Supreme Court of India
Shyam Deo Pandey & Ors vs State Of Bihar on 23 March, 1971
Equivalent citations: 1971 AIR 1606, 1971 SCR 133
Author: C Vaidyialingam
Bench: Vaidyialingam, C.A.

PETITIONER:
SHYAM DEO PANDEY & ORS

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT23/03/1971

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
RAY, A.N.

CITATION:
1971 AIR 1606 1971 SCR 133
1971 SCC (1) 855
CITATOR INFO :
R 1974 SC 387 (2)

ACT:
Code of Criminal Procedure (Act 5 of 1898), s. 423--Absence of appellants and counsel at the time of final disposal--Dismissal on merits--Duty of appellate court to peruse records.

HEADNOTE:
The appellants were convicted and sentenced for the offence of kidnapping. They filed an appeal which was admitted by the High Court and notice was ordered to be issued. On the date an which the appeal was posted for hearing neither the appellants nor their counsel appeared and the High Court dismissed the appeal in the following terms: 'On perusal of the Judgment under appeal I find no merits in the case. It is accordingly dismissed.'
On the question whether the disposal of the appeal by the High Court is in conformity with s. 423, Cr. P. C.,
HELD:If a criminal appeal by the accused is not dismissed summarily under s. 421 of the Code and notice as required by s. 422 is issued, then; under s. 423, it is obligatory for the appellate court to send for the record if it is not already before the Court. After the records are

before the court and the appeal is set down for hearing, it is essential that the appellate court should: (a) peruse such record; (b) hear the appellant or his pleader appears; and (c) hear the public prosecutor if he appears. After complying withthese requirements, the appellate court has full power to pass any of the orders mentioned in the section. If the appellant and his counsel are not present the appellate court cannot dismiss the appeal enable them to appear or it should consider the appeal on merits and pass final orders. The consideration of the appeal on merits at the stage ,of final hearing and deciding the appeal on merits and passing final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. While there is no emphasis on the perusal of the record in s. 421 at the admission stage, under s. 423, one of the essential requirements and a condition precedent to a final disposal of the appeal either by dismissing it or in any other manner contemplated by the section, is that the appellate court should peruse the record. The requirement regarding the perusal of the record that has been sent for and received in court before disposing of an .appeal is not an empty formality. On the contrary, the expression after perusing the record' in the section assumes importance in the context of the enormous powers that the appellate court has in the final disposal of the criminal appeal. Record of the case does not mean only the judgment, because, that must have already been perused under s. 421 when the High Court admits the appeal [14OA-B, C, E, G-14; 141A-D, H; 142BC, D-E, F-H; 143A-B]

In the present case, there is no indication in the order that it was passed after perusing the record that must have been sent for as required by s, 423(1). From the mere recital in the High Court's order that there is no merit in the case it is not possible to infer that the High Court has come to the conclusion after applying its judicial mind and after perusing

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the record. There must be a clear judication in the judgment or order of' the appellate court that it has applied its judicial mind to the particular appeal it was dealing with. Such an indication will be available when the appellate court has considered the material on record which means, not only the judgment and petition of the, appeal, but also other relevant materials. Since the impugned order of the High Court was passed without considering the material on record the order was not in conformity with s. 423 of the Code and had to be to set aside. [143C-D, E-G, H 144A-C]

Sankatha Singh v. State of U.P. [1962] Supp. 2 S.C.R. 817,

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION': Criminal Appeal No283 of 1968.

Appeal by special leave from the judgment and order dated May 10, 1968 of the Patna High Court in Criminal Appeal No. 453 of 1966.

S. N. Prasad, for the appellants.

R. C. Prasad, for the respondent.

The Judgment of the Court was delivered by Vaidialingam, J.-The short question that arises in this appeal, by special leave, is whether the judgment and order of the Patna High Court dated May 10, 1968, dismissing the Criminal Appeal No. 453 of 1966, are in conformity with Section 423 of the Code of Criminal Procedure, (hereinafter to be referred as the Code).

