal, it cannot revise its own order so as to enhance the sentence upon the altered finding. The altered finding was not of the lower Court whose order in under revision and, therefore, there was nothing to revise.

69. There is yet another aspect of the case. The power to enhance the sentence under Section 439 being a power of revision against an order of the lower Court, and being subject to the condition that the finding is not altered, is of necessity confined to an enhancement up to the maximum limit provided by law for the offence for which an accused has been found guilty by the lower Court. The power of enhancement, therefore, cannot be so extended as to exceed that limit.

70. The power of the High Court in revision is generally limited to question of law. The High Court does not usually go into facts in revision. It, therefore, has power to see, either on its own motion or on the motion of any other party, whether the sentence passed by the Court below is justified in law or not. If it is not justified and requires enhancement, it can enhance it. These powers are necessarily confined to the maximum sentence that the law provides for the offence of which the accused has been convicted by the Court below The provincial Government may also appeal against an acquittal of an accused. An appeal must be filed within a specified time and, therefore, after, the expiry of that period an accused obtains a certain amount of security from furthers harassment. When the accused himself appeals against his conviction, the law does not seem to contemplate that he should be worse off than he would have been if he had not appealed.

If the High Court has the power to alter the finding and enhance the sentence so as to make it appropriate to the altered finding, the accused will be very seriously prejudiced for no other reason than that he availed of his right of appeal. The right of appeal in such a case, instead of being a benefit conferred on him, would turn to this disadvantage It would be unjust if the law provided for this. In my opinion, the law does not provide for this.

71. There is nothing in the history of legislation which would comple us to arrive at a different conclusion. It is true that in the old. Criminal Procedure Code of 1872, the power of enhancement of sentence was conferred upon all the appellate Courts even in oases of an appeal against a conviction, vide Section 280. The High Court's power of enhancing the sentence in revision was also provided for in that Code, vide Section 297. Under the still older Code of 1861, the appellate Court had no power to enhance the sentence, vide Section 419. The power of the appellate Court to enhance the sentence even in an appeal by an accused seems to have been found to be unjust and anomalous and was taken away by the Code of 1882, vide Section 423, while at the same time the power of the High Court to enhance the sentence in revision was retained. This continues to be the position under the present Code.

It is, therefore, an error to think that the power of enhancing the sentence under the Code of 1872, which was conferred on all the appellate Courts under Section 280, has now been retained for the High Court alone under Section 439 of the present Code of 1898. The truth is that the power of enhancement given to the appellate Courts for the first time in the Code of 1872 was totally abolished in the later Codes.

72. The view I have taken of the combined effect of Sections 423 and 439 is supported by four decisions of this Court.

73. In Sia Ram v. Chhote Lal, Cri Ref. No. 128 of 1941, decided on 25-8-1941 by Allsop and Verma JJ., it was observed :

> "We are quite satisfied that the Legislature never intended that these two sections (Sections 423 and 439) should be combined together in such a way as to entitle a Court to convert a finding of acquittal into a finding of conviction and thereby enhance the sentence. The two sections are perfectly plain. In an appeal from a

> conviction the Court must not do anything to the prejudice of the appellant. In an application in revision it may enhance a sentence provided it does not change the finding. We think that there is no difficulty in understanding the principles which were in the mind of the Legislature. We suppose that a Court in revision can enhance a sentence provided it does not pass a sentence greater than what could have been passed under section under which the lower Court convicted. Under Section 423 it can change the finding provided it does not enhance the sentence."

A similar view was expressed in Mohammad Sharif v. Rex, A. I. R. (37) 1950 ALL. 380, Raghunath Singh v. State, A. I. R. (37) 1950 ALL. 471, and Bex v. Raghubir, 1950 ALL. L. J. 871. The Sind Court has also taken the same view, vide Jado Rahim v. Emperor, 40 Cr. L. J. 93 (sind.)

74. The cases decided before the Privy Council decision in Kishan Singh's case, 50 ALL. 722, holding the contrary view, were based upon an erroneous interpretation of the word "acquittal", vide Bali Reddi v. Emperor, 37 Mad. 119, and Bhola v. Emperor, 12 Pun. Re. Cr. 1904. In these cases the words "finding of acquittal" in Sub-section (4) of Section 439 were taken to mean a complete acquittal of all offences and not one of acquittal of a particular offence coupled with a conviction for some other offence. This view has been finally rejected by the Privy Council in Kishan Singh's case. These cases, therefore, can no longer be held to be good law. Although the decision of the Privy Council in Kishan Singh's case turned on the interpretation of Section 439, come of their observations may usefully be recalled in connection with the point under discussion in this case.

75. Reference was made by the Privy Council to the decision of this Court in Emperor v. Sheo Darshan Singh, 44 ALL. 332, and their Lordships approved of the statement of the law contained in that case which was as follows:

> "We cannot, however, change the conviction into a conviction for murder. Sheo Darshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal. With regard to this statement of the law their Lordships stated, "Their Lordships are of opinion that the above is a correct statement of the law; it is indeed no mote than a repetition of the provisions of the material sections of the Code of Criminal Procedure."

Zamir Qasim's case, 1944 A. L. J. 303 is not in substance contrary to the above statement of the law because all that was held in that case was that an alteration of the finding, when the sentence is maintained, could be made. The same cannot be said of an alteration of the finding with an enhanced sentence. That, as the Privy Council has observed, can only be done in an appeal by the Government against the acquittal.

