

Damei Sethi and Others Vs Udi Behera

Court: Orissa High Court

Date of Decision: Sept. 21, 1953

Acts Referred: Cattle Trespass Act, 1871 " Section 24
Penal Code, 1860 (IPC) " Section 109, 126, 147, 302, 304

Citation: (1954) CriLJ 883

Hon'ble Judges: Panigrahi, C.J; Mohanty, J

Bench: Division Bench

Judgement

Panigrahi, C.J.

This is an application u/s 439, Criminal P. C. challenging the legality of an order of conviction passed by Sri B. C. Patnaik,

Magistrate, First Class with appellate powers, Cuttack. The petitioners were accused of having allowed their cattle to stray into the field of the

complainant (P. W. 1) and damage his chilly crop. The complaint filed by P. W. 1 was taken cognizance of by the Subdivisional Magistrate, who

transferred it for trial to the file of Sri P. Tripathy, Magistrate, II Class, Cuttack. The Magistrate found that damage had been caused to the crop of

the complainant (P. W. 1) by the cattle of the petitioners. He also found that the cattle were being led to the pound by P. W. 1 when the petitioners

forcibly rescued them.

The trying Magistrate was of opinion that these two facts were not sufficient to constitute the ingredients of an offence u/s 24, Cattle Trespass Act.

He however convicted the petitioners u/s 426, I. P. C. and sentenced them to pay a fine of Rs. 50/- each. Against this order of conviction the

petitioners preferred an appeal before Sri B. C. Patnaik, Magistrate, First Class with appellate powers, Cuttack, and he held that Section 426, I.

P. C. was not applicable to the facts proved in the case and that the lower court had taken an erroneous view of the law. The appellate Magistrate

therefore altered the finding of conviction u/s 426, I. P. C. into one u/s 24, Cattle Trespass Act and reduced the sentence. It is against this

appellate judgment that the present petition has been filed, u/s 439, Criminal P. C.

2. Mr. B. Mohapatra, learned Counsel for the petitioners, has addressed a lengthy argument on the powers of an appellate court u/s 423, Criminal

P. C. and contends that the trial Court having acquitted the petitioners of the offence of cattle trespass, the lower appellate court had no power to

alter that finding of acquittal into one of conviction and that it has thus exercised a power beyond its jurisdiction. Strong reliance was placed on the

minority view propounded in - Zamir Qasim and Others Vs. Emperor, , and the decision of a single Judge in - Panu Nayak and Others Vs. Chintai

Mallik, . Even at the time of admitting this revision, Narasimham J, appears to have doubted the correctness of the decision in - Panu Nayak and

Others Vs. Chintai Mallik, " and directed that this matter should be placed before a Division Bench.

3. Sub-section (1) of Section 423, Criminal P. C. says:

423 (1) The appellate courtmay (a) in an appeal from an order of acquittal reverse such order and direct that a further enquiry be made, or that

the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass a 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 re-tried by a court

of competent jurisdiction subordinate to such appellate court or committed for re-trial; (2) or "alter the finding maintaining the sentence" or alter the

finding reducing the sentence; or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, subject

to the provisions of Section 106 not so as to enhance the same; (c) in 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.

The Section, therefore, defines the powers of an appellate court both in an appeal against acquittal and in an appeal against conviction. An appeal

against an order of acquittal is provided for in Section 417, Criminal P. C. and the power to appeal is vested exclusively in the State Government.

Section 423 (1) enables the appellate Court to reverse the order of acquittal and direct a further enquiry to be made or direct that the accused may

be committed for trial, or find him guilty and pass a sentence on him according to law.

It should be noted that these orders can be passed only if the order of acquittal is reversed or set aside. Section 423 (1) (b) deals with appeals

against orders of conviction. In dealing with such appeals the Court may do one of three things. Firstly, it may reverse the finding and sentence and

acquit the accused, or order him to be re-tried or committed for trial. So far, it would appear that the appellate court has the power, when it

reverses a finding of acquittal or conviction, to direct the subordinate court to re-try him or commit him for trial, if it is of opinion that a further

Inquiry should be made into the case. Secondly, the appellate Court, in dealing with appeals against convictions, has some further powers, one of

them being to alter the finding maintaining the sentence, Or reduce the sentence without altering the finding. Thirdly, it has also the power to alter

only the nature of the sentence without interfering with the finding, or reduce the sentence itself. The only limitation is that it cannot enhance the

sentence while altering the finding or the sentence.