The appellants, who are accused Nos. 2 to 5, along with the first accused Sia Devi (wife of 5th accused) were tried by the learned First Assistant Sessions Judge, Biharsharif, for an offence under Section 363 of the Indian Penal Code. The case of the prosecution was as follows One Kanta Kumari, an orphan minor, and niece of the com- plainant (P. W. 1) Parmeshwar Pandey was under the lawful guardianship and protection of the latter and residing with him since the death of her parents. At about 8 P. M. on February to the house of the complainant and called Kanta KumaKanta Kumari responded to the call by coming out. When she wasquestioned by her uncle as to where she was going out with the two, accused, Kanta Kumari replied that she was going out for singing marriage songs. Kanta Kumari went away with the two accused and returned home by about mid- night. In the morning of February 15, 1965, the complainant found that Kanta Kumari was missing from his house. On a search made by him, he came to know that Kanta Kumari was seen early that morning at about 3 A. M. going in the company of all the five accused persons for Ganga Ashnan. He was expecting Kanta Kumari to return. But on the evening of February 17, 1965, when he met the first and the fifth accused in the village, he was informed by the fifth accused that his paternal cousins, accused Nos. 2 and 3, had taken away Kanta Kumari with them. On receiving this information, Parmeshwar Pandey lost all hope of his niece Kanta Kumari coming back and on February 18, 1965 he filed a complaint before the police alleging that his niece Kanta Kumari, a minor, has been kidnaped from his lawful guardianship by the five accused. All the five accused were charged under Section 363 1. P. C. for kidnaping the minor girl Kanta Kumari on February 15, 1965 from the lawful guardianship of her uncle Parmeshwar Pandey without his consent. All the accused pleaded not guilty before the trial court and stated that they were falsely implicated by Parmeshwar Pandey on account of long standing enmity. In particular they pleaded :

(a) that Parmeshwar Pandey had no niece called Kanta Kumari ;

(b) they have not kidnaped Kanta Kumari; and

(c) in any case Kanta Kumari was not a minor as alleged but was a major about 18

years of age.

The learned Assistant Sessions Judge by his judgment and order dated August 31, 1966 substantially rejected all the pleas of the accused. The learned Judge held that the complainant Parmeshwar Pandey, who had given evidence as P. W. I had a niece by name Kanta Kumari, who was living with him under his guardianship as she had lost her parents. Though Kanta Kumari ,Was not traced and as such she was not before the court, the learned Judge held that Kanta Kumari at the time of the occurrence must have been only 9 or 10 years old. The learned Judge further held that accused Nos. 2 to 5 (appellants herein) have kidnaped Kanta Kumari, a minor girl, on February 15, 1965 from the lawful guardianship of her uncle Parmeshwar Pandey without his consent and as such they were guilty of the offence under Section 363 1. P. C. Accordingly he convicted appellants of the said offence and sentenced them to undergo rigorous imprisonment for five years. Each of them was also fined a sum of Rs. 500 and in default of payment of fine to undergo further rigorous imprisonment for six months. The learned Judge, however, held that the case against accused No. 1, Sia Devi has not been proved beyond reasonable doubt and as such acquitted her.

The appellants filed Criminal Appeal No. 453 of 1966 in the Patna High Court on September 8, 1966 challenging the various findings recorded by the learned Assistant Sessions judje and contending that those findings were not supported by the evidence adduced. They also pleaded that their conviction is illegal. In particular they have pleaded that the finding regarding the age of Kanta Kumari, when she has not appeared before the court is based on pure conjecture and surmise and not on any legal evidence.

On September 9, 1966 the High Court admitted the appeal and passed the following order : "9.9.66 This appeal will be heard. Issue notice.

Pending the hearing of this appeal the appellants will continue on bail to the satisfaction of the District Magistrate. The realisation of fine also will remain stayed during the pendency of this appeal." The appeal was posted for hearing on May 10, 1968. On that date neither the appellants nor their counsel seems to have appeared and the Court dismissed the appeal and passed the fol- lowing order and judgment.

