Raghubir And Ors. vs Rex on 9 August, 1950

Equivalent citations: AIR1951ALL365, AIR 1951 ALLAHABAD 365

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Sapru, J.

1. By an order dated 29.1.1949 the learned Additional Sessions Judge of Meerut convicted the appellant, Raghubir, under Sections 304, 148 and 323/149, Penal Code. He sentenced him to transportation for life under Section 304, Penal Code, to three years' rigorous imprisonment under Section 148, Penal Code, and to one year's rigorous imprisonment under Section 323/149, Penal Code, the sentences to run concurrently. He convicted the remaining nine appellants under Sections 148 and 323/149, Penal Code, and sentenced them each to 3 years' rigorous imprisonment under Section 148, Penal Code, and to one year's rigorous imprisonment under Section 323/149, Penal Code. The sentences were ordered to run concurrently.

2. On 26-8-1949 this appeal came up before a bench of this Court for hearing. That bench issued notice to the appellants to show cause why their convictions be not altered and the sentences enhanced. Learned counsel for the appellants has appeared to show cause. The case has been fully argued on both sides.

3. Before indicating my views on the question whether the section under which the appellants have been convicted can be altered and at the same time the sentence can also be enhanced in the exercise of our revisional jurisdiction, it is necessary to refer briefly to the main facts of this case. According to the case of the complainants which was accepted by the learned Sessions Judge, the appellants had, after a quarrel over a mare which strayed into the field of the appellants, beaten the complainants mercilessly with deadly weapons and in that beating one person lost his life. The prosecution was clearly able to establish its case by good evidence which I do not propose to review at any length as it has been subjected to a close scrutiny by my learned brother in a separate but concurrent judgment.

4. The law, as I understand it, is that where a number of persons go armed with deadly weapons to attack a person or a party, it may be assumed as a matter of common sense that their common intention is at least to cause grievous hurt. If in the course of the commission of that offence, death is caused the persons so attacking will be guilty of an offence under Section 302, Penal Code. This appears to have been the view of this Court for some years past and the learned Sessions Judge

appears to have over-looked the settled law on the point. So far as this is concerned, the learned Sessions Judge clearly went wrong.

5. The main question, however, which we have to consider in this case is whether we have any power, as the law stands, to alter the conviction under our appellate power under Section 423, Criminal P. C. to Section 302, Penal Code and there, after enhance the sentence in the exercise of our revisional power under Section 439, Criminal P. C. Shortly put, the question, as I see it is whether it is open to us to exercise our revisional power of enhancing the sentence after we have exercised our appellate power under Section 423 (1) (b) of altering the finding. Section 423, Criminal P. C. lays down the powers of the appellate Court in disposing of appeals. Section 493 (1) (b) lays down that in an appeal from a conviction the appellate Court can alter the finding, maintaining the sentence, or with or without altering: the finding, reduce the sentence. The first important point which we have to note is that the power of altering the finding so as to enhance the sentence has not been conferred by the section referred to above. We can enhance the sentence only in the exercise of our revisional power which is to be found in Section 439, Criminal P. C. The question whether we can exercise both the powers, i. e., the power of altering the finding under Section 423 and enhancing the sentence under Section 439, Criminal P. C., simultaneously came up for consideration before a Bench of this Court in the case of Mohammad Sharif v. Rex, A. I. R. (37) 1950 ALL. 380 : (51 Cr. L. J. 1040). It was held by that Bench that this Court cannot exercise its appellate power and revisional power simultaneously so as to convert a finding of acquittal into one of conviction and enhance the sentence.

6. The position then, as I see it, is that we cannot, in altering the conviction, enhance the sentence in the exercise of our appellate power. It is quite obvious that the two processes, i. e., of altering the finding and enhancing the sentence cannot be absolutely simultaneous. For it is quite clear that we shall, first of all, have to come to a conclusion whether the section should be altered or not. If the section is altered, then no doubt we can maintain the sentence. But it is also clear that in the exercise of our appellate power we cannot enhance the sentence. After this process, namely, the exercise of our power of an appellate Court is over, we shall have to invoke the assistance of our revisional power for the purpose of enhancing the sentence. It strikes me that the two processes cannot go together. For, first of all, we have to come to a conclusion in regard to the altering of the conviction before we can take up the question of enhancing the sentence. Section 439, Criminal P. C. gives us revisional jurisdiction not over ourselves but over subordinate Courts and it strikes me that there is no escape from the position that what the learned Additional Assistant Government Advocate contends is that we should sit as a Court of revision over the decisions arrived at by us in our appellate capacity. From that point of view, the judgment of Bhargava J. in the bench case to which reference has been made above appears to me to be correct and I am not prepared to dissent from it.

