Supreme Court of India
Pratap vs State Of U.P on 22 December, 1972
Equivalent citations: 1973 AIR 786, 1973 SCR (3) 136
Author: A Alagiriswami
Bench: Alagiriswami, A.

PETITIONER:
PRATAP

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT22/12/1972

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
DUA, I.D.
VAIDYIALINGAM, C.A.

CITATION:
1973 AIR 786 1973 SCR (3) 136
1973 SCC (3) 690

ACT:
Criminal trial-Trial for murder under s. 302 I.P.C.-Accused whether undergoing sentence of life imprisonment at time of commission of offence so as to attract death penalty under S. 303 I.P.C.-Whether trial judge must take evidence for this purpose under s. 3 10 Cr. P. C. Propriety of High Court converting conviction to one under s. 303 I.P.C. exercising powers under s.439 I.P.C. on the basis of revision petition filed by private party.

HEADNOTE:
The appellant was tried for an offence under s.302 I.P.C. The prosecution sought to put on record two documents to show that the appellant was punishable with death under s. 303 1. P.C. in view of the fact that he had earlier been convicted of another murder and was in that connection undergoing a sentence of life imprisonment though he had been released on probation. The trial judge held that the documents were not relevant because in his view the conditions which would make them relevant were not satisfied. He convicted the appellant under s. 302 I.P.C. as charged and sentenced him to imprisonment for life. The State did not file any appeal but two revision petitions

were filed in the High Court by the brother of the deceased against the orders of the Sessions Judge refusing to summon the aforesaid documents and refusing to frame a charge under s. 303 I.P.C. The appellant sent an appeal against his conviction to the High Court of Allahabad in the form of a' letter. The High Court sent the matter to the Sessions Judge for determination of the question whether the appellant and the person alleged to have been convicted of murder in the earlier case were the same persons. The Sessions Judge recorded a finding that the appellant was the person who had been convicted of the earlier murder and was undergoing imprisonment of life in that connection. On this report the High Court convicted the appellant under s. 303 I.P.C. and sentenced him to death. It however granted him a certificate to appeal to this Court. The questions that fell for consideration were : (1) whether the appellant was liable to be sentenced under s. 303 I.P.C. for the enhanced punishment of death; (ii) whether it was necessary in the present case to follow the procedure laid down in s. 310 of the Criminal Procedure Code; (iii) whether the High Court would impose the enhanced punishment of death when there was no appeal by the State merely on the basis of revision petitions filed by a private party.

Dismissing the appeal,

HELD:Per Alagiriswami and Vaidialingam JJ. (Dua J. dissenting)

(i)It was established that the accused was under 'a sentence of imprisonment for life when he committed the present murder. He would therefore be liable to be convicted under Section 303 of the Indian Penal Code. [142-D]

(ii)Under s. 3 10 of the Code of Criminal Procedure as under s. 75 of the Indian Penal Code, it is enough if the person concerned has been earlier convicted. It is not necessary that the sentence should be

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in force. But under s. 303 I.P.C. the person's sentence must be in force if the person is to be dealt with for a subsequent offence of murder under that section. Bearing in mind that section 75 I.P.C. and section 310 of the Code of Criminal Procedure deal with persons with previous conviction the previous sentence need not necessarily be in force when the subsequent offence is committed-it would be clear that the latter section is intended to be applicable only to cases to which section 75 of the Indian Penal Code applies. [144A-B]

Section 303 is like a proviso to a. 302 and a court trying a person for murder could apply the provisions of s. 303 if it is brought to its notice that the person being tried is under a sentence of life imprisonment. The punishment for an offence under r. 302 is either death or life imprisonment and s. 303 removes the alternative punishment and makes a sentence of death compulsory. There is no need therefore to

for ' me a further charge under section 303 according to the provisions of section 3 1 0 Cr. P. C. It must therefore be held that there was no illegality committed by the High Court in sentencing the appellant to death without farming a charge as required under section 310 of the Code of Criminal Procedure or without sending back the case for fresh trial by the Sessions Judge after framing a charge under section 303 I.P.C. [1440-H]

(iii)Under Section 439 of the Code of Criminal Procedure the High Court has ample powers and as a notice had been given to the appellant to show cause why his sentence should not be enhanced, there 'was no illegality in the sentence of death imposed on the appellant. The power under s.439 Cr. P.C. is one which the High Court can exercise suo motu and all that a person filing a revision petition under that section does is to draw the court's attention to an illegal, improper or incorrect finding, sentence or order of a subordinate court. The fact that in this case the brother of the deceased filed the revision petitions and the Government did not do so did not affect the powers of the High Court under that Section. In addition reference may also be made to s. 423 (IA) of the Cr., P.C. [145B-D]

Per Dua J.-In this case the High Court was not at all justified in interfering with the discretion of the trial court in decling to take the two documents on the record when the prosecution had not in good time summoned the evidence for proving the previous conviction of the appellant and the fact that he was under a life sentence and had also not asked, for adjournment of the appellant's trial on the charge under s. 302 I.P.C. The appellant could by no means be considered to have notice of a charge under s. 303 1. P.C. or of the facts which form the essential ingredients of the offence, when there was absolutely no such indication in the charge actually framed against him and on which he was tried. [155E-G]

The High Court did not also scrutinise the proceedings of the Sessions Judge for ascertaining if the appellant had been afforded adequate legal assistance and also as to why the thumb impressions and the handwritings, if any of the accused in the two cases were not got compared. The High Court should have done so in order to satisfy itself if the appellant had been afforded adequate and effective opportunity to defend himself before the Sessions Judge because those proceedings were just as serious as a trial for an offence prescribing death as the only penalty. 1156C-D]

Bashira v. State of U.P. A.I.R. 1968, S.C. 1313, referred to.

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The High Court erred in enhancing the appellant's sentence on the facts and circumstances of this case. Justice had quite clearly failed here as a result of the interference by the High Court on revision at the instance of the private

complainant. The death sentence passed by the High Court against the appellant must accordingly be quashed and the sentence of life imprisonment passed by the trial Court must be restored. [156-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 206 of 1971.

