State Vs. Diwanji Gardharji and ors.

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Court : Gujarat

Decided On : Oct-06-1961

Reported in : AIR1963Guj21; 1963CriLJ168; (1962)GLR882

Judge : V.B. Raju and; A.R. Bakshi, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 369, 417, 422, 423, 423(1), 424, 425 and 430; Indian Penal Code (IPC) - Sections 71, 302 and 304

Appeal No. : Criminal Appeal No. 105 of 1961

Appellant : State

Respondent : Diwanji Gardharji and ors.

Advocate for Def. : A.M. Barot, Adv.

Advocate for Pet/Ap. : H.K. Thakore, Asst. Govt. Pleader

Disposition : Appeal dismissed

Judgement :

Raju, J.

1. This is an appeal against the orders of acquittals of respondents passed by the learned Sessions Judge, Banaskantha. A preliminary objection is raised that this appeal is not maintainable in view of the fact that Criminal Appeal No. 645 of 1960 filed by the respondents against their convictions was already decided by a Division Bench of the High Court on and February, 1961.

2. The contention that by reason of the judgment of the Division Bench of this High Court in Criminal Appeal No. 645 of 1960 which was an appeal by the respondents against their conviction under section 304 Indian Penal Code, an appeal against the acquittal of the respondents under Section 302 Indian Penal Code is not competent is based mainly on sections 369, 430 and 421 Criminal Procedure Code. Section 430 Criminal Procedure Code provides as follows:

'Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.'

It is, therefore, urged that the judgment of the First Bench of this High Court in Criminal Appeal No. 645/60 is final and that the High Court can pass no further orders in respect of the same accused even if the State has filed another appeal from

acquittal under section 302 of the Indian Penal Code. In support of this contention, reliance is placed on the Full Bench' decision of the Madhya Bharat High Court, in State v. Kalu, AIR 1952 Madh-B 81, the Full Bench decision of the Punjab High Court in The State v. Mansha Singh Bhagwant Singh, AIR 1958 Punj 233 (FB) and also on the reasoning of Niyogi, A. J. C. in Mohammadi Gul Rohilla v. Emperor, AIR 1932 Nag 121 at p. 125 (FB). The appeal against the conviction under section 304 Indian Penal Code was filed by the respondents and admitted and numbered as Appeal No. 645/60. That appeal was decided in February 1961, and Appeal No. 105 of 1961 was filed on 11-3-1961 by the State against the acquittal of the respondents under section 302 Indian Penal Code and it was not summarily dismissed under section 421 Criminal Procedure Code but a notice of the appeal was given to the accused under section 422 Criminal Procedure Code. The High Court having admitted both the appeals -- one by the accused against their conviction and the other by the State against the acquittal and having given notice of both the appeals under Section 422, it was obligatory on the part of the High Court to proceed to hear and decide them as provided in Section 423 Criminal Procedure Code and to pass judgments in both the appeals. In the instant case, the appeal against acquittal under Section 302 Indian Penal Code having been admitted under Section 422 Criminal Procedure Code, it is too late now to contend that the appeal is not maintainable. The appeal has been admitted and a notice has been given as provided in section 422 Criminal Procedure Code and the appeal must be heard and decided in accordance with section 423 Criminal Procedure Code and a judgment must follow as provided in Sections 424 and 425 Criminal Procedure Code. A criminal appeal which was competent when it was filed -cannot become incompetent by reason of any subsequent event or by reason of any judgment in another appeal arising out of the same trial. It is true that when the appeal by the State against the acquittal was dealt with under Sections 421 and 422 Criminal Procedure Code, no notice was given to the accused because no notice was necessary to be given under section 421 Criminal Procedure Code. We will, therefore, hold that at present it is Open to the respondents to challenge the maintainability of the appeal. The Criminal Procedure Code having clearly provided for an appeal against an acquittal, unless there is a specific provision in law anywhere else, it is not open to contend that an appeal for which there is a specific provision in the Criminal Procedure Code is not competent and does not lie. It is true that while hearing the appeal, the Appellate Court is bound by the provisions of other laws, if any, such as Section 430, 417 and 369 Criminal Procedure Code. While hearing the appeal, the Appellate Court may find that a particular point involved in that appeal has been finally decided by a competent Court and is, therefore, what may be called res judicata or final. In such a case, the Appellate Court will treat that decision as final and as res judicata, but that will not affect the competency to hear and decide the appeal which it is obligatory on its part to decide. The Appellate Court would, therefore, take care to see that it does not ignore the provisions of Section 430 Criminal Procedure Code and that it does not interfere with any final decision by any competent Court. The decision given by the High Court in Appeal No. 645/60 is no doubt, final and will have to be treated as final. But even doing so, it is open to the Appellate Court viz., the High Court to dispose of Appeal No. 105 of 1961 which is an appeal against acquittal, as the appeal against acquittal raises 'points which are different from those decided in Appeal No. 645/60. The points arising and decided in Appeal No. 645 of 1960 are as follows: -