7. Reliance was placed by learned counsel for the State on a Full Bench case, namely, Bawa Singh v. Emperor, A. I. R. (28) 1941 Lah. 465 at p. 468 : (43 Cr. L. J. 235 F. B.). In that case it was observed as follows :

> "As regards the High Court, the matter stands on a different footing. In its appellate jurisdiction the High Court can alter the landing to any that it considers suitable. As soon as it has done so, it can, under the provisions of Section 439, Clause (1), in its revisional jurisdiction enhance the sentence to any sentence it considers suitable."

From the very phraseology of Dalip Singh J. it is quite clear that the two processes are not simultaneous. The second process, i. e., the process of enhancing the sentence to any sentence it considers suitable has to come after the High Court has exercised its power of altering the finding to any finding that it considers suitable. It strikes me that after the High Court has altered the conviction and maintained the sentence, the revisional power that it will be exercising will not be against the conviction and sentence passed by the learned Sessions Judge bat against the conviction and sentence passed by itself. From that point of view, the ruling on which reliance has been placed by learned counsel for the appellants, namely, Mohammad Sharif v. Rex, A. I. R. (37) 1950 ALL. 380 : (51 Cr. L. J. 1040), appears to be correct. I am quite clear in my mind that it is not in conflict with the decision of their Lordships of the Privy Council in Chunbidya v. Emperor, 57 ALL. 156: (A. I. R. (22) 1935 P. C. 35 : 36 Cr. L. J. 482). In that case all that was decided was that :

> "In the exercise of its revisional powers under Section 439, Criminal P. C., 1898, a High Court, upon having the record of a criminal proceeding brought to its notice by an appeal from the conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced, and having heard and dismissed the appeal can forthwith enhance the sentence under that revisional power although precluded by Section 423 from doing so in the appeal."

In that case what happened was that the High Court enhanced the sentence of four petitioners before their Lordships from transportation for life to death in the exercise of its revisional jurisdiction, after it had maintained their conviction under Section 302 and dismissed their appeal.

It is to be noted that in that case the appeal was dismissed and the sentence enhanced. The facts of that case were thus quite different from the facts of the case before us. I may further-point out that the Lahore case to which attention was drawn by learned counsel for the State was decided much before the Division Bench ruling of this Court on which reliance has been placed by learned counsel for the appellants. No adequate reason has been shown why, after the law has been settled by a Division Bench of this Court, it should be disturbed by reference to a larger bench. In my opinion, no case has been made out for referring the case to a Full Bench.

8. Learned counsel for the State has urged with earnestness that the offence committed was of such a revolting nature and the sentences passed are so grossly inadequate that the ends of justice require that the case should be sent back for a re-trial. The difficulty that I feel in regard to the proposition that we should order a re-trial is that the new Sessions Judge, trying the case, will have to record a finding on no new material. Inevitably from the fact that we are directing a re-trial, he will draw the inference that we were dissatisfied not only with the section applied but with the sentence passed. Naturally he will be driven to the conclusion that there is a direction by this Court to convict the appellants under Section 302, Penal Code, and sentence them to at least transportation for life. For

transportation for life and death are the only two sentences that can be passed under Section 302, Penal Code. A re-trial under these circumstances will be in the nature of a force and it is not the function of Courts to encourage a farce. If the State had any grievance in regard to the section under which the appellants have been convicted the obvious course for it was to file an appeal against their acquittal under Section 302. The State omitted to do so. It cannot, therefore, be permitted at this stage to ask for a re-trial because no question of jurisdiction is involved and there is no question of any new material forthcoming which was not available to the learned Sessions Judge who recorded the convictions in this case. The position is that, in my opinion, on the facts found the section applicable was Section 302. We cannot change Section 323 into Section 302 without enhancing the sentence, for the minimum sentence under Section 302 is transportation for life. In the case of Raghubir, I think the section which we should apply is Section 302 and as an alteration of the section will not mean any enhancement of sentence, I am prepared to apply Section 302 to Raghubir. The conclusion at which I have arrived is that in the case of Raghubir the conviction should be altered from Section 304 to Section 302, Penal Code.