76. In Dulli v. Emperor, 16 ALL. L. J. 918, the conviction under Sections 325 and 382, Penal Code, was altered to one under Section 302, Penal Code, and the sentence was also enhanced. The learned Judges who decided that case observed:

> "We have before us an appeal by Dulli against his conviction, as well as the notice of enhancement issued by this Court. It is therefore up to us to exercise any of the powers conferred by Section 423 (1) (b), Criminal P. C. as well as any of the powers specified under Section 439 of the same Code. It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire ease, and that the appellate Court, being empowered to alter the finding by Section 423 (1) (b) above referred to may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. It is quite true that under this section, considered by itself the finding can only be altered without enhancement of the sentence; but the power to enhance the sentence is separately conferred upon this Court by Section 439, Criminal P. C. It follows that in the case now before us there can be no question that we have authority to record a conviction under Section 302, Penal Code, and to pass an appropriate sentence."

With all respect to the learned Judges none of the reasons given by me above were considered by them. It was rather assumed that a Court may alter a finding under Section 423 (1) (b) and enhance the sentence upon She altered finding under Section 439. No reasons were given for this view.

77. Two cases of the Rangoon High Court, On Shwe v. Emperor, A. I. R. (11) 1924 Rang. 93, and Emperor v Kan Thein, A. I. R. (13) 1926 Bang. 154 were also decided before Kishan Singh's case, 50 ALL. 722. In On shwe's case, the old Madras and Punjab view was followed which was later on dissented from by the Privy Council. In Kan Thein's case, Duckworth J. followed his view he had already expressed in the earlier case (On Shwe's case), though only by way of obiter dicta because the finding was not altered; while Carr, J. expressly stated that he did not commit himself to the acceptance of the view taken in On Shwe's case. The Rangoon High Court, therefore, is not committed to any view.

78. In Bawa Singh v. Emperor, A. I. R. (28) 1941 Lah, 465 (P. B.) Dalip Singh, J. observed:

> "There is no need to imagine that any restriction is put upon the nature of the finding to be given by the appellate Court. It is true that a restriction is imposed in Section 423 (1) (b) but the restriction is only as to the sentence which the appellate Court as such is not given power to enhance. The appellate Court, whatever finding it gives as to the nature of the offence committed by the accused, is obliged to maintain the sentence at the point at which it was fixed by the trial Court. In other words all that is taken away from the appellate Court is the power of enhancing the sentence, but no restriction is placed on the power of the appellate Court to change the finding to any that it considers suitable to the purpose.
>
> As regards the High. Court, the matter stands on a different footing. In its appellate jurisdiction the High Court can alter the finding to any that it considers suitable. As soon as it has done so, it can, under the provisions of Section 439, Clause (1), in the revisional jurisdiction enhance the sentence to any sentence it considers suitable. That the High Court can so combine its appellate and revisional jurisdiction is to my

mind set at rest by the ruling of their Lordships in Chunbidya v. Emperor, 67 All. 156."

With the greatest respect to the learned Judge, it may be pointed out that the power to alter the finding is not divorced from the duty to maintain to the sentence. The words in Section 423 'alter the finding maintaining the sentence' have to be read together and not divorced from each other and so read the maintenance of the sentence is a condition precedent to the alteration of the finding. Further, the learned Judge did not consider that the power of enhancing the sentence under Section 439 was also subject to the condition that it could not be exercised along with the alteration of the finding. The Privy Council case referred to by the learned Judge was a case in which the finding had not been altered because the appeal had been dismissed and so it gave no support to the conclusion arrived at by the learned Judge.

79. The Patna High Court has left the question open, vide Ambika Prasad v. Emperor, A. I. R. (26) 1939 Fat. 611.

80. No case of the other High Courts deciding the question at issue has been brought to our notice.

81. I would, therefore, answer the question referred to us in the-negative.

82. In accordance with the opinion of the majority, our answer to the question referred to us is in the negative i.e., it is not open to the High Court in an appeal from conviction under Section 323, Penal Code, to alter the conviction of the appellant to one under Section 302, Penal Code, with which he had been charged, and, in exercise of its revisional jurisdiction, after having previously given notice for enhancement of the sentence, to enhance the sentence of imprisonment to one of death or transportation for life. (After the opinion of the Full Bench was received, the final order of the Division Bench consisting of Dayal and Desai JJ. was delivered by).

Raghubar Dayal, J.

83. In our order dated 19-12-1950 we had indicated that the appellants were rightly held to have taken part in this, incident and that the offence which could be made out against them would have been really an offence under Section 302, Penal Code. As these were convicted of an offence under Section 333, Penal Code, and the legality of altering their conviction to Section 302, Penal Code, in the exercise of our appellate powers and then enhancing the sentence to the appropriate sentence in the exercise of our revisional powers existed was in question we referred this legal question to a larger Bench. The answer of the larger Bench is that when a finding is altered in the exercise of our appellate powers, we cannot) simultaneously enhance the sentence in the exercise of our revisional jurisdiction. It follows, therefore, that if we were to alter the finding, against the appellants that they are guilty of an offence under Section 323, Penal Code, to one that they are guilty under Section 309, Penal Code, we shall not be in a position to pass a proper sentence according to law, as Section 302, Penal Code, provides only for a sentence of death or of transportation for life. This may mean that we should cot alter the finding in the aforesaid manner.

84. A number of cases do come to notice from time to time in which such a position arises and in which there is no appeal from the State Government. It would appear that the matter deserves some attention of the Legislature, so that the embarrassing position of finding that persons guilty of graver offences do not get their due, not because the Courts below have taken a wrong view of facts, but because they have erred in the view of law applicable to the facts found, should not arise.

85. We therefore, dismiss the appeal and also the revision. The appellants are on bail. They should surrender.