"10-5-68. No one appears to press this appeal. On perusal of the judgment under appeal, I find no merit in the case. It is accordingly dismissed."

The appellants on the same day filed Criminal Miscellaneous Application No. 556 of 1968 praying for restoration of the Criminal Appeal which had been dismissed by the Court. After issuing notice in the said application, the High Court on July 12, 1968 dismissed the application, for restoration on the ground that no sufficient cause has been shown by the appellants. The appellants filed an application for grant of a certificate under Article 134(1) (c)of the Constitution to appeal to this Court together with an application to excuse delay in filing the application. The High Court dismissed this application on August 2, 1968. This Court, however, on December 11, 1968, granted special leave to appeal against the judgment and order of the High Court dated May 10, 1968.

Mr. S. N. Prasad, learned counsel for the appellants, raised two contentions : (i) that the disposal of the appeal by the High Court on May 10, 1968 is contrary to the terms of Section 423 of the Code ; and (ii) that the order pronounced by the High Court is not a judgment as understood in law as it does not contain the point or points for, determination, the decision thereon and the reasons for the decision.

MR.R. C. Prasad, learned counsel for the, State, has urged that the order dated May 10, 1968 complies in all respects with Section 423 of the Code. He has further urged that Section 367 of the Code relating to the contents of the judgment does not apply to the High Court and in this connection he relied on Section 424 of the Code. In the view that we take regarding the first contention of Mr. S. N. Prasad, that the judgment is not in compliance with Section 423 as the code, we do not think it necessary to express any opinion as to whether Section 367 applies to the judgment delivered 'by the High Court as also the scope of Section 424 of the Code. 'The question whether the High Court has got jurisdiction to restore a criminal appeal has also not been agitated before us.

The contention of Mr. S. N. Prasad is that the High Court having admitted the appeal on September 9, 1966 and issued notice to the State, it has no power under Section 423 of the Code to dismiss the appeal summarily as it has done on May 10, 1968. The manner of disposal of the appeal, the counsel pointed out, shows a complete disregard by the High Court of the provisions of Section 423 of the Code enjoining the appellate court to look into the entire record and give reasons for the decision arrived at. According to the counsel, this approach should be made by the appellate court irrespective of the fact whether the appellant or his pleader or the public prosecutor for the State appears or not.

Mr. R. C. Prasad, learned counsel for the State, on the other hand, pointed out that the impugned order clearly shows that the High Court has gone through the judgment of the trial court, which was under appeal and as it found no merit in the case, it dismissed the same. There is no illegality or any violation of Section 423 of the Code in the manner of disposal of the appeal by the High Court. In order to appreciate the contentions taken by the counsel of both sides, it is necessary to advert to the material provisions of the Code bearing on the point arising for consideration.

Part VII deals with Appeal, Reference and Revision. Chapter XXXI in the said part deals with Appeals. Section 410 of the Code gives a right to any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge to appeal to the High Court. Sub-section (i) of Section 418 provides that an appeal may lie on a matter of fact as well as a matter of. law, excepting where the trial was by the Jury, in which case the appeal shall lie on a matter of law only. The Explanation provides that the alleged severely of a sentence shall for the purpose of Section 418 be deemed to be a matter of law. Under Section 419, the appeal is to be made in the form of a petition in writing presented by the appellant or his pleader. Unless the court otherwise directs, the petition of appeal shall be accompanied by a copy of the judgment or order appealed against. Section 420 provides for the manner of filling an appeal when the appellant is in jail. Sections. 421, 422 and 423, which, in our opinion, are important are as, follows "Section 421. (1) Summary dismissal of appeal On receiving the petition and copy under Section 419 or section 420, the appellate Court shall peruse

the same, and, if it considers that there is'-no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2)Before dismissing an appeal under this section, the Court may call, for the record of the case, but shall not be bound to do so.