9. Without going into the question whether in the case of a re-trial a fresh notice is necessary or not, I have come to the conclusion that it will not be in the interest of justice to order a re-trial.

10. On the facts, I have already expressed the opinion that the case was of a brutal nature. There is no doubt that the appellants were responsible for causing the death of Khacheru. In view of the fact, however, that we are powerless in the circumstances of this case to simultaneously exercise our appellate and revisional jurisdiction, the conclusion at which I have arrived is that in the case of Raghubir the section should be altered from Section 304 to Section 302, Penal Code and that in the case of others the sentences should be maintained and the notices discharged.

11. The result is that I would dismiss the appeal.

Y. Bhargava J.

12. Raghubir, Jhabbar, Balwant, son of Chhotey, Tara, Amar Singh, Kalia, Desa, Balwant son of Kadam Singh, Bholey and Kaley have filed this appeal against their convictions and sentences of three years' rigorous imprisonment and one year's rigrous imprisonment each for offences punishable under Sections 148 and 323, Penal Code, read with Section 149, Penal Code. Raghubir appellant has further appealed against his conviction and sentence of transportation for life for an offence punishable under Section 304, Penal Code. All the sentences of each appellant have been directed by the learned Sessions Judge to run concurrently.

13. The prosecution case is that on the afternoon of 26-3-1948, a mare belonging to one Kacheru happened to trample the field Raghubir appellant and damage the pea crop in that field. Raghubir resented this damage and had an exchange of words with Khacheru. Later on, he came in company with all the other appellants armed with various weapons, including spears and buris, and attacked Khacheru and his younger brother, Bhuddhu. Tikam, Chandu and Balwant also arrived there and they were also similarly beaten, Kacheru fell down injured and died instantaneously. The other injured persons were treated for their injuries and later recovered. The first information report of

this incident was lodged the same day at about 6 P. M. at the Kithore Police Station 5 miles away by Balwant, one of the injured persons. On these facts, the appellants were prosecuted for various offences, including the offence of committing murder while they were members of an unlawful assembly in prosecution of the common object of that assembly. All the appellants were, therefore charged with an offence under Section 302/149 Penal Code. The learned Sessions Judge, however, held that the facts disclosed an offence under Section 304, Penal Code only, committed by Raghubir alone, whereas the offence committed by the other appellants fell under Section 323 read with Section 149, Penal Code. He, therefore convicted and sentenced the appellants as mentioned above.

14. In this case, the version given by the prosecution was held by the learned Sessions Judge to have been proved beyond all doubt by the evidence of the prosecution witnesses who were examined before him. The evidence of these witnesses has been carefully examined by the learned Sessions Judge in his judgment. On the examination of this evidence, he has come to the view that the prosecution version has been fully established and that it was also proved that all the appellants took part in the incident. He further came to the view that the injury which resulted in the death of Khacheru was inflicted by Raghubir. I see no reason to differ from the conclusions of the learned Sessions Judge. Learned counsel for the appellants was unable to advance any argument that these conclusions were not justified by the evidence and were, in any way, incorrect. In this case, therefore, we have to hold that the prosecution version has been satisfactorily established.

15. It was argued by Mr. Sri Ram, Additional Assistant Government Advocate, on behalf of the State that, on the facts established by the prosecution, the conviction of all the appellants should have been for an offence punishable under Section 302 read with Section 149, Penal Code because all the appellants were members of an unlawful assembly, the common object of which was to cause grievous hurt to Kacheru and others and it was in the prosecution of this common object of that assembly that Raghubir appellant committed the offence of murder by intentionally inflicting a spear wound in the chest, of Khacheru so as to cause his death. This contention appears to be perfectly sound. The facts proved do show that all the appellants should have been convicted under Section 302 read with Section 149, Penal Code, and the learned Sessions Judge fell into an error when he convicted Raghubir under Section 304 and the other appellants merely under Section 323 read with Section 149, Penal Code.