4. It is necessary, here, to refer to the provisions of Section 439, Criminal P. C. as most of the decisions placed before us relate to the combined

powers of the High Court under Sections 423 and 439. Sub-section (4) of Section 439, Criminal P. C. says that nothing in that section shall be

deemed to authorize the High Court to convert a finding of acquittal into one of conviction. The powers of the High Court are delimited by the two

sections. While exercising the powers of an appellate Court, it can set aside an order of acquittal and convert it into one of conviction. But while

exercising its revisional powers it cannot do so.

There is another limitation placed on the appellate court u/s 423 which says that in altering the finding of conviction it cannot enhance the sentence.

Section 423 deals with powers vested in "all" courts, whether High Courts or subordinate courts, except that Clause (a) of Sub-section (1) of that

Section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that Court, while Clause (b) of

Sub-section (1) of that Section is not so restricted and embraces all courts. u/s 439 (1) the power to enhance the sentence is expressly conferred

upon the High Court.

It would appear, therefore, that the High Court, while dealing with an appeal against conviction, may act u/s 439(1) and give notice to the accused

to show cause why the sentence should not be enhanced. Section 290 of the old Criminal Procedure Code, 1872, enacted that the appellate court

may alter and reverse the finding and sentence or order of the court below and may, if it saw reason to do so, enhance any punishment that had

been awarded. This power of enhancing the sentence was expressly taken away by Section 423 of the Code of 1882 and has been retained in the

same form in the present Code. It would appear that the Legislature did not think it desirable that the power to enhance the sentence should be

entrusted to more than one Court and that it should be confined to the High Court alone. Section 439 of the Code of 1882 was retained, in the

present Code, and it enacted that the High Court may, in its discretion, exercise all the powers conferred on a court of appeal by Sections 423,

426 and 428, or on a court by Section 338, and may enhance the sentence.

5. I shall now examine the contention raised on behalf of the petitioners. It is urged that the refusal of the trying Magistrate to convict the petitioners

u/s 24, Cattle Trespass Act amounts to a finding of acquittal of that charge - though, it should be noted, no formal charge was framed, this being a

summons case. A finding of acquittal may be either express or implied, and such a finding cannot be altered by an appellate court other than the

High Court and converted into a finding of conviction. It is, therefore, claimed that the lower appellate court acted without jurisdiction in convicting

the petitioners u/s 24, Cattle Trespass Act thereby setting aside an implied order of acquittal recorded by the Trial Court.

6. I shall later examine the soundness of the contention whether the trying Magistrate did in fact record any order of acquittal, either implied or

express, in holding that he was unable to punish the accused u/s 24, Cattle Trespass Act. I shall assume, for the moment, that there is an implied

order of acquittal and then examine the soundness of the contention which seems to be based upon certain decisions.

7. That an order of acquittal may be either express or implied and that Section 423 covers both kinds of orders can no longer be in dispute, after

the decision of the Judicial Committee in - "Kishan Singh v. Emperor" AIR 1928 PC 254 (C). In that case their Lordships were discussing the

scope of Section 439(4), Criminal P. C. and referred to the observation of the Madras High Court in - "Kambam Balli Reddy v. Emperor" AIR

1914 Mad 258 (D), where it had been decided that Section 439(4) must be construed as referring to cases Where the trial had ended in a

complete acquittal. The reason for this decision was that any other construction would be inconsistent with the power to ""alter the finding"" given to

the Court as a Court of revision, by virtue of this power to exercise the powers of a Court of appeal conferred by Section 423(1) (b).

The Judicial Committee distinguished the Madras case on the ground that the accused had appealed to the High Court against their conviction

under Sections 147 and 304, I.P.C. and the High Court had given them notice to show cause why they should not be convicted of murder. It will

be noticed that the Madras case was one where there had been a "complete acquittal" by the trial Court, of the charge of murder. The High Court

had before them an appeal against an order of conviction for a minor offence and were discussing the effect of the combined operation of Sections

423 and 439. Their Lordships of the Judicial Committee declined to express any opinion as to whether the facts of the Madras case would justify

the decision at which the learned Judges of that Court had arrived, and observed:

Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition

in Sub-section (4) of Section 439 refers only to cases where the trial has ended in a complete acquittal of the accused in respect of the charges or

offences, and not to a case such as the present where the accused have been acquitted of the charge of murder but convicted of the minor offence

of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of the decision.