(1) Was the Sessions Court right in convicting the accused 'under section 304 Indian Penal Code?

(2) Was the sentence passed by the Sessions Court proper in the circumstances of the case?

These are the only two points for determination before the Bench in Appeal No. 645 of 1960. The question whether the learned Sessions Judge was wrong in acquitting the accused under Section 302 of the Indian Penal Code did not arise for determination in Criminal Appeal No. 645 of 1960 and could not have been considered by the High Court in that appeal. Moreover the High Court hearing an appeal from conviction is not competent to set aside an acquittal in respect of which no appeal has been filed. (Vide judgment of the Bench of this High Court in Prabat Laxman v. State of Gujarat Criminal Appeals Nos. : AIR1962Guj51 in which reference was made to the judgment of the Privy Council in Kishansing v. Emperor, ILR 50 All 722 : (AIR 1928 PC 254))

3. Under the Criminal Procedure Code when an Order of acquittal is passed, the State has a tight of filing an appeal against that order of acquittal. This right cannot be interfered with and cannot be taken away by anything other than a substantive provision of law. The appeal which was filed in time and admitted, must be heard and decided and the Court cannot refuse to hear and decide an appeal which has been properly filed, in the absence of any specific provision in law to the contrary. Section 430 Criminal Procedure Code is not a provision to the contrary because it makes decisions final only on the points which were decided. The Division Bench which decided Appeal No. 645/60 which was an 'appeal filed by the accused from the conviction was competent to deal with an appeal by the 'State against the acquittal under a different section of the Indian Penal Code and the decisions of the Division Bench on the points which were before it for decision and which were in fact decided by it would be final under section 430 Criminal Procedure Code. Section 430 Criminal Procedure Code is not, therefore, a provision to the contrary taking away the right of the State to file an appeal from an acquittal or taking away the obligation on the Court to hear and decide such an appeal once it has been filed.

4. It is true that when an appeal from a conviction is filed by an accused person and the State files an appeal against his acquittal, both the appeals are generally heard together. The hearing of two appeals is a matter of convenience. Even when two appeals are heard together, there must be separate judgments in the two appeals. For convenience again the two separate judgments are recorded in the same sheaf of papers, and in fact, under sections 424 and 425 Criminal Procedure Code, there must be a judgment in respect of every appeal. Even if an appeal from an acquittal and an appeal from a conviction are heard together, sometimes it happens that the appeal against a conviction is confirmed. If the contention of the learned counsel is correct, the moment the Division Bench of the High Court pronounces its judgment confirming the conviction, it would be incompetent for the same Division Bench to pronounce a judgment in an appeal from an acquittal, even if both the appeals are heard together. The contention urged by the learned counsel for the respondents would, therefore, result in an absurdity viz., that even one Division Bench of the High Court cannot hear an appeal from a conviction and an appeal from an acquittal in respect of the same accused persons.

5. It is next contended that if the present appeal from the acquittal is heard, the Appellate Court would not be competent to exercise all the powers given to it under Sections 423 (1) (a), Criminal Procedure Code, which provides that -

'(i) 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 411-A, 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.'