Appeal by certificate from the judgment and order dated August 11, 1970 of the Allahabad High Court in Criminal Appeal No. 216 of 1966.

M. S. Gupte, for the appellant.

O. P. Rana, for the respondent.

The Judgment of A. Alagiriswami and C. A.. Vaidialingam, JJ. was delivered by Alagiriswami, J., 1. D. Dua, J. gave a dissenting Opinion.

ALAGIRISWAMI, J. This is an appeal against the judgment of the High Court of Allahabad altering the sentence of life imprisonment inflicted on the appellant by the Sessions Judge, Hamirpur; to one of death under Section 303 I.P.C. The main argument in this case has been about the legality of the conviction of the appellant under Section 303 I.P.C. though an attempt was also made to canvass the correctness of the judgment of the Sessions Judge awarding the sentence of life imprisonment.

On 14-10-1964 the deceased. Rati Ram and his brother Pooran, P.W. 1, had gone to their fields and Pooran and his servant Ganga, P.W. 4, were ploughing their fields. In another field belonging to Pooran the appellant was grazing his cattle. Rati Ram asked the appellant to take away the cattle from his field as it was not yet dry and grazing of the cattle would damage the field. The appellant refused to remove his cattle from the field and upon this there was an exchange of abuses between the two. When the deceased was driving away the cattle from the field, the appellant gave a blow on the left side of the neck of the deceased with a Pharsa, which he had in his hand, and the deceased fell down and died. Sunder Lal, P.W. 2, who was ploughing his field nearby as well as Laxmi Prasad, P.W. 3, who happened to be on the spot. also saw this occurrence in addition to P.W. I and P.W. 4. P.W. I reported the occurrence at the police station and the Station Officer, P.W. 5, reached the village the same day, held an inquest, removed the blood stained clothes from the dead body, prepared a site plan and sent the body for postmortem examination. He also took the blood stained earth. After recording the statements of PWs 1 to 4 and recording the statement of the accused on 25-10-64 he submitted the charge sheet. The accused was committed to the Court of Sessions in due course to stand his trial under Section 302 I.P.C. The defence of the appellant was complete denial of the quarrel at the scene of occurrence as spoken to by the prosecution witnesses.

The medical evidence established that the deceased died of a blow given on his neck with a Pharsa. The occurrence happened during day time and in the report to the police the whole story, as spoken

to by the prosecution witnesses, was mentioned. There, was no suggestion to PWs 1, 2 and 4 of any enmity with the accused. A suggestion was made to P.W. 3 that the appellant's father had appeared as a witness in a dacoity case against PW 3's grand father, in which he-was convicted. P.W. 3 stated that he did not know whether this was true. and except this suggestion there was no other evidence to establish the enmity. This suggestion, however, looks far-fetched. We have carefully gone through the evidence in this case as also the Judgment of the Sessions Judge and the High Court and find no reason to differ from them in their conclusion that the appellant is guilty of the murder of Rati Ram.

It was argued before the Sessions Judge that in any case, no offence under Section 302 I.P.C. had been made out and that there was only an offence under Section 304, even if the prosecution story could be held to have been proved. The learned Sessions Judge took the view that though the occurrence took place without premediation and in a sudden fight, and there was exchange, of abuses on both sides, it could be presumed that it took place in the heat of passion upon a sudden quarrel, but that it could not be said that the offender had acted without having taken any undue advantage, and on the ground that the accused had acted in a cruel and unusual manner. he held that the offence did not fall' under Exception 4 of Section 300 of the, Indian Penal Code and found him guilty under Section 302 I.P.C. On the around, how,ever I , that there was no premediation and it was a sudden fight and the murder was committed in the heat of passion upon a sudden quarrel, and that the accused had given only , a single blow of the Pharsa, he awarded the lesser penalty of imprisonment for life.

Before the Sessions Judge, a petition was presented on 21st- July 1965 drawing his attention to the fact that the appellant was under a previous sentence of imprisonment for life, on conviction under s. 302 I.P.C. and that he was released on probation in the year 1959 and that his probationary period was upto 1973 and hence he should be charged under Section 303 I.P.C. The Sessions Judge was requested to send for the file of release orders under the- U.P. Releases on Probation Rules containing G.0 No. 271

(i)P/ XXII-1212(1)/1959 dated April 4, 1959 relating to the release of the appellant. On that application the Sessions Judge passed' a one word order saying 'Summon. On July 22, 1 965 on behalf of the prosecution another application was filed in these terms "Most respectfully it is submitted that the prosecution wants to bring into the records the following two papers. It is, therefore, prayed to your honour kindly to allow papers to be filed with the records.

Papers to be filed

1. Previous conviction certificate of the accused U/s. 302 I.P.C. in the year 1953 by the learned Sessions Judge, Hamirpur.

2. copy of the letter from the U.P. Govt. to the D.M. Hamirrpur regarding the release of this accused on probation of the year 1959. In that release order his probation period is upto the year 1973."

On this application the Sessions Judge passed the following order:-

"The papers are not relevant unless any document is produced to show that the present murder was committed when the accused was on probation or was serving out the sentence. Hence rejected."

Thereafter the remaining evidence was taken and the accused was examined. Arguments were heard and the judgment was delivered ,on July 26, 1965.

