(1936) 11 AHC CK 0026

Allahabad High Court

Case No: None

Sarda Prasad		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Nov. 6, 1936

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

1. This is a criminal revision from an order of the Sessions Judge convicting the accused u/s 60(a), U.P. Excise Act. On the findings it appears that the house of the accused was searched by the Excise Inspector accompanied by wit-nesses, and a large number of articles were found consisting of (1) liquor contained in two bottles, and (b) a distilling apparatus, pitchers and other utensils containing fermented wash. The Magistrate framed two separate charges (1) u/s 60(a) for being in possession of illicit liquor and fermented wash, and (2) for being found in possession of implements for manufacture of illicit liquor. The learned Magistrate came to the conclusion that it was not proved that the liquor found in the two bottles was illicit liquor and therefore he thought that the accused could not be convicted of any offence u/s 60(a), Excise Act. He accordingly recorded a formal order of acquittal of the charge under that section. He however came to the conclusion that the articles found in the possession of the accused were implements for the manufacture of illicit liquor and accordingly convicted him u/s 60(f) and sentenced him to 6 months'' R.I. There was no appeal preferred by Government from the acquittal, but the accused appealed to the Sessions Judge from his conviction u/s 60(f). On the facts the leUParned Sessions Judge came to just the contrary conclusion. He found that there was no proof that the implements which were found in the house of the accused could not have been used for any purpose other than that of manufacturing illicit liquor, and therefore he held that no offence u/s 60(f) was established. He accordingly set aside the conviction of the accused under that section. But he came to the conclusion that the liquor found in the two

bottles was really illicit liquor because it was proved by the evidence of the Excise Inspector that the strength of the liquor in it was more than that allowed for liquor to be used for public consumption. The learned Judge accordingly convicted the accused u/s 60(a), Excise Act.

2. In revision it is contended on behalf of the accused that the learned Judge had no jurisdiction to convert the finding of acquittal u/s 60(a) into one of a conviction under that section. This point was raised before the Court below but was rejected on the strength of two rulings Emperor v. Sardar (1912) 34 All 115, and Dulli Vs. Emperor, Now in Emperor v. Sardar (1912) 34 All. 115 there had really been no order of acquittal by the Court below at all. The matter came up in appeal from a conviction u/s 147 read with Section 225, I.P.C. The accused had been charged u/s 353, I.P.C. also. A learned Judge of this Court in revision held that he was entitled to convict the accused u/s 353, I.P.C. instead of u/s 147 read with Section 225, I.P.C. as that was merely an alteration of the finding. The case of Dulli Vs. Emperor, does somewhat support the view of the Court below. In that case three thieves had attacked the deceased and caused him serious injuries which resulted ultimately in his death. They were somewhat wrongly charged u/s 397, I.P.C. and also u/s 302, I.P.C. The learned Sessions Judge acquitted the accused of the charge u/s 302 but convicted them of offences under Sections 325 and 382, I.P.C. In Dulli''s appeal from the conviction, a Bench of this Court thought that they had power to alter the conviction and convict the appellant u/s 302, I.P.C., instead of u/s 325, I.P.C.

3. The position has been considered by their Lordships of the Privy Council recently in Kishun Singh v. Emperor AIR 1928 P.C. 254. In that case the accused had been charged u/s 302, I.P.C. but the Sessions Judge came to the conclusion that the offence did not fall under that section and accordingly convicted him of the offence u/s 304, that is, culpable homicide not amounting to murder. There was no formal order acquitting the accused of the offence u/s 302 with which he had been charged. Their Lordships first considered the argument that there was no express finding of acquittal in respect of the charge of murder and came to the conclusion that the conviction of the accused u/s 304 instead of u/s 302 amounted to an acquittal in respect of the latter charge. Their Lordships approved of the ruling of this Court in Emperor Vs. Sheodarshan Singh, that neither an appellate Court nor a revisional Court has power to reverse the finding of acquittal and convert it into one of conviction. Their Lordships also expressed their disapproval of the view that Section 439(4), Criminal P.C., refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges of offences, and not a case where the accused has been acquitted of the charge of murder but convicted of the minor offence of culpable homicide not amounting to murder. Their Lordships accordingly set aside the order of the High Court which in the exercise of its revisional powers had convicted the accused u/s 302, I.P.C. instead of u/s 304, I.P.C. In that case no doubt the act was the same and the facts which have been found were identical, the only question being whether the offence came within any

of the exceptions so as to reduce the offence to that u/s 304, I.P.C. Their Lordships emphasized that where the Court below has either acquitted an accused expressly or by necessary implication, then, unless there is an appeal from acquittal, the finding cannot be converted into one of conviction.