There is some substance in this argument because if the conviction of the accused under Section 304 Indian Penal Code is confirmed by the High Court, then subsequently the High Court cannot order a re-trial of the accused, although the subsequent matter before the High Court is an appeal from the acquittal of the accused under Section 302 Indian Penal Code, because by ordering a re-trial, the Court will have to set aside the conviction of the accused. The conviction of the respondents which has been confirmed by the Division Bench of the High Court cannot be set aside and unless the conviction is set aside, a re-trial cannot be ordered. But there may be cases even under Section 423 (i) where a further inquiry may be ordered notwithstanding that the decision of the Division Bench in the appeal from a conviction is final. But the High Court ordering further inquiry will have to make it quite clear that the escope of the inquiry must be restricted to the points not covered by the decision of the Division Bench of the High Court in Criminal Appeal No. 645 of 1960. A re-trial cannot be ordered generally in respect of the conviction which is final by reason of the judgment of the High Court in the appeal from a conviction, in view of the provisions of Section 403 Criminal Procedure Code. But the circumstances that the Appellate Court hearing the appeal from an acquittal may not be able to exercise some of the powers mentioned in Section 423 (i) (a) Criminal Procedure Code is no ground for arguing that the appeal itself is incompetent and cannot be heard. In favour of this contention, reliance, was placed by Niyogi, A, J. C. in AIR 1932 Nag 121 on an 'English Case of Cox v. Hakes, (1890) 15 AC 506. The learned Judge at the Nagpur High Court, Niyogi, A. J. 'C. observed as follows: -

'The competency of the. Appellate Court to hear appeals 'depends upon its power to enforce its orders; and circumstance which takes away or restricts this power must affect the competency of the Court. It must follow that any appeal filed in such circumstances will turn out to be futile. In other words, the appeal itself will be incompetent. In (1890) 15 AC 506 at p. 534 Lord Herschell in delivering his opinion upon an analogous question stated the principle in these terms:

'I think it is impossible to read the section your Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of appeal in case it should differ in opinion from the Court below, were intended to be coextensive. And I cannot think that it was ever contemplated that an appeal should, be entertained from any class of orders when that which was effected by them could never be effectually interfered with .....and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine, appeals to extend to such cases'. This principle was stated in connection with a case where the Legislature did not make

any provision for enforcing the Appellate Court's judgment, but it will apply with equal force to a case where the Appellate Court, as in the present case, is unable to enforce the powers conferred on it by law. In fact the Criminal Procedure Code has made no provision for resolving the conflict between the, decisions of the High Courts of the nature already, indicated.'

In the English Case reported in (1890) 15 App Cas 506, the question for determination was whether at the inception an appeal lay or not. Upon a construction of the various provisions involved including section 47 of the English Judicature Act, 1873, it was held that on a construction of the relevant provisions, it was clear that the Legislature did not intend the exercise of the Appellate jurisdiction in a particular case and that, therefore, no appeal lay from an order of the High Court discharging a person by exercising its powers of habeas corpus. Lord Bramwell (at page 524) observed as follows: -

'I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of discharge on a writ of habeas corpus, and the possible futility of such reversal, is a strong argument to show that an appeal does not lie.' .

Lord Herschell observed (at page 534) as follows:-

'I am driven, then to the conclusion, that where, a person has been discharged by the High Court under a writ of habeas corpus the Court of Appeal has no power effectually to interfere with the action of the Court below. The judgment of the higher Court cannot in anywise affect the discharge or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo that which it holds to have been wrongly done by the order appealed from.'

In view of the special provisions of the English Law, it was held that once a person had been discharged from custody as a result 6 an order of the High Court in a habeas corpus petition, no powers were given to the Court of appeal to order his arrest again. It was, therefore, held that the legislature did not intend that the Court of Appeal should hear an appeal from the High Court under of discharge passed in a habeas corpus petition. Lord Herschell also observed (at pages 533, 534), as follows:

'The function of a Court of Appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings.'

'I think it is impossible to read the section your. Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ in opinion from the Court below, were intended to be coextensive. And I cannot think that it was even contemplated that an appeal should be entertained from any class of orders when that which was effected by them could never be effectually interfered with. The jurisdiction of the Courts whose functions were transferred to the High Court, to discharge under a writ of habeas corpus, was well known; and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases. It was said that it sometimes

happens that events subsequent to the judgment of a Court of first instance render it impossible for the Court of Appeal to remove the effect of the judgment below, even though it should hold that judgment to have been a wrong one, and that it could not be contended that on this account the judgment could not be appealed against. This is no doubt true, and many illustrations of it might be given. But the difficulty there arises from the accidental circumstances of the particular case. Here it is inherent in the nature of the order itself in all cases in which a person is discharged from the custody of the law. This distinction appears to me to be a vital one.'