"S". 422. Notice of appeal If the Appellant Court dose not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under Section 411A sub-section (2) or section 417, the Appellate Court shall cause a like notice to be given to the accused.

Section 423 : Powers of Appellate Court in disposing of appeal :

(1)The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under Section 41 IA, sub-section (2) or Section 417, the accused, if he appears the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a)in an appeal from an order of acquittal, reverse such order and direct that further inquiry 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 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 (3), not so as to enhance the same,,

(c)in an appeal from any other order, alter or reverse such order ;

(d)make any amendment or any consequential or incidental order that may be just or proper. (IA) Where an appeal from a conviction lies to the High Court, it may enhance the sentence, notwithstanding anything in consistent therewith contained in clause (b) of sub- section (1) :

"Provided that the sentence shall not be so enhanced, unless the accused has had an opportunity of showing cause against such enhancement.

(2)Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

From the scheme of the sections referred to above, the fol- lowing facts emerge : The appellants had a right under Section 410 to file an appeal to the High Court against their conviction. Under Section 418 they were entitled to challenge the correctness of the findings of the trial court, both on facts and law, as admittedly their trial was not by the jury. They were also entitled as them. The appellants had filed the appeal in due form as required by Section 419 accompanied by a copy of the judgment or order appealed against. Under Section 421 the Appellate Court is bound to peruse the appeal petition and the copy of the judgment or order appealed against. If the Appellate Court, on perusal of the same, considers that there was no sufficient ground for interfering with the judgment and order appealed against, it can dismiss the appeal-summarily. Under sub-section (2) of Section 121, it is open to the Appellate Court before dismissing the appeal to call for the record of the case ; but it is not mandatory that the Appellate Court should call for the record. The stage under Section 421 is to enable the Appellate Court to decide whether the appeal should be admitted or dismissed summarily. In the case before us on September 9, 1966 when the High Court ordered "this appeal will be heard. Issue notice", it is clear that on perusal of the petition of appeal and the judgment of the Sessions Court, the High Court did not take the view that there was no sufficient ground for interference so as to dismiss the appeal summarily. On the other hand, the order of the High Court, extracted above, clearly indicates that the appeal is to be heard and disposedof on merits and for that purpose it issued notice to the State. In fact the provisions regarding issue of notice as providedunder Section 422 has also been followed by the High Court. The procedure under Section 422 has to be followed, only when the appeal is not dismissed summarily under Section 421. In this case the stages envisaged by Sections 421 and 422 have passed. The appeal has been admitted and taken on file and notice must have been also issued to the appellants or their counsel, as envisaged in the section.

Coming to Section 425, which has already been quoted above, it deals with powers of the Appellate Court in disposing of the appeal on merits. It is obligatory for the Appellate Court to ,send for the record of the case, if it is not already before the Court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. The correctness or otherwise of the findings recorded in the judgment on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for by the Appellate Court. A reading of Section 423 makes it clear that a criminal appeal cannot be dismissed for default of appearance of the appellants or their counsel. The court has either to adjourn the ,hearing of the appeal in order to enable them to appear or it should consider the appeal on merits and pass final orders. The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits so as to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are before the court and the appeal is setdown for

hearing, it is essential that the Appellate his pleader, if he appears, and (c), hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section. It is to be noted that if the appellant or his pleader is not present or if the, public prosecutor is not present, it is not obligatory on the Appellate Court to postpone, the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the appeal; but that disposal must be after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the fact whether the appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits. Under Section 421 the Appellate Court has to decide whether the appeal is to be taken on file or dismissed summarily. The obligation of the court at that stage is only to peruse the petition of appeal and the copy of the order or judgment appealed against. A summary dismissal of the appeal will then be legal if the Appellate Court considers that there is no sufficient ground for interference. But even in such circumstances it has been held that a summary decision is a judicial decision which vitally affects the convicted appellant and in a fit case, it is also open to be challenged on an appeal before this Court. Though a summery rejection, without giving any reasons, is not violative of any statutory provisions, such a manner of disposal removes every opportunity for detection of errors in the order. It has been further held that when an appeal in the High Court raises a serious and substantial point, which is prima facie arguable, it is improper for an Appellate Court to dismiss the appeal summarily without giving some indication of its view on the point. The interest of justice and fair play require that in such cases an indication must be given by the Appellate Court of its views on the point argued before it. The earliest decision on this aspect is the one reported in Mushtak Hussein v. The State of Bombay. (1) The entire case law has been referred to and reiterated in Govinda Kadtuji' Kadam and others v. The State of Maharashtra (2). The recent decision on this aspect is of Challappa Ramaswami v. State of Maharashtra.(3) We have referred to the above decisions to show that though a sum- mary rejection by an Appellate Court under Section 421 may not (1) [1935] S.C.R. 809.