When the matter came up before the High Court on appeal by the appellant, two revision petitions were filed by Pooran, brother of the deceased, against the order of the Sessions Judge refusing to summon documents and refusing to frame a charge under S. 303 I.P.C. The prayer was that the appellant should be convicted and sentenced under s. 303 I.P.C. The appeal and the revisions were heard together. The High Court took the view that the appellant was guilty of the offence of murder and had been rightly convicted. The learned Judges were of the opinion that the Sessions Judge was n ot justified in disposing of the applications filed by the prosecution during the course of trial before him in the manner done by him, and it was his duty to get the necessary material and then to decide whether the prosecution was justified in asking for' the charge to be framed under s. 303 I.P.C. or not and that the 'Sessions Judge had failed to perform his duty. The Deputy Government Advocate produced before the High Court a G.O., which had been asked to be summoned in the earlier applications, which established that one Pratap son of Tulaiyan was sentenced to death for the murder of Srimati Phulrani and this was commuted to one of life imprisonment. This sentence was in force on the date on which the appellant committed the murder of Rati Rain. When he was questioned whether he had been convicted earlier under s. 302 I.P.C. the appellant denied that he had been prosecuted or convicted for murder. The matter was, therefore, sent by the High Court to the Sessions Judge, with a direction to make an enquiry whether the appellant and the person referred to as Pratap son of Tulaiyan convicted earlier for murder of Smt. Phulrarni were one and the same. The Sessions Judge accordingly held an enquiry in which he examined the husband of Smt. Phulrani, as also Pooran, who had been examined earlier as P.W. 1 in the present case. Both of them gave evidence that the appellant was none other than Pratap son of Tulaiyan, who had been earlier convicted for murder of Smt. Phulrani. The appellant admitted before the Sessions Judge that he was the same person who was prosecuted for the murder of Phulrani in 1953 and had been convicted and sentenced to death. The Sessions Judge recorded the finding that Pratap son of Tulaiyan who was convicted for the murder of Phulrani in Sessions Trial No. 25 of 1953 and the present appellant were one and the same person. The High Court accepted this finding.

It was contended before the High Court that it could not, in exercise of its revisional jurisdiction under s. 439 Cr. P.C., convict the appellant of the offence under s. 303 I.P.C. and that it should remand the case to the Sessions Judge for framing an additional charge under s. 303 I.P.C. and then proceed in accordance with the procedure prescribed by s.31O Cr.P.C. The High Court held that it was not necessary to follow the procedure prescribed by s. 310 Cr. P.C. and that they could, in exercise of their revisional powers, enhance the sentence on the appellant to one of death under s. 303 of the Indian Penal Code, and that it was not a case of the appellant having been acquitted under s. 303 of the I.P.C. earlier and it could not be said that he was being convicted for an offence for which he had been acquitted by the lower Court. On the above view the High Court convicted the appellant under s. 303 I.P.C. and sentenced him to death.

As already mentioned, there is no doubt that the offence of murder has been amply proved by the evidence of the prosecution witnesses in this case. That leaves the question whether the conviction of the accused under s. 303 I.P.C. is bad for all or any of the reasons urged by the appellant before the High Court and now before this Court. We are of the opinion that it was not necessary in this case to follow the procedure prescribed under s. 310. It is established that the accused was under a sentence of imprisonment for life when lie committed the present murder. His conviction was made in 1953 and he was released on licence in 1959 and the period .of licence was to last till 1973. Under the provisions of Section 2 of the Uttar Pradesh Prisoners' Release on Probation Act, 1938, the, State Government may by licence permit a person under sentence of imprisonment to be released-on condition that he be placed under the supervision or authority of a Government Officer or of a person or institution or society as may be, recognised by the State Government. Under Section 3 of that Act a licence granted ,under Section 2 shall be in force until the date on which the person released would, in the execution of the order of warrant authorizing, his imprisonment, have been discharged from prison had he not been released on licence or until the licence is revoked, which,ever is earlier. Under Section 4 of that Act, the period during which a person is absent from prison under the provisions of that Act on a licence which is in force shall be reckoned as part of the period of imprisonment to which he was sentenced, for the purpose ,of computing the period of his sentence and for the purpose of computing the amount of remission of sentence which might be .awarded to him under any rules in force relating to such remission. It is, therefore., obvious that the appellant had committed the murder of Rati Ram while he was under a sentence of imprisonment for life and he would. therefore. be liable to be convicted under Section 303 of the Indian Penal Code.

The argument on his behalf is that before sentencing him under Section 303 I.P.C. the procedure prescribed under Section 310 of the Code of Criminal Procedure should have been followed and as that has not been done the sentence of death passed on him is illegal.

Section 310 of the Code of Criminal- Procedure reads as follows :

310. In the case of a trial by a jury (or by the Judge himself) when the accused-is charged with an offence and further charted that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by' the foregoing provisions of this. Chapter shall be modified as follows, namely :-

(a) such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution. or any evidence adduced thereon unless and until.

(i) he has been convicted of the, subsequent offence. or

(ii)in the case of a trial by a jury, the jury have delivered their verdict on the charge of the subsequent offence;

(b) in the case of a trial (held by the Judge himself), the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction."

The question, therefore, arises whether in this case the appellant was, by reason of a previous conviction, sentenced to enhanced punishment or to a punishment of a different kind. There is no doubt that the sentence of death is an enhanced punishment over the previous sentence of life imprisonment. But the Section speaks of previous conviction which makes him liable to enhanced punishment. There has. of course. been a previous conviction in the case of the appellant. Section 303 of the Indian Penal Code speaks of a person. being under sentence of imprisonment for life, being liable to be punished with death if he commits murder. The distinction between the conviction of a person in section 310 Cr. P.C. and a person being under a sentence of imprisonment in section 303 I.P.C. should7be noted. A conviction by a Court may be followed either by the sentence being remitted under the provisions of the Code or the sentence may have been served out. In such cases though the person concerned could still be spoken of as having been convicted. he cannot be said to be under a sentence. The provisions of section 310 of the Code of Criminal Procedure can be usefully contrasted with the Provisions of section 75 of the Indian Penal code, which reads as follows : "75. Whoever having been convicted.-

(a)by a court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards..... shall be guilty of any offence punishable under either of those Chapters with, like imprisonment for the like term shall be subject for every such subsequent offence, to (imprisonment for life), or to imprisonment of either description for a term which may extend to ten years."