16. The question, however, is as to what order can be passed in these proceedings in this Court in order to correct the error committed by the learned Sessions Judge. It has been argued by the learned Additional Assistant Government advocate that this Court should exercise its appellate power under Section 423, Criminal P. C. to alter the conviction of all the appellants to an offence punishable under Section 302 read with Section 149, Penal Code and should exercise its revisional powers at the same time so as to enhance the sentence of all of them to a minimum sentence of transportation for life. This request involves a question of law as to whether this Court has the power of altering the conviction so as to enhance the sentence. It is, of course, clear that Section 423, Criminal P. C. does not by itself empower this Court to enhance the sentence at the same time when the conviction is altered. But the contention on behalf of the State is that the power under Section 423, Criminal P. C. should be combined with the power under Section 439 of the Code and the two orders of altering the conviction and enhancing the sentence should be simultaneously passed in the

exercise of these two separate powers. In this case, a notice has already been issued to the appellants by a Bench of this Court to show cause why their convictions should not be altered and their sentences should not be enhanced. These proceedings, which are before us, thus relate to the exercise of powers by this Court under both the sections, namely, Section 423 and 439, Criminal P. C. The contention of the learned counsel for the State is, however, met completely by the view taken by a Division Bench of this Court in the case of Mohammad Sharif v. Rex, A. I. R. (37) 1950 ALL. 380 : (51 Cr. L. J. 1040). The point involved in this case is exactly the same as the point that was decided in that case and consequently the view expressed in that case is fully applicable to the present case also. In view of this position, the learned Additional Assistant Government Advocate requested that a reference may be made to larger Bench for an authoritative decision on this important question of law. I do not however, consider that there is any reason at all to make a reference to a larger Bench because, I may say with due respect, the view taken by the former Division Bench is perfectly correct and sound. I entirely agree with the view that the High Court cannot simultaneously exercise the appellate power under Section 423, Criminal P. C., to alter a finding and revisional power under Section 439, Criminal P. C., to enhance the sentence. This case does not lay down, nor should I be understood to lay down, that there cannot be simultaneous exercise of the appellate power under Section 423 and the revisional power under Section 439 of the Code in any case whatsoever.

17. This point has already been settled by a decision of their Lordships of the Privy Council in Chunbidya v. Emperor, 57 ALL. 156 : (A. I. R. (22) 1935 P. C. 35 : 36 Cr. L. J. 482). In that case an appeal from a conviction came before the High Court. The appeal was dismissed and the question arose whether, at the time of the dismissal of the appeal, the High Court had jurisdiction, to enhance the sentence in the exercise of its revisional power under Section 439, Criminal P. C. Their Lordships of the Privy Council held that the record had come to the knowledge of the High Court in the appellate proceedings and since the record had come to its notice, it had the right to exercise its revisional power, if it chose to do so. It is therefore, clear that it is not in every case that there is a bar to the simultaneous exercise of the appellate and revisional jurisdiction of the Court. The right to exercise those powers will, however, depend on the particular appellate and particular revisional powers which the Court intends to exercise. In the present case, the appellate power which is being invoked is that of altering the finding and the revisional power that is being invoked is that of enhancing the sentence. It is these two powers which, in my opinion, cannot be exercised simultaneously. This view is based on the fact that the exercise of the power to alter the finding granted by Section 423, Criminal P. C., has been made subject to certain conditions and, whenever that power is exercised, it must be exercised so as to comply with those conditions. Clause (b) of Sub-section (1) of Section 423, Criminal P. C., lays down that, when a finding is altered, the Court must at the same time pass an order either maintaining the sentence or reducing the sentence or altering the nature of the sentence so as not to enhance the sentence. Consequently, whenever an order is passed altering the finding, it is obligatory on the appellate Court to add an order by which either the sentence is maintained or it is reduced or its nature is altered, but this alteration in the nature of the sentence is such as has not the effect of enhancing the sentence. In the present case, therefore, if the nature of the conviction is altered, it would be necessary for us to pass at the same time an order either maintaining the sentence passed by the lower Court or reducing it or altering its nature so as not to enhance the sentence. Once such an order is passed, any order passed in exercise

of revisional jurisdiction under Section 439, Criminal P. C., will have the effect of revising our own order passed under Section 423 of the Code and will not have the effect of revising an order passed by the lower Court.