(2) A.I.R. 1970 S.C. 1033.

(3) A.I.R. 1971 S.C. 64.

be violative of the section, nevertheless when an arguable or substantial question arises for consideration, the Appellate Court in its order should indicate its views on such point. If the position is as indicated above that even under Section 421, which contemplates dismissal of an appeal summarily, under Section 423, in our opinion, a very rigorous test must be applied to find out whether the Appellate Court has complied with the provisions contained therein. There is no emphasis on the perusal of the record in S ection 421 whereas under Section 423 one of the essential requirement is that the Appellate Court should peruse the record. There cannot be any controversy that Section 423 applies to cases in which appeals have been presented and admitted. Though Section 423 does not provide any limitation on the power of the Appellate Court that it is incompetent to dispose of the appeal, if the appellant or his pleader is not present, nevertheless there is a limitation. That limitation, which is provided by the section is that the Appellate Court,

before disposing of the appeal, must peruse the record. No doubt if the appellant or his pleader is present, he must be heard. Similarly, if the public prosecutor is present, he too must be heard. The Legislature in S. 423 contemplates clearly that in certain cases a criminal appeal might be disposed of without hearing the appellant or any one on his behalf or the public prosecutor. The expression "after perusing such record" in the section is, in our opinion, a condition precedent to a proper disposal of an appeal either by dismissing the same or in any other manner contemplated in the said section. The powers which the Appellate Court in criminal appeals possesses are depicted in Section 423. It his power not only to dismiss the appeal but also pass any one of the orders enumerated in clauses (a),, (b), (c) and (d) and sub- section (lA). These provisions show the enormous powers which the Appellate Court possesses in regard to a criminal appeal. These powers, it cannot be gainsaid are very vast. Any one of the orders, mentioned above, could be passed by the Appellate Court whether the appeal is disposed of on hearing or without hearing the appellant or his pleader. These provisions, in our opinion, clearly indicate the, nature of a judgment or order that is expected of the Appellate Court in its judgment. It is in this context that the expression "after perusing such record" assumes great importance. Absence of these words in Section 421, brings out in bold contrast the difference in the nature of jurisdiction exercised under the two sections. It is not necessary to deal exhaustively with the connotation of the expression "after perusing such record" occurring in Section 423 (1). That will depend upon the I nature of the order or judgment appealed against as well as the point or points that are taken before the Appellate Court. But one thing is clear. There must be a clear indication in the judgment or order of the Appellate Court that it has applied its judicial mind to the particular appeal with which it was dealing. Such an indication will be available when the Appellate Court has considered the material on record, which means not only the judgment and petition of appeal, but also the other relevant materials. The Appellate Court is bound to have looked into the judgment of the lower court appealed against. The petition of appeal must have also been looked into to know the nature of the attack that is made against the judgment. There will be other materials on record and they will have to be perused by the Appellate Court. The nature of such perusal to be indicated in the Appellate judgment may also differ under different circumstances. Applying the above tests, we find that the order passed by the High Court in the case before us does not satisfy the above requirement. There is no indication in the order that it was passed "after perusing the record" that it must have sent for as required in the earlier part of Section 423(1). Admittedly the order does not state that the court has perused "such record" meaning the record sent for by it. On the other hand, the recital in the judgment is "on a perusal of the judgment under appeal, I find no merit in the case." Under Section 421, as we have already pointed out, the High Court should pursue the petition of appeal and the copy of the judgment or order appealed against. Even for a summary rejection under Section 421, apart from ocru-sal of the judgment, it is obligatory for the Appellate Court to peruse the petition of appeal also. The High Court in this case has admitted the appeal under Section 421 and issued notice. By this it is clear that the High Court was of the opinion that there were arguable points raised in the appeal, which required consideration on merits under Section 423. Under Section 423 one ,of the importantrequirement is that the Appellate Court must peruse the record. Record of the case does not mean only the judgment, becausethat must have already been perused on September 9, 1966 under Section 421, when the High Court admitted the appeal. We have already pointed out that there is no indication in the order of the High Court that it has perused any record. Without a perusal of the record of a particular case and .giving any indication of such perusal in the appellate order or judgment, an