Their Lordships also referred, with approval, to the decision of the Allahabad High Court in - Emperor Vs. Sheodharshan Singh, , Where it was

held that an acquittal could be converted into a conviction only through the medium of an appeal filed on behalf of the Local Government. It will be

noticed that the applicability of Section 423(1)(b)(2) was not under consideration and the Privy Council case affords no guidance for determining

the scope of the expression ""alter the finding, maintaining the conviction"" occurring therein.

In - AIR 1935 89 (Privy Council) , their Lordships of the Judicial Committee had, again, to consider the powers of a court of appeal u/s 423,

Criminal P. C. and said that the powers conferred on the appellate court under that Section ""appeared to be as ample as the powers that the High

Court would have on revision, u/s 439, with the exception of the power to enhance the sentence"". The only question before the Privy Council in

Kishan Singh's case was whether the High Court could, in exercise of its revisional powers, alter the finding of acquittal into one of conviction,

irrespective of whether it is a partial acquittal or complete acquittal. It had no occasion to consider the scope of the power vested in an appellate

court u/s 423(1) (b) (2).

In another case reported in - AIR 1935 35 (Privy Council) the Judicial Committee expressly held that the powers vested in the High Court u/s

439, Criminal P. C. could be combined with Section 423 and that the High Court, upon having the record of a criminal proceeding brought to its

notice by an appeal from conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced. It would appear

therefore from the later decisions of the Judicial Committee that the view taken by the Madras High Court in Balli Reddy's case is correct and that

its authority has by no means been affected by the pronouncements of the Privy Council.

8. The view taken by the several High Courts both before and after the decision of the Judicial Committee in Kishan Singh's case is reflected in the

leading case reported in - "Queen Empress v. Jabanulla", 23 Cal 975 (H). This has been followed in - Hanuman Sarma Vs. Emperor, ; "In re

Galla Hanumappa", 35 Mad 243 (J); --- Mahangu Singh and Others Vs. Emperor, ; - AIR 1934 200 (Oudh) . The question whether the Privy

Council decision in "Kishan Singh's case, (C)", may be regarded as having overruled the view of law as laid down in these cases was considered

in - Zamir Qasim and Others Vs. Emperor, ; - "Bawa Singh v. Emperor" AIR 1941 Lah 465 (FB) (M); - Sailendra Nath Mitter and Another Vs.

Emperor, ; - " Shyam Sunder Singh Vs. Shyam Das Kaviraj and Another, ; and - "Mahabir Singh v. The State" AIR 1951 Pat 295 (P). All these

cases would appear to follow the decision in 23 Cal 975 (H) and say that Kishan Singh's case is no authority for the proposition that an appellate

court acting u/s 423 (1) (b) (2) is not competent to alter the finding of acquittal while maintaining the sentence.

9. Mr. Mohapatra submitted, however, that the minority view in the Full Bench decision reported in - Zamir Qasim and Others Vs. Emperor, is

much the better view and is more consistent with the provisions of Criminal P. C. After considering the conflict of opinion on the point, Mulla J.

held that the power to alter a finding, u/s 423 (1) (b) (2), should be exercised "subject to the provisions contained in Sections 236, 237 and 238 of

the Code". Those sections make provision for altering the conviction and prescribing the limits within which it can be exercised and the learned

Judge says that no alteration which is not covered by those sections is permissible. It was, therefore, observed that an appellate Court cannot

convict an accused person of a major offence when he was charged, with, and tried only for, a minor offence. The learned Judge, however, held,

that the finding must really be one of acquittal, that is to say, a finding relating to the facts tending to establish the ingredients of the offence and not

merely a categorical finding which is, on the face of it, inconsistent with the finding of conviction recorded by the court. His Lordship then

observed:

In such cases, the finding of acquittal can be ignored or set aside as a clerical mistake or blunder apparent on the face of the record.

I am unable to see how this caution will work in actual application. If the appellate court has got the option to set aside a finding of acquittal merely

on the ground of a "clerical mistake or blunder apparent on the face of the record", words which are not to be found in the Code, why should it not

set aside the finding when a wrong view of the law has been taken by the trial Court? Otherwise, it may be that the appellate court would be

powerless to correct the finding of the trial court even in cases where the finding of acquittal would result in a failure of justice.