Under this section the mere fact that a person has been convicted under Chapter XII or Chapter XVII of the Code is enough to subject him to enhanced punishment in case of a subsequent offence committed by him' even though the sentence following his earlier conviction might either have been remitted or be may have been released after serving his sentence. Under section 310 of the Code of Criminal Procedure also it is enough that the person concerned has been earlier convicted. It is not necessary that the sentence should be in force. But under section 303 I.P.C. the person's sentence must be in force if the person is to be dealt with for a subsequent offence of murder under that section. If the previous sentence of life imprisonment had been remitted or had been served out when the subsequent murder was committed, section 303 will not apply. Bearing in mind that section 75 I.P.C. and section 310 of the Code of Criminal Procedure deal with persons with previous conviction-the previous sentence need not necessarily be in force when the subsequent offence is committed-it would be clear that the latter section is intended to be applicable only to cases to which section 75 of the Indian Penal Code applies. .Moreover, section 75 I.P.C. will be applicable as often as the necessity arises and in respect of any one of the offences subsequently, whereas section 303 of the Indian Penal Code will be applicable only in one circumstance, that is, of the accused committing murder while he is under sentence of imprisonment and not any other offence either. It is, however, argued that under the provisions of section 310, clause (b) there is a discretion given to the Trial Judge either to proceed or refrain from proceeding with the trial of accused on a charge of previous conviction and if that section should be held not to be applicable to this case it would mean that this valuable safeguard from the point of view of the accused which is available in the case of

less serious offences will not be available in the case of the more serious offences of murder. But it appears to us that that is the very reason why section 310 of the Code of Criminal Procedure would not be applicable to a case which attracts section 303 of the I.P.C. It is difficult to imagine any circumstances under which a Judge trying a person for murder committed by him when he was under sentence of life imprisonment would feel it justifiable or expedient not to frame a charge on the basis of his previous conviction. The offence of murder is punishable with life imprisonment or death under section 302 I.P.C. but this alternative is not available where a person being under the sentence of life imPrisonment commits murder and section 303 becomes applicable. The Legislature has, therefore, deliberately restricted the discretion of the Court in imposing the punishment for murder committed by a Person who is under a sentence of life imprisonment. This argument is, therefore, without any force. Furthermore, section 303 is like a proviso to section 302, and a court trying a person for murder could apply the provisions of section 303 if it is brought to its notice that the person being tried is under a sentence of life imprisonment. The punishment for an offence under section 302 is either death or life imprisonment and section 303 removes the alternative punishment and makes a sentence of death compulsory. We see no need therefore. to frame a further charge under section 303 according to the provisions of section 310 Cr. P.C.

We, therefore, hold that there was no illegality committed by the High Court in sentencing the appellant to death without framing a charge as required under 3 1 0 of the Code of Criminal Procedure or without sending back the case for fresh trial by the Sessions Judge after framing a charge under section 303 I.P.C.

Whether the High Court could impose a sentence of death on the appellant when there was no appeal by the State, merely on the basis of a revision petition filed by a private party, does not give rise to any serious difficulty. Under section 439 of the Code of Criminal Procedure the High Court has got ample powers and as a notice has also been issued to the appellant to show cause why his sentence should not be enhanced, there is no illegality in the C sentence of death imposed on the appellant. The power under section 439 Cr. P.C. is one which the High Court can exercise suo motu and all that a person filing a revision petition under that section does is to draw the court's attention to an illegal, improper or incorrect finding, sentence or order of a subordinate court. The fact that in this case the brother of the deceased filed revision, petition and the Government did not do so does not affect the powers of the High Court under that section. In addition, we may also refer to section 423 (IA) of the Cr. P.C.

In the result the appeal is dismissed.

DUA, J, I have read the judgment prepared by any learned brother Alagiriswami J. with respect I am unable to persuade myself to agree.

Material facts have been stated by my learned brother and it is unnecessary to restate them. As in my view the appellant's conviction under s. 302, I.P.C. is fully justified and the only question on which I am constrained to take a different view is the imposition of the sentence of death by the High Court under s. 303, I.P.C. on revision by the private complainant, I would only refer to the circumstances relevant and necessary for that limited purpose. M. Kaiser Beg, Magistrate, First

Class and A.D.M.

(i) Hamirpur had on February 20, 1965 committed the appellant for being tried by the Court of Sessions for an offence punishable under s. 302, I.P.C. Pursuant to the order of commitment the Magistrate framed the charge which was read. over and explained to the appellant. That charge reads:

Charge I. M. Kaiser Beg, Magistrate I Class and A.D.M. (J) Hamirpurl, hereby charge you Pratap as follows : That you armed with a pharsa, on the 14th day of October, 1964 at about noon, in village Pawai, P.S. II-L63ISup.Cl/73 Jaira in the field, adjoining Seth Wala field, did commit murder of Ratiram by intentionally and knowingly killing him with pharsa.

And you thereby committed an offence punishable under section 302, I.P.C. and within the cognizance of the Court of Sessions.

And I hereby direct that you be tried by the, said court on the said charge.

Sd./- M. Kaiser Beg A.D.M. (J) Hamirpue' This charge was read out and explained to the appellant by the Temporary Sessions Judge, who tried him, at the commencement of his trial (Trial No. 35 of 1965) 'on July 21, 1965. On that very day the counsel for the prosecution (the panel lawyer) filed an application in the trial court. In that application it was stated that the accused was a previous convict under S. 302, I.P.C. and that having been released on probation in the year 1969 his probationary period was up to 1973. It was accordingly suggested that he should be charged under S. 303, I.P.C. It was prayed that the Judicial Assistant Collectorate, Hamirpur be summoned along with the "File of Release Orders under the U.P. Release on Probation Rules containing G.O. No. 271 (i) P/XXII-1212/ 1959 dated April 4, 1959 relating to the release of Pratap, accused". On this application the court made the order "summon". On the following day, that is, July 22, 1965, when Pooran, P.W. 1, who had started making his statement on July 21, 1965, was to be cross-examined, the prosecuting counsel made another application seeking to place on the record", (1) Previous conviction certificate of the accused under S. 302, I.P.C. in the year 1953 by the learned Sessions Judge, Hamirpur; (2) copy of the letter from the U.P. Government to the D.M. Harnirpur, regarding the release of this accused on probation of the year 1959. In that release order his probation period is up to the year 1973", on which the trial court recorded the following order :