order, similar to the one in question could be passed in any criminal appeal in a routine manner, when the appellant or his pleader does not appear or even in appeals where parties have been heard. From the mere recital in the High Court's order that there is no merit in the case, it is not possible to infer that the High Court has come to that conclusion after applying its judicial mind and after perusing the record. In fact the conclusion that there is "no merit in the case" is arrived at, as the High Court itself says, only on the basis of its "perusal of the judgment under appeal". The requirement regarding the perusal of the record that has been sent for and received in court, before disposing of an appeal, is not to be treated as an empty formality, as is evident by the vast powers conferred on the Appellate Court to pass the various types of orders enumerated in the section. We are of the opinion, that in passing the impugned order the High Court has not considered the material on record before coming to the conclusion that there was no case for inter- ference. As such the order is not in conformity with Section 423 of the Code; hence it has to be set aside. Mr. R. C. Prasad, learned counsel for the State, drew our attention to the decision of this Court reported in Sankatha Singh vs. State of U. P. (1) and urged that a similar order has been sustained by this Court. We have gone through the said decision and it does not support the respondent. This Court was not dealing with an order passed by the High Court as an Appellate Court. On the other hand, the Sessions Judge had dismissed a criminal appeal stating that the appellants and their counsel were absent and that he has perused the judgment of the trial court and seen the record and that it finds no ground for interference. This order was passed on November 30,1956. Later on, the appellants had filed an application to the Sessions Judge for restoring the appeal to file. On July 2, 1957 the Sessions Judge allowed the application and restored the criminal appeal to file the appeal which had been dismissed on November 30, 1956. But when the criminal appeal so restored came up for hearing before the successor Sessions Judge, he took the view that the order of restoration passed on July 2, 1957 by his predecessor was illegal and without jurisdiction. This order was challenged in revision and the High Court agreed with the view of the Session.-, Judge that the original order of restoring the criminal appeal to file was illegal. This Court held that the order of the High Court holding that the criminal appeal should not have been restored, was correct. Therefore, this Court was only dealing with the correctness of the view of the High Court regarding the legality of the order of restoration passed by the Sessions Judge. This Court has, no doubt, observed that the order passed on November 30, 1956 by the Sessions Judge after perusing the record and judgment without giving any other reasons may not be a strict compliance with the provisions of Section 367 of the Code and that it may be set aside by a superior court; but the point that was emphasized was that the nature of the order passed by the Sessions Judge on November 30, 1956 will not give power to the Sessions Judge, an Appellate Court, to set aside the said judgment for the (1) [1962] supp. 2 S.C.R. 817.

purpose of rehearing the appeal. therefore, the above facts clearly show that the point that we hive decided in this appeal never arose for consideration in that decision. To conclude the appeal is allowed. The judgment and order of the High Court dated May 10, 1968 in Criminal Appeal No. 45 3 of 1966 are set aside and the said appeal is remanded to that court for hearing and disposal according to law and in the light of the observations contained in the judgment.

V.P.S Appeal allowed.
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