18. In this connection, the distinction between the facts of the present case and the facts of the case which came up before their Lordships in Chunbidya v. Emperor 57 ALL. 156 : (A. I. R. (22) 1935 P. C. 35 : 36 Cr. L. J. 482), may be prominently brought out. In the case before, their Lordships, the order passed by the appellate Court under Section 423, Criminal P. C., was an order dismissing the appeal. When an order dismissing an appeal is passed, there is no obligation on the appellate Court at the same time to pass an order either maintaining the sentence or reducing it or altering its nature. In fact, there is no further restriction on the powers of the appellate Court. The order dismissing the appeal merely amounts to a rejection of the prayer of the appellant to set aside his conviction and reduce the sentence. What further action may be taken is not mentioned in Section 423 of the Code. There is, therefore, nothing in Section 423 which would limit the power of that Court of passing any further order which it may be empowered to pass under other provisions of the law. Consequently, in such a case, the Court can exercise its power under Section 439, Criminal P. C., and enhance the sentence. In a case of the nature which is before us, the position is different. Here the appellate Court, in altering the finding, is enjoined, when doing so, to add in its order a direction either maintaining the sentence or reducing the sentence or altering the nature of the sentence so as cot to enhance it. This mandatory provision has to be complied with whenever the finding is altered and, with, out complying with it, there can be no alteration of the finding. Once it is complied with, the sentence passed by the lower Court is substituted by the sentence passed by this Court either by means of maintaining the lower Court's sentence or by means of reducing it or altering its nature. Consequently, in a case of this nature, the exercise of revisional power will have the effect of enhancing the sentence passed by this Court itself, which position does not arise in a case where the appeal is dismissed.

19. The learned Additional Assistant Government Advocate very strongly relied on the view taken by a Full Bench of the Lahore High Court in the case of Bawa Singh v. Emperor, A. I. R. (28) 1941 Lah. 465 : (43 Cr. L. J. 235 F.B.). The leading judgment of the Full Bench was delivered by Dalip Singh J. and in his judgment he expressed the view of the Bench in the following words :

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

is, to my mind, set at rest by the ruling of their Lordships In Chunbidya v. Emperor, 57 All. 156 : (A. I. R. (22) 1935 P. C. 35 : 36 Cr. L. J. 482)."

20. No doubt, the view expressed by the Full Bench of the Lahore High Court supports the proposition put forward on behalf of the State that this Court can, while altering the finding, also enhance the sentence. With due respect, I am constrained to say that I am unable to agree with the view taken in this case. It appears to me that though it was held that the appellate Court, whatever finding it gives as to the nature of the offence committed by the accused, is obliged to maintain the sentence at the point at which it was fixed by the Court, the necessary logical consequence which follows from it was not realised. The use of the words, "is obliged to maintain the sentence," would indicate that it was held that it was compulsory for the appellate Court, even if it be the High Court, to maintain the sentence when altering the finding. If, on the other hand, the sentence is enhanced, even though it may be in exercise of the powers under Section 439, Criminal P. C., obviously it is not maintained and the obligation to maintain the sentence is, therefore, not fulfilled. Again, as is clear from the quotation reproduced above, it was remarked that "as soon as it has done so, it can, under the provisions of Section 439, Clause (1), in its revisional jurisdiction, enhance the sentence..." The use of these words clearly brings out the fact that the exercise of the revisional power follows the order under the appellate power. Under the appellate power, the sentence has to be maintained and if, therefore, the revisional power is exercised thereafter, its exercise necessarily overrides the order passed in the exercise of the appellate power. The revisional order, therefore, becomes, an order revising an order of the High Court itself and not of the subordinate Court. It was also remarked that "the High Court can so combine its appellate and revisional jurisdiction is to my mind, set at rest by the ruling of their Lordships of the Privy Council in Chunbidya v. Emperor, 57 All. 156 : (A. I. R. (22) 1935 P. C. 35 : 36 Cr. L. J. 482)."