"The papers are not relevant unless any document. is produced to show that the present murder was committed when the accused was on probation or was serving out the sentence. Hence rejected,"

Evidence, as just stated, was recorded on July 21 and 22, 1965. and at the conclusion of the prosecution evidence on July 22, 1965 the appellant was examined. First the appellant stated that he would produce witnesses in defence but later he declined to do so. The arguments were heard on July 24, 1965. The trial court, as per judgment dated July 26, 1965, convicted the appellant under s. 302, I.P.C. and sentenced him to imprisonment for life. It is noteworthy that the appellant was tried on the charge as framed which only mentioned the offence punishable under s. 302, I.P.C. That charge contained no reference to s. 303, I.P.C. nor were the ingredients of the offence contemplated

by and punishable under s. 303 otherwise stated in the charge so as to give to the appellant precise notice of the matter he was charged with as contemplated by s. 221, Cr. P.C. Even in the two applications full facts of the previous case had not been stated.

The appellant's memorandum of appeal from his conviction was forwarded by the jail authorities to the High Court in which the only ground taken was that the police had falsely implicated him and that the witnesses had given evidence against him on account of enmity. Apparently he had no legal advice and the grounds of appeal clearly seem to have been stated by him without legal assistance. Two criminal revisions (Nos. 1886 and 1887 of 1965) were also presented in the High Court on behalf of Pooran, brother of deceased Rati Ram, against the orders of the trial court refusing, to summon the documents and refusing to frame a charge under s. 303, I.P.C. against the appellant. It was, prayed that the appellant be convicted and sentenced under the aforesaid section. On December 1, 1969 the High Court examined the appellant who denied having been tried and convicted of the murder of Smt. Phulrani in the year 1953. The High Court apparently did not feel satisfied with his denial. By means of an order of the same date i.e., December 1, 1969, the High Court sent to the Sessions Judge, Hamirpur the papers of the present case as also of the appeal in the murder case of 1953 (Crl. Trial No. 25/53) for determining if the appellant Pratap was the same person who had been convicted in the previous case. The High Court observed in that order :

"..... The Sessions Judge may examine such witnesses and documentary evidence as he considers necessary and as the parties produce before him. We have on our record the original jail, appeal filed by Pratap son of Tulaiyan against his conviction and sentence under section 302, I.P.C. in Sessions Trial No. 25 of 1953 which bears a very good thumb impression of Pratap son of Tulaiyan. This jail appeal in original will be sealed and forwarded to the Sessions Judge. We have also on the record of the present case a jail appeal filed by Pratap son of Tula Ram which bears a good thumb impression. We have also a letter sent by Pratap son of Tula Ram from jail to this Court which also bears a good thumb impression. These two documents will be flagged and sealed along with the jail appeal of Pratap son of Tulaiyan and sent to the Sessions Judge. We may mention that Pratap son of Tula Ram has signed his statement made before the committing court and the Sessions Judge. If the Sessions Judge considers necessary, he may find out whether any such signatures of Pratap son of Tulaiyan are available in the record of Sessions Trial No. 25 of 1953 and have them compared. It will be open to the Sessions Judge to obtain thumb impressions or signatures of the accused in the two cases either from the record of the committing courts or of the Sessions court or from the jail records for purposes of comparison. After making the necessary enquiries the Sessions Judge will submit his finding and report within two months from the receipt of this order."

The portion reproduced by me is the material part of that order. No reference was made by the High Court to the orders of the trial court on the applications made by the panel lawyer on which the impugned orders had been made by the First Temporary Sessions Judge and no comments on these orders are discoverable in the order of the High Court. The jail petition of the appellant in the previous appeal (Crl. Appeal No. 1383 of 1953) decided by the High Court on January 28, 1954 and the appellant's petition and letter were directed to be forwarded to the Sessions Judge. The enquiry was not directed to be made by the trial court (the court of the First Temporary Sessions Judge) but by the Sessions Judge who submitted his report on May 5, 1970. The delay in submitting this report

as stated by the Sessions Judge in his covering letter dated May 5, 1970 was due to the fact that the record, though received in the court of the Sessions Judge on December 20, 1969 was, under some mistaken impression, sent to the court of the First Temporary Civil and Sessions Judge, Hamirpur where it remained up to April 11, 1970. The report of the Sessions Judge reads Sir.

In compliance with the order of the Hon'ble High Court dated 1-12-1969 I have the honour to submit my report as follows :-

An enquiry was held by me in compliance with th order dated 1-12-1969.

Complainant in S. T. No. 25 of 1953 Moti Lal and complainant in S. T. No. 35 of 1965 Pooran and other witnesses were summoned. Pratap convict was also summoned in this enquiry. S.T. No. 25 of 1953 was in respect of the murder of Smt. Phoolarani Moti Lal alias Mutaiyan son of Pooran is the husband of Smt. Phoola Rani deceased. Moti Lal alias Mutiayan stated on oath that Smt. Phoolarani was murdered about 17 years back and Pratap was prosecuted for her murder. Pratap present in this Court is the same person (Pratap) who was prosecuted for the murder of Smt. Phoolarani and was sentenced to death in that case. The sentence of death passed in that case on Pratap was commuted to life imprisonment and after some years Pratap was released. Moti Lal also stated that the father of Pratap is alive. His name is Tula Ram and he is called Tulaiyan also. Moti Lal has not been cross-examined by Pratap. S.T. No. 35 was in respect of the murder of Rati Ram. Pooran brother of Rati Ram has been examined. Pooran stated that Pratap present in Court was prosecuted for the murder of Rati Ram. The father of Pratap Tula Ram is also called Tulaiyan. There is no other person in village Pathkhuri with the name of Tula Ram or Tulaiyan. He went on to state that there is no other person with the name of Pratap son of Tula Ram or Pratap son of Tulaivan in village Pathkhuri except Pratap who is present in the Court today. Pratap did not cross-examine this witness also-

The Statement of Pratap son of Tula Ram has been recorded. He has admitted that he is the same person who was prosecuted for the murder of Smt. Phoolarani in the year 1953 and who was convicted and sentenced to death in that case. Pratap further admitted that he is the person who was prosecuted for the murder of Rati Ram in the year 1965. Pratap also admitted that he is the only person with the name of Pratap son of Tula Ram or Pratap son of Tulaiyan in village Pathkhuri. He admitted that his father is called Tula Ram and Tulaiyan both.