4. The learned Assistant Government Advocate relies on a later Division Bench ruling of this Court in which the Privy Council case has been distinguished. But that was a special case in which the accused had been tried on charges of culpable homicide u/s 304 and also of rioting u/s 147, I.P.C. The learned Sessions Judge found all the facts established and the trend of his judgment showed that the accused were guilty of both the offences, but he convicted the accused u/s 304, I.P.C. and failed to say anything as regards their guilt u/s 147, I.P.C. As pointed out by the learned Judges:

He merely omitted, probably by an oversight, to record a conviction u/s 147 also.

5. Thus the case was not one in which there had been either an express acquittal or even an acquittal by necessary implication. Indeed the learned Judges came to the conclusion that there had been no acquittal by necessary implication but rather the findings amounted to a conviction u/s 147, I.P.C. The learned Judges accordingly held that they had power to alter the conviction u/s 304 to a conviction u/s 304 read with Section 149, I.P.C. That case therefore is quite distinguishable. In the present case the accused was found in possession of two sets of articles. The first set was alleged to be illicit liquor and the other was alleged to be implements and other articles for the purpose of manufacturing excisable article. In respect of the first set of the articles the Magistrate found that the accused was not guilty and acquitted him, but found'' him guilty in respect of the second set of articles. The appellate Court however found that the accused was not guilty is respect of the second set of articles but was guilty in respect of the first set of articles. There was an express order of acquittal passed by the Magistrate with regard to the offence u/s 60(a) relating to the possession of the first set of articles namely, liquor. There is an express order of acquittal by the Sessions Judge of the offence u/s 60(f) with regard to the articles in the second set. The question then is whether we should uphold the order of the Sessions Judge convicting the accused u/s 60(a) of which offence he had been acquitted by the Magistrate.

6. There can be no doubt that the powers of an appellate Court are confined to Ch. 31, Criminal P.C., Section 423 of which is applicable to this case. That section is divided into two sub-parts. Sub-section (1)(a) refers to a case where there is an appeal from an order of acquittal, in which case an appellate Court can reverse the order and direct further inquiry or retrial or find him guilty and pass sentence according to law. That would obviously be the case where the Government have u/s 417 appealed from an acquittal.

7. Sub-section (1)(b) on the other hand refers to the case where there is an appeal from a conviction, and is sub-divided into three-parts (1) under which the appellate

Court can reverse the finding or 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; (2) or alter the finding maintaining the sentence; or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence. Now there is clearly a distinction between reversing a finding and merely altering it. Where an order of acquittal is to be converted into an order of conviction it amounts to a; reversal of the order. On the other hand where the conviction under one section is altered to a conviction under some other section maintaining the sentence or reducing it or altering it, it amounts merely to an alteration of the finding and not to a reversal of the finding. It is clear to us that Sub-section (1)(b) is not applicable to a case where there is an express order of acquittal and no appeal from a conviction pending before the appellate Court. In such a case the appellate Court has no power to reverse the finding at all. It cannot by convicting the accused of the offence of which he has been acquitted reverse the finding, by regarding it as if it were merely an alteration of the finding. In Sub-section (c) the appellate Court in an appeal from any other order can both alter or reverse such order; and in Sub-section (d) it can make any amendment or any consequential or incidental order that may be just and proper.

8. The powers conferred upon the High Court in revision include all those which may be exercised by a Court of appeal. But those powers can be exercised in any case in which a record has been called for by the High Court, and are not confined to the case where there is an appeal from an acquittal or an appeal from a conviction pending before the High Court within the meaning of Section 427(1)(a) or (b). But Section 439 itself limits the exercise of the revisional powers of the High Court in several ways, one of which is contained in Sub-section (4), under which nothing in that section is deemed to authorize a High Court to convert a finding of acquittal into one of conviction. That section also therefore clearly lays down that the High Court cannot convert a finding of acquittal into one of conviction by acting on its revisional side. There is however no prohibition in that section against the High Court ordering a retrial, even where there has been an acquittal and there has been no appeal preferred by Government against such an acquittal. The power to order a retrial is unrestricted and such an order does not amount to a conversion of a finding of acquittal into one of conviction, which obviously means convicting an accused straight off, who has already been acquitted by a subordinate Court.

9. In any case in which in an appeal before a Sessions Judge it appears that the accused was charged of separate offences under each section but the Court below has wrongly acquitted him of one offence, the Sessions Court may report the case to the High Court for proper orders to be passed. But the appellate Court cannot itself set aside the acquittal and convict the accused of the offence of which he had been charged and acquitted. In the present case it is urged that the accused has already undergone a part of the sentence, which had been imposed upon him. We do not think that that is in itself a sufficient ground for not ordering a retrial when it

appears prima facie that the accused might have been guilty of both the offences. In case of conviction the Magistrate would, of course, take into account the fact that he has already undergone part of the sentence previously. We accordingly set aside the order of the Magistrate dated 28th March 1936, and the order of the Sessions Judge dated 22nd May 1936, and order that the accused be retried by a Magistrate. The accused will remain on bail unless the Magistrate otherwise directs.