The principle of the English Case does not, therefore, apply to the facts in the instant case and this was recognised by .Niyogi, A. J. C. who observed that this principle was stated in connection with a case where the Legislature did not make an provision for enforcing the Appellate Court's judgment, but he observed that the same principle will apply with equal force to a case where the Appellate Court is unable to enforce the powers conferred on it by law. He seems to have taken the view that if in an appeal from acquittal the accused is convicted under Section 302 Indian Penal Code there would be a conflict between the decisions of the High Court given in an appeal against acquittal and given in an appeal against conviction. If the High Court confirms the conviction of the accused under section 304 Indian Penal Code and if subsequently another Bench in an appeal from an acquittal convicts the same accused person under Section 302 Indian Penal Code, there would not be a conflict between the two orders. An offence is described in Section 40 Indian Penal Code as a thing made punishable by the Indian Penal Code. An act may be punishable under two sections of the Code. If an accused person gives one blow to the victim as a result or which the victim dies, the blow might amount to grievous hurt as defined in Section 320 Indian Penal Code. In such a case, the accused would be guilty both under Section 326 Indian Penal Code if he had used dangerous weapon and he may be guilty also under Section 302 Indian Penal Code. In fact even at the trial such a person can be convicted both under Sections 326 and 302 Indian Penal Code in respect of the same blow. This is contemplated in Section 71 Indian Penal Code which reads as follows:-

'Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, 'when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which' tries him could award for any one of such offences.'

Section 71 Indian Penal Code, therefore, limits the punishment awardable in such a case, but it does not take away the power of the Court to convict an accused person of all the offences under which the act falls. Section 2 of the Indian Penal Code provides as follows:-

'Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.'

It is clear, therefore, that a person can be convicted of two different offences in respect of the same or a single act. The act of giving a blow with a dangerous weapon may amount to an offence under Section 326 Indian Penal Code and also to an offence under Section 302 Indian Penal Code if the blow causes death; and he can be found guilty under both the sections. In such a case the punishment is regulated by Section 71 Indian Penal Code. But the case of Section 304 and Section 302 might present some difficulty, because section 304 of the Indian Penal Code punishes culpable homicide not amounting to murder and Section 302 Indian Penal Code punishes culpable homicide amounting to murder. If therefore in an appeal from a conviction, the High Court has confirmed the conviction under Section 304 Indian Penal Code holding that the offence is culpable homicide not amounting to murder, then it is possible to argue that it may not be open to the Court in an appeal from acquittal to differ from that finding that the offence does not amount to murder, although the question whether the culpable homicide amounted to murder may not have been considered. The difficulty arises because of the use of the words 'not amounting to murder' in section 304 Indian Penal Code. In such a case, in view of the finding of the High Court in the appeal from conviction that the offence of which the accused is guilty is culpable homicide not amounting to murder, it is possible to contend that it would not be open in the High Court in an appeal from acquittal, even if it is heard subsequently, to convict the accused under Section 302 Indian Penal Code. But here again, the fact that a particular order cannot be passed by the High Court in an appeal on a point which is already res judicata does not take away the competency of the High Court to hear the appeal. In AIR 1932 Nag 121 the learned Judicial Commissioner, Nachair, J. C., observed:

'I do not think any difficulty is involved in the fact that if the appeal against the acquittal succeeds, there will be two convictions one for the minor offence and one for the major. A person who is guilty of the major offence is guilty of the minor offence. The substitution of punishment for the major offence for a less severe punishment for the minor offence does not involve variation of the conviction and sentence for the minor offence.'

A High Court hearing an appeal from acquittal must take care to see that it accepts as final the findings of the earlier judgments, of the High Court on all matters which it was competent for the High Court in the earlier appeal to decide.

6. Reliance is also placed on the following observations of their Lordships of the Supreme Court in U. J. S. Chopra v. State of Bombay. : 1955CriLJ1410 and in particular, reliance is placed on the following observations of their Lordships of the Supreme Court at page 649:

'A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would certainly be arrived at after due consideration of the evidence and all the arguments and would therefore be a judgment and such a judgment when pronounced would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below'.