Again, it appears that the distinction between the case which came up before their Lordships of the Privy Council and the case which was before the Lahore High Court was not noticed. The case before their Lordships of the Privy Council was one in which, after the dismissal of the appeal, there was no obligation on the High Court to pass any order with regard to sentence. Consequently, the revisional power with respect to the sentence could be exercised independently of the appellate power under Section 423, Criminal P. C. In the case which came up before the Lahore High Court as well as in the case before me, the position is different because in these cases, the revisional power cannot be exercised without coming into conflict with the appellate power. While there is such a conflict, it appears to me to be clear that both the powers cannot be exercised simultaneously. I, therefore, hold that the view which was taken by the Division Bench of this Court in Mohammad Sharif v. Rex, A. I. R. (37) 1950 ALL. 380: (51 Cr. L. J. 1040), is the correct view of the law and there is, therefore, no reason at all to make any reference to the Full Bench.

21. In this view, the only appellant whose conviction can be altered is Raghubir. In his case, the sentence of transportation for life has been awarded under Section 304, Penal Code. The conviction can be altered to Section 302, Penal Code, without altering the sentence as it is permissible to award a sentence of transportation for life under Section 302, Penal Code. As regards the remaining appellants, it is not possible to alter their convictions to Section 302, Penal Code, because such an alteration would necessarily involve enhancement of sentence. Consequently, the notice of

enhancement has to be discharged altogether.

22. The learned Additional Assistant Government Advocate also made an alternative request that, since in this case there was a clear error of law by the learned Sessions Judge, we should send this case back for re-trial. Under the provisions of Section 423, Criminal P. C., in an appeal from a conviction, it is within the powers of this Court to set aside the conviction and sentence and to direct a re-trial. This power can be exercised whether the appellant invokes it or not. In this case, it is the counsel for the State who wants that this power should be exercised. In my opinion, however, a direction for a retrial in a case of this nature is not a proper course. The object of the retrial, as is clear from the position explained above, is that the appellants should be convicted for an offence under Section 302, Penal Code, and should be sentenced to a heavier punishment than that already awarded. A re-trial for such a purpose cannot, by any means, be considered to be in the interest of justice. If a re-trial is ordered under these circumstances, the result would be that the learned Sessions Judge, in deference to the view expressed by us in our judgment, would, in all probability, convict all the appellants, apply Section 302, Penal Code, to all of them and pass a much more severe sentence than has already been passed. Proceedings of this nature would not be in the interest of justice The fresh trial cannot possibly be a proper judicial trial where the Court could (not ?) be expected to exercise its own independent judgment uninfluenced by views expressed in any previous proceedings. It is true that a serious error of law has been committed by the learned Sessions Judge. But it is unfortunate that the proper remedy for correcting such an error has not been sought. The proper remedy in such cases is an appeal by the State. If there had been an appeal under Section 417, Criminal P. C., we could have granted both the requests made on behalf of the State of altering the conviction as well as enhancing the sentence. This remedy, which the law intended should be sought by means of an appeal under Section 417, Criminal P. C., should not, in my opinion, be granted by the round about course of directing a re-trial which, it is obvious, cannot be expected to be a proper, fair and judicial trial. The request for a re-trial must also, therefore, be refused.

23. Consequently, I would dismiss the appeal with the amendment that the conviction of Raghubir appellant for an offence under Section 304, Penal Code, be substituted by a conviction for the offence under Section 302, Penal Code, and would discharge notice of enhancement of sentence against all the appellants.

24. By the Court.--The appeal of the appellants is dismissed with the amendment that the conviction of Raghubir appellant under Section 304, Penal Code, is substituted by a conviction under Section 302, Penal Code, and he shall undergo the sentence of transportation for life. The nine appellants who are on bail shall surrender to their bails to undergo the remaining portions of their sentences. The notice issued by this Court is discharged.