In view of the above evidence it is clear that Pratap son of Tulaiyan, who was prosecuted for the murder of Smt. Phoolarani and was convicted under section 302, I.P.C. and sentenced to death in S. T. No. 25 of 1953 and Pratap Son of Tula Ram who was prosecuted for the murder of Rati Ram and was convicted and sentenced to Life Imprisonment under Section 302, 1,P.C. is one and the same person.

The evidence recorded in this enquiry consisting of the statement of Moti Lal son of Pooran, the statement of Pooran son of Tatiyan and the statement of Pratap son of Tula Ram is enclosed herewith."

The original record shows that the appellant was not repre- sented in those proceedings by any counsel and it was apparently for this reason that there was no cross- examination of the witnesses. When the appellant was questioned his answers to the two questions relating to the two murder cases was "yes, I am the same man". The third question was as to what the appellant had to say about the evidence of the two witnesses. To this he replied "yes, this is true". To the fourth question asking him if he wanted to say anything else he replied that he had denied in the High Court that he had been prosecuted or convicted for the murder of Jagrani. The Sessions Judge had not cared to have the thumb impression or the handwriting of the appellant examined by an expert as suggested by the High Court. The thumb impressions on the records of the two cases were ignored by the Sessions Judge though the relevant material had been specifically forwarded to him by the High Court with a clear suggestion to get them compared and also to see if the two records had on them the writings of their respective accused persons so as to have them also compared. Such comparison by an expert would certainly have thrown more useful light. Apparently the Sessions Judge did not consider it proper even to appoint an amicus curiae for assisting the appellant. The enquiry which was being held by the Sessions Judge involved compulsory imposition of death sentence. The proceedings should, therefore, have been treated with the same seriousness as is required in a trial involving death sentence and in all fairness an amicus curiae should have been appointed to assist the appellant who was apparently a pauper. Neither the report of the Sessions Judge nor the record discloses the presence of a counsel for rendering assistance to the appellant to meet the more serious charge under s. 303 ', I.P.C. On receipt of the report the High Court heard and disposed of, by a common judgment, the appellant's appeal and the two criminal revisions. Even the High Court does not seem to have considered the advisability of examining an expert for getting compared the two thumb impressions. The High Court in the final judgment dated August 11, 1970, impugned herein, upheld the appellant's conviction for the murder of Rati Ram holding that the evidence on record establishes "beyond reasonable doubt that Pratap son of Tula Ram caused the death of Rati Ram by giving him pharasa blow on the neck". So holding the High Court dismissed the appellant's appeal.

Thereafter, the High Court dealt with the two revisions preferred by the complainant. After observing that according to the prosecution and the complainant the appellant Pratap had been previously convicted under s. 302, I.P.C. in 1953 and at the time of the commission of the present offence in 1964 he was under a life sentence, the High Court reproduced the two applications filed by the panel lawyer and the orders made thereon, and observed : "In our opinion, the Sessions Judge was not justified in disposing of these applications in this manner. It was a very serious matter whether the charge should have been framed under section 302 or section 303 I.P.C. Once the matter was brought to his notice, it was the duty of the Sessions Judge to get the necessary material and then to decide whether the prosecution was or was not justified in asking for the charge to be framed under section 303 I.P.C. The Sessions Judge has failed to perform his duty." The High Court , as its final judgment shows, had permitted the Deputy Government Advocate to produce before it material for showing the appellant's previous conviction and the sentence of death imposed on him, which was later commuted by the Governor, as also his release in accordance with Rule 8 of the U.P. Prisoners' Release on Probation Rules. However, as the High Court felt that "there was some slight difference in the name of the father of Pratap in the two cases" the appellant was sent for and he appeared before the High Court on December 1, 1969. On being questioned the appellant

denied that he had been previously prosecuted or convicted for the murder of Smt. Phularani, adding that his father was not known as Tulaiyan. The High Court recorded the appellant's statement in Hindi. The impugned judgment further shows that the High Court had compared the left thumb impression of Pratap on the memorandum of appeal presented in the year. 1953 and that of the appellant in the appeal in the present case, and observed that those thumb impressions appear to be identical. This comparison had apparently been made before sending the necessary record to the Sessions Judge for holding the enquiry though it was not so stated in the order dated December 1, 1969, according to which the Sessions Judge was required to have them compared. This is what the High Court has said in the impugned judgment in this connection :