It is, therefore, argued that once the judgment of the Sessions Court is replaced by the judgment of the High Court, there remains no longer any judgment of the Sessions Court to be dealt with by in High Court in an appeal against acquittal by the

State. But this argument is fallacious because when the High Court Judgment replaces the judgment of the Sessions Court, it replaces it only on the points decided by the High Court in the appeal and not on the points not decided by the High Court in the appeal. This position is made clear by His Lordship S. R. Das. J., of the Supreme Court in the observations made by him in the same case. At page 643 His Lordship observed that the finality, statutory or general, of the judgment under Section 430 Criminal Procedure Code extends only to what is actually decided by the High Court and no further. As already observed, in an appeal by an accused person against his conviction, the point whether he had been wrongly acquitted of a different offence is never for consideration before, the High Court and that point cannot be decided by the High Court in an appeal from a conviction. The point whether the acquittal was wrong can only be decided by the High Court in an appeal filed by the State against the acquittal and therefore, the principle of merger or replacement of one judgment by another does not apply to the points which could not have been decided by the High Court in appeal. It so far as the points decided are concerned, viz., whether the conviction is proper and the sentence is proper, the judgment of the High Court would replace that of the Sessions Court and therefore, their Lordships of the Supreme Court observed that once the order of the High Court regarding the conviction and sentence replaces that of the Sessions Court, there can be no revision of this order.

7. If two persons are convicted at one trial and they file two separate appeals, it is open to the High Court to hear the two appeals separately. When the High Court hears the two appeal separately and passes judgment in one, the judgment of the High Court in the first appeal replaces the judgment of the Sessions Court only with regard, to that accused person and it is competent to the High Court to hear the case of the second accused person separately by disposing of the second appeal filed by the second accused, even if the second appeal is filed earlier.

8. Section 430 Cri. Pro. Code makes final only those judgments and orders which have been heard and decided. As observed by His Lordship of the Supreme Court in the same case, namely : 1955CriLJ1410 , before there can be finality under Section 430, the points must have been heard and decided. When the question as to the correctness or otherwise of the acquittal of the accused was never heard and decided by the High Court in Appeal No. 643/60, there can be no finality of that question whether the accused were rightly or wrongly acquitted under Section 302 I. P, C. That point must be heard and decided so that the decision can become final under Section 430 Cri. Pro. Code.

9. Reliance is also placed on the following observations of a Madhya Bharat Full Bench in AIR 1952 Madh-B, 81 at page 88 :

'If an appeal against conviction is dismissed then, unless there is anything 'contrary in the judgment itself, I would take it that the appellate Court confirmed the conclusions of the trial Court on facts which constituted the offence, for which the accused was convicted, confirmed conviction as well as the -sentence, and also confirmed the conclusion of the trial Court that on those facts the offence fell within a particular section of the statute.'

With great respect, it is difficult to agree with these observations. There can be nothing like a general 'conviction. A conviction 'must be with reference to a particular offence. The question always is whether an accused 'person is guilty of a particular

'offence as denned in a, particular law. A conviction must have always a reference to the definition of the offence. With reference to the definition of the offence, the Court has to see whether the ingredients of the offence as defined in that definition have been 'proved. When a Court convicts an accused person under Section 326 I. P. C., it holds that all the ingredients mentioned in Section 326 I. P. C. are proved beyond reasonable doubt. It does not decide that oil the facts proved; the offence fell only under Section 326 I. P. C. The finding of the High Court that the conviction under Section 326 I. P. C. is confirmed does not mean that in their view, the accused committed an offence under Section 326 I. P. C. and no other offence. The confirmation of the conviction under Section 326 I. P. C. in an appeal means only this that in their view, the Judge convicting the accused under Section 326 I. P. C. rightly held that all the ingredients of the offence under Section 326 I. P. C. had been proved beyond reasonable doubt.

10. The argument that it is against the fundamental principles of 'Criminal Jurisprudence to convict a person of two distinct offences on the same set of facts cannot, with great respect, be accepted because such a procedure is clearly contemplated by Sections of the I. P. C. and Section 71 I. P. C. Only, a person cannot be punished more severely than as provided for in Section 71 I. P. C.