The safe rule of law to follow, in such cases, therefore, appears to me to hold that the expression "alter the finding" occurring in Section 423(1) (b)

(2) is not subject to any limitation except that the sentence cannot be enhanced by the appellate court. That power is undoubtedly subject to the

provisions contained in the Chapter dealing with joinder of charges and the appellate court cannot afford to ignore the provisions of Sections 236

and 238. But it would be unduly restricting the scope of the appellate powers u/s 423 (1)(b) (2) to hold that that power can be exercised only in

cases falling within Sections 236, 237 and 238.

10. Our attention was drawn to - "Emperor v. Sada Singh" AIR 1930 Lah 338 (Q) where the accused persons were charged u/s 302, I, P, C.

and were convicted u/s 302 read with Section 109, I. P. C. The court held that there was an acquittal u/s 302, I. P. C. and an appeal from such

acquittal was competent. This case does not assist the contention of the petitioners.

11. Nor does the case of - AIR 1925 723 (Oudh) where the High Court declined to enhance the sentence u/s 439, Criminal P. C. as the Local

Government had not appealed against acquittal of a major offence help the petitioners. There it was held that Government was competent to

appeal even though it was a case of partial acquittal.

12. In - Panu Nayak and Others Vs. Chintai Mallik, ", Ray J. (as he then was) held that a conviction u/s 426, I. P. C. could not be altered by the

appellate Court to one u/s 379, I. P. C. in view of the provisions of Sections 237 and 238, Criminal P. C., and held that the power to reverse a

finding of acquittal is not exercisable in all cases but only in some cases. The learned Judge, however, expressed his agreement with the following

principle laid down in - "Krishna Dhan Mandal v. Queen Empress", 22 Cal 377 (S):

When an act, or series of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an

appeal from a conviction for any one of such offences, must lay the whole case open to the interference of the appellate court notwithstanding any

order of acquittal by the first court with regard to any of the other offences. Interference of the appellate court in such cases is directed primarily

not against the acquittal but against conviction which is called in question by the accused, though, if the interference is to be rational and complete,

the appellate court must deal with the whole case.

This case is no authority for the extreme proposition advanced by learned Counsel that in no case can an appellate court set aside a finding of

acquittal except by way of an appeal u/s 417.

13. Let me now examine Mr. Mohapatra"s. contention in the light of what transpired in the present case. The trying Magistrate held that the cattle

of the petitioners had damaged the crop of the complainant (P. W. 1) and that they had been rescued by them while they were being taken to the

pound. These facts, in his opinion, were insufficient to constitute the offence under the Cattle Trespass Act as, according to him, another ingredient,

namely ""seizure of the cattle"" had also to be proved. The trial court did not record an acquittal, nor did it say in so many words that the accused

had not committed any of the acts alleged against them. The observation of the trial court which is said to constitute a finding of acquittal is : ""As

such the accused persons cannot be punished u/s 24, Cattle Trespass Act"". If the two facts, namely, (1) causing damage to the complainant's

crop, and (2) forcibly rescuing the cattle, had not been believed by the trial court, it would not have convicted the petitioners u/s 426, I. P. C. The

appellate Court held that the trial court's view of the law, on the facts proved, was erroneous and that for a conviction u/s 24, Cattle Trespass Act

proof of seizure of the cattle is not necessary.

In this case, the appellate court was dealing with an appeal against a conviction u/s 423 (1) (b), Criminal P. C. and could alter the conviction under

S. 126, I. P. C, into one u/s 24, Cattle Trespass Act, on the same facts which had been held to have been proved against the accused persons.

Even according to the minority view of the Allahabad High Court in "Zamir Qasim's case, (A)", this could be done because the procedure

adopted by the lower appellate court does not contravene any of the other provisions of the Code. The only question that both the courts below

had to deal with was what is the law to be applied to the facts proved in the case. If the trial court had taken a wrong view of the law, it was open

to the appellate court to correct it.

14. We are, therefore, satisfied that there has been no illegality committed by the lower appellate court in the present case. We would, therefore,

dismiss the revision.

Mohanty, J.

15. I agree.