"It is thus fully established that Pratap son of Tulaivan was under the sentence of life imprisonment on the date on which Pratap son of Tula Ram committed the murder of Rati Ram. As there was some 15 2 slight difference in the name of the father of Pratap in the two cases, we sent for Pratap son of Tula Ram who has been convicted for the murder of Rati Ram. He was produced before us on December 1, 1969. On being questioned by us, he denied that he had been previously prosecuted or convicted for the murder of Shrimati Phularani. He further stated that his father was not known as Tulaiyan. We thereupon compared the left thumb impression of Pratap son of Tulaiyan on the memorandum of appeal which he had filed in the 1953 case with the left thumb impression of Pratap son of Tula Ram on the memorandum of appeal filed in the present case. Both the thumb impressions are very clear and distinct. They appeared to be identical. We accordingly sent these two documents together with the record of this case to the Sessions Judge and directed him to make an inquiry whether Pratap son of Tula Ram convicted for the murder of Rati Ram is the same person as Pratap son of Tulaiyan convicted for the murder of Srimati Phularani. The Sessions Judge examined two witnesses in the presence of Pratap son of Tula Ram. The first witness examined by him was Moti Lal alias Mutian husband of Srimati Phularani who had been murdered in the earlier case. He stated that Pratap present in court was the same person who was prosecuted and sentence to death for the murder of Srimati Phularani. He further stated that the sentence of Pratap was commuted to life imprisonment and Pratap was released after some years. He further stated that the father of Pratap was alive and that his name was Tula Ram but he was also called Tulaiyan. The second witness examined by the Sessions Judge was Pooran, brother of Rati Ram, who had earlier been examined as P.W. 1 at the trial. He stated that Pratap present in court was prosecuted for the murder of Rati Ram. He also stated that the father of Pratap is Tula Ram, and he is also called Tulaiyan and that there was no other person in village Pathkhuri of the name of Tula Ram or Tulaiyan. He further stated that, apart from the accused Pratap, there was no other Pratap son of Tula Ram or Tulaiyan in the village. The Sessions Judge then examined Pratap accused. Before the Sessions Judge Pratap admitted that he was the same person who was prosecuted for the murder of Srimati Phularani in the year 1953 and who was convicted and sentenced to death in that case. He further admitted that he was prosecuted for the murder of Rati Ram in the year 1965. He also admitted that his father was called Tula Ram as well as Tulaiyan and that he was the only person of the name of Pratap son of Tula Ram or Tulaiyan in village Pathkhuri. On the basis of this material, the Sessions Judge has recorded a finding that Pratap son of Tulaiyan, who was convicted of the murder of Srimati Phulrani in S. T. No. 25 of 1953 and Pratap son of Tula Ram who was convicted and sentenced for the murder of Rati Ram in S. T. 36 of 1965 is one and the same person." In the High Court it seems that the counsel appearing for the appellant did not challenge the finding of the

Sessions Judge. Apparently when the two witnesses examined by the Sessions Judge had not been cross-examined by the appellant and that evidence was accepted by the Sessions Judge there could not possible be any challenge by the counsel. It was, however, contended that the High Court could not on revision convict the appellant under S. 303, I.P.C. and that the case should be remanded to the trial court for framing an additional charge under s. 303, I.P.C. and for proceeding in accordance with the provisions of s. 310, Cr. P.C. This contention did not find favour with the High Court, Section 303, I.P.C. in the opinion of that court was only in the nature of a proviso to S. 302, and. therefore, it was open to it on revision to enhance the sentence of imprisonment to that of death even though no charge under s. 303 had been framed by the trial court. Confirming the appellant's conviction for the murder of Rati Ram, which was committed when he was under a sentence of imprisonment for life for committing the murder of Phulrani, the High Court sentenced him to death. Two questions arise : (1) if the High Court was right in enhancing the sentence and (2) if there is no cogent ground for interference by this Court in the present appeal.

Now , when the prosecuting counsel applied on July 21 , 1965 for summoning the witness concerned and the File of Release Orders the trial court allowed the prayer and directed the same to be summoned. The counsel apparently did not ask for the postponement of the trial and of the recording of evidence and indeed the statement of P.W. I actually began on that day. The following day the remaining evidence was recorded. Apparently when on July 22, 1965 the prosecuting counsel applied for bringing on the record the documents mentioned in that application the court cannot be considered to have gone seriously wrong in exercising its discretion in declining those documents to be brought on the record, because the witness summoned for proving the relevant document was not in attendance. The letter of the U.P. Government could not prove itself. Nothing has been stated before us as to whether the witness and the file directed to be summoned or July 21, 1965 had actually been summoned urgently and whether the prosecution was in a position to adduce the necessary evidence, for making out a prima facie case for modifying the charge, so as; to include S. 303, I.P.C. or the essential ingredients of the offence defined therein. In my opinion, therefore, the trial court was not unjustified in exercising its judicial discretion on the facts and circumstances of this case in declining the prayer of the prosecution. The fact therefore remains that the actual charge framed on which the appellant was to be tried made no reference to the date of the previous conviction for murder or to the fact that he was under the sentence of imprisonment for life when the present murder was committed. Under S. 221(2), (3) and (4) Cr. P.C. these facts should have been appropriately stated in the charge to give to the appellant proper notice that he was to be tried for an offence defined in and punishable under s. 303, I.P.C., for which offence if found guilty he must be sentenced to death. The prosecution had not cared to make out such a case in the commitment court. It also failed to take suitable steps at the proper time in the trial court to have the charge amended for the trial to be held for an offence defined in S. 303, I.P.C. The appellant, therefore, could not be deemed to have notice of the matter necessary for bringing the charge against him within the purview of S. 303, I.P.C. In the absence of such a charge, the trial court cannot be considered to have committed any serious error-if at all there was an error-in declining the prayer of the prosecution to place on the record the documents, which had nothing to do with the trial of the offence under S. 302, I.P.C. without any reference to the facts attracting s. 303, I.P.C. Assuming that S. 303, I.P.C. is comparable to a proviso to S. 302, the additional fact which must necessarily be proved to attract S. 303 should, in my opinion, have found place in the charae on

which the appellant was tried. Failure to do so cannot but be deemed to have prejudiced the appellant. The State did not feel aggrieved by any of the orders of the trial court and did not care to challenge them in the High Court and it did not itself apply for the appellant's trial on a proper charge or even for adducing additional evidence in the High Court. The power of revision in criminal cases vesting in the High Court, though wide and also exercisable suo niotu is a power which, generally speaking, is narrower and more limited than its appellate power, though in certain respects it has a somewhat wider scope. It is discretionary and cannot be invoked as of right such as is the case of appellate power. Broadly stated, the object of conferring- revisional power on the High Court under S. 435 and S. 439, Cr. P.C. is to clothe the highest court in a State with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. The error or defect may arise from misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, more perversity or even undue hardship or leniency. The real core of this power is that its exercise is justified only to set right grave failure of justice, and not merely to rectify every error however inconsequential. Merely because the lower court has taken a wrong view of law or misapprehended the evidence on the record cannot by itself justify interference on revision un- less it has also resulted in grave injustice. It is no doubt not possible and is also not practicable to lay down any rigid test of uniform application and the matter has to be left to the sound judicial discretion of the High Court in each case to determine if it should exercise its extraordinary power of revision to set right Injustice. Administration of criminal justice is as a matter of general policy a function which the State performs and private parties who may be inspired by a feeling or spirit of vengeance or Vindictiveness are ordinarily not encouraged to prosecute criminal proceedings except when for special reasons the cause of justice so demands. The High Court is, therefore, ordinarily disinclined to interfere with the orders of subordinate criminal courts in which the State is the prosecutor at the instance of private parties except where for some exceptional reason it considers proper to do so in the larger interests of justice.

