(1925) 07 CAL CK 0057

Calcutta High Court

Case No: None

Emperor		APPELLANT
	Vs	
Miajan and Others		RESPONDENT

Date of Decision: July 20, 1925

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 360
- Penal Code, 1860 (IPC) - Section 147, 323, 325

Citation: AIR 1926 Cal 585 : 95 Ind. Cas. 61

Hon'ble Judges: Suhrawardy, J; Duval, J

Bench: Division Bench

Judgement

Suhrawardy, J.

In this case the accused were convicted under Sections 147, 323 and 325 of the Indian Penal Code, and sentenced to various terms of imprisonment. There was an appeal by the accused to the Sessions Judge of Hooghly, and the learned Judge passed an order similar to the one which we have considered in the other case(Revision Case No. 270 of 1925). An objection in this case was taken before him on the ground that there was no sufficient compliance with the provisions of Section 360 of the Cr. P. C. The learned Sessions Judge gave effect to this contention and passed the following order: "I have carefully considered the circumstance urged and in my considered opinion I hold that I have no other alternative but to allow the appeal. The conviction and sentences are set aside. As regards the expediency of a re-trial, I leave the matter to the learned District Magistrate, inasmuch as any opinion passed by me, one way or the other, would prejudice the result of a retrial." When the matter went back to the learned District Magistrate, he ordered that the case should be re-tried. It went back to the Magistrate who had originally heard it, and was transferred from his file to the file of an Honorary Magistrate. The Trial Magistrate, being of opinion that the order passed by the Sessions Judge was virtually an order of acquittal, refused to proceed with the case and sent the papers

to the District Magistrate with the remark that, in his opinion, the accused had been acquitted by the Sessions Judge, and they could not be tried again for the same offences. The learned District Magistrate could not agree with the view taken by the Honorary Magistrate, and has referred this mattar to us u/s 438 of the Cr. P. C. His recommendation is that the order made by the Sessions Judge did not amount to an acquittal of the accused, and that, in the circumstances of this case, and in view of the evidence, it was in the interest of justice that the accused should be re-tried. I think that the reference should be accepted. What the Sessions Judge did, as appears from his judgment, was to give effect to the objection taken on behalf of the accused that the provisions of Section 360 of the Cr. P. C. were not observed, and there being this material irregularity the whole trial was vitiated. The learned Judge in his judgment did not discuss the evidence or record any finding on the merits of the case, as is apparent from the latter part of the order in which he says that he leaves the matter to the learned District Magistrate, inasmuch as any opinion passed by him, one way or the other, would prejudice the result of a re-trial. The learned Judge himself might have ordered a retrial, but for some reason best known to him he left it to the discretion of the District Magistrate. By virtue of the discretion thus left in the District Magistrate, that officer has now ordered that there should be a re-trial. It does not appear that there is any illegality in this order. But it is argued by the learned Counsel, who appears for the accused, that the order of the Sessions. Judge amounted to an acquittal of the accused in law. This argument is based on the wording of the judgment which says that the conviction and sentences are set aside. It is maintained that, if the learned Judge was of opinion that there should be a re trial, he was the only person who could order it, and that he was not correct in leaving the matter to the discretion of the District Magistrate. I think this contention should not prevail. Orders in the form in which the present order is passed are frequently passed by Appellate Courts. The reason is that in some cases the Appellate Court thinks it proper to leave the question of re-trial to the discretion of the authorities who might not consider it worth while to proceed with the matter further. A question similar to this came up for consideration of this Court in the case of Beni Madhab Kundu v. Emperor 49 Ind. Cas. 849 : 29 C.L.J. 34 : C.W.N. 64 : 20 Cri. L.J. 225 : 48 C. 212. There a Bench of this Court, in setting aside the conviction and sentence of the accused passed by the Assistant Sessions Judge, in a trial held with the aid of a Jury had passed the following order; "it will be open to the Crown to proceed further with the case, if it be so advised". A similar objection was raised that the order operated as an acquittal. The learned Chief Justice held that it was virtually an order for re-trial, and that this Court must be taken not to have finally disposed of the matter but left it to the Crown. I fully endorse the view expressed therein, and I think that the order of the District Magistrate for re-trial was with jurisdiction and the reference must be accepted. Lat the papers be sent down at once.

Duval, J.

2. I agree. The only point that arises is whether the order of the Sessions Judge amounted to an acquittal. The order may not be very happily worded, but it is clear, reading it as a whole, that there was no intention by the Sessions Judge to acquit the accused. It was left to the District Magistrate to decide whether he would, considering the evidence that had been adduced; proceed with the case or not; and I hold that the Magistrate Had full jurisdiction to act in the way he did. I, therefore, agree that the reference should be accepted.