In this case the High Court was, in my opinion, not at all justified in interfering with the discretion of the trial court in declining to take the two documents on the record when the prosecution had not in good time summoned the evidence for proving the previous conviction of the appellant and the fact that he was under a life sentence and had also not asked for adjournment of the appellant's trial on the charge under s. 302, I.P.C. The appellant could by no means be considered to have notice of a charge under s. 303, I.P.C. or of the facts which form the essential ingredients of that offence, when there was absolutely no such indica- tion in the charge actually framed against him and on which he was tried. From the record it is also clear that the appellant had been committed to the court of sessions a long time ago and the curse was also twice adjourned by the trial court. The trial was first fixed for April 26 and 27, 1965 when it was not adjourned because the investigating officer Shri Y. K. Singh Pippal, P.W. 5, had to go to Calcutta. Second time it was adjourned from July 6 and 7, 1965 to July 21 and 22, 1965 because of the illness of the mother of the appellant's counsel. There was thus ample opportunity for the prosecution to take suitable steps in the first instance to have a proper charge framed by the committing court and later to have the charge modified in the trial court in good time for the trial to be held on a charge under s. 303 , I.P.C. without unreasonable delay and finally to have the entire evidence, on the point of the appellant being under a life sentence at the time of the present offence, ready, if it was desired to have him tried on the charge under S. 303,

I.P.C. Indeed, the proper course for the prosecution was to have asked for framing appropriate charge under S. 303, I.P.C. in the commitment court, which course for reasons unexplained at the bar- and not discoverable on the record, was not adopted. The High Court does not seem to have adverted to any of _these considerations and without fully ,applying its mind to all the relevant circumstances, has adversely criticised the trial court's interlocutary order dated July 22, 1969. The High Court also did not properly scrutinise the proceedings of the Sessions Judge for ascertaining if the appellant had been afforded adequate legal assistance and also as to why the thumb impressions and the hand writings, if any, of the accused in the two cases were not got compared. In my opinion, the High Court should have done so in order to satisfy itself if the appellant had been afforded adequate and effective opportunity to defend himself before the Sessions Judge because those proceeding were just as serious as a trial for an offence prescribing death as the only penalty. Reference in this connection may usefully be made to Bashira v. State of U.P.(1) in which the desirability of appointina counsel for helping in his defence an accused person tried on charge for which capital sentence is provided, has been emphasised. That was a case from Allahabad and General Rules (Criminal) promulgated by the Allahabad High Court were relied upon. The appellant is undoubtedly a poor man as is clear from his petition of appeal in the form of a letter dated July 6. 1971 forwarded through Central Jail, Naini, Allahabad to this Court. Clearly he is not in a position to afford to engage a counsel.

The High Court has, in my opinion, erred in enhancing the appellant's sentence on the facts and circumstances of this case. Justice has quite clearly failed here as a result of the interference by the High Court on revision at the instance of the private complaint.

The present appeal is not under Art. 136 of the Constitution but is on a certificate granted under Art. 134 (1) (c). The very first ground for granting the certificate is "that the Sentence of death has been imposed upon the appellant in the first instance" by the High Court. As the sentence of death has been imposed by the High Court for the first time on additional material not on the record of the trial court, for bringing the appellant's case under s. 303, I.P.C. which is a more serious offence (entailing capital sentence as the only penalty) than one under s. 302, I.P.C. and (1) A.I.R. 1958 S.C. 1313.

requires additional facts to be proved for conviction thereunder, and the necessary certificate has been granted for this reason, this court is fully justified in going into the entire record and coming to its own conclusions as to how-far the sentence of death by way of enhancement is justified on the facts and circumstances of this case hideed on the present record I would have felt little hesitation in interfering even under Article 136 of the Constitution. I am clearly of the opinion that no case was made out for invoking the revisional jurisdiction of the High Court for enhancing the sentence by converting the conviction from an offence under s. 302 to that under S. 303, I.P.C. There has been in this case an infringement of the essential principles of justice. As this conclusion is sufficient for rising of the appeal, I do not think this Court is bound to express any opinion on the second ground on which the High Court felt justified in granting the certificate. After considering all the facts and circumstances and going through the record, in my opinion the appeal must be allowed in part and the sentence of death quashed. I would have considered the desirability of sending the case back to the trial court for recording the evidence after amending the charge and after giving the appellant

proper legal aid. But the offence in this case was committed as far back as August 1964. In my opinion, therefore, it would not serve the ends of _justice to adopt that course and to subject the appellant to further inquiry with respect to the ingredients of the offence under s. 303, I.P.C. I would accordingly quash the death sentence and restore the sentence of life imprisonment imposed by the trial court. On the view that I have taken on the material on the, present record I have not considered if necessary to express any considered opinion on the question of the applicability of s. 310. Cr. P.C. to the facts of this case though this is also one of the grounds on which the High Court granted the certificate. Decision on that point is unnecessary for disposing of this appeal. Similarly, I consider it unnecessary to express any opinion on the point whether the High Court should not have more appropriately remitted the papers to the trial court from whose orders it was hearing the Appeal and the two revisions, rather than to the Sessions judge for further inquiry and report on the question of the appellant's guilt under S. 303, I.P.C.

G.C. Appeal dismissed.