11. The decision of Their Lordships of the Supreme Court in : 1955CriLJ1410 applies only to the case of revision application for the enhancement of sentence which had been confirmed by the High Court in an earlier appeal and the same principle cannot be extended by way of analogy to the case of appeal because in the case of appeal from acquittal, the question for consideration is entirely different from that which is for consideration of the High Court in an appeal from conviction. But in a case of enhancement of sentence, the question of sentence is for consideration in both the matters viz. the earlier appeal against conviction and the subsequent revision application. The same question cannot be considered by the High Court at two different stages. But different questions may be considered by the High Court at two different stages. In the case of an appeal against conviction and an appeal against acquittal the questions for consideration before the High Court are essentially different. It is true that the 'provisions relating to judgment' contained in Chapter XXVI do not apply to judgments by the High Court. Even in the case of a High Court, it has to certify its judgment or order 'under Section 425 Cri. Pro. Code. The principles contained in Section 367, Cri. Pro. Code that the judgment shall contain the point or 'points for determination, the 'decision thereon and the reason for the Decision are principles of general application. Even a High Court pronouncing its judgment has to frame the point or points for determination and its decision is confined to the point or points for determination. When the High Court is deciding an appeal by an accused person against his conviction, the question of the correctness or otherwise of his acquittal under a different 'section is never a point for determination before the High Court and is not a point for decision before the High Court in the appeal against 'conviction. For the reasons stated above, with great respect, it is difficult to agree with the following observations of Gurnam Singh J. in :

'It cannot be denied that before the trial Court the only matter for determination was the finding of the nature of the offence, if any, from the proved facts.

In deciding the appeal against conviction the learned Single Judge undoubtedly considered the propriety and legality of his conviction as well as the propriety of the sentence passed by the trial Court, presumably the learned Judge first considered if

on the proved facts the convict was guilty and if so What offence was committed by him. After determining the nature of the offence the learned Judge then considered the propriety of the sentence. In other words he reviewed the entire Case against the accused before pronouncing his decision.'

In an appeal from a conviction an appellate Court does not decide the question, what offence the proved facts constitute.

12. For the reasons already stated, with great respect, it is difficult to agree with 'the following observations of Gurnam Singh J. in AIR 1958 Punj 233 at p. 235 :

'In an appeal against acquittal any finding to the contrary would naturally amount to variance of the judgment already passed by the High Court in appeal against conviction. It means the recording of two convictions on the same set of facts.'

13. If the High Court hears the appeal against acquittal after the appeal by the accused against conviction has been heard and decided by the same High Court, that would not amount to contravention of Section 403 Cri. Pro. Code. When an appeal is being heard, the accused is not being re-tried. The hearing of the appeal is merely a continuation of the trial as observed by Their Lordships of the Supreme Court. In Sm. Kalavati v. State of Himachal Pradesh, AIR 1953 SC 131 at p. 133 Their Lordships observed :

'An appeal against an acquittal whereversuch is provided by the procedure is in substance a continuation of the prosecution.'

That after a trial and conviction, an appeal is heard does hot mean that the accused is being tried again. The learned Judges of the Punjab High Court observed that strictly speaking neither Article 20 of the Constitution nor Section 403 Cri. Pro. Code would apply to a case where the appeal against acquittal is being heard. But they observed that the principle which is embodied in Illustration (d) to Section 403 Cri. Pro. Code is of the utmost importance. Illustration (d) to Section 403 Cri. Pro. Code is as follows :

'A is charged before the Court of Sessions and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.'

It is difficult to see what is the principle involved in the illustration which is not found in the words of the illustration. The illustration clearly applies to a second trial and not to an appeal after a trial. It is difficult to agree with the following observations of Grover, J., on page 241:

'This illustrates the principle which is firmly established in England as well as America that where a person has been convicted for an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence.'

If these observations are correct, then an accused person cannot file an appeal against his conviction and the State cannot file a revision application for the enhancement of the sentence.

14. Their Lordships of the Punjab High Court also relied on section 425 Criminal Procedure Code and it is observed as follows at page 242:

'Apart from these considerations, the provisions of section 425 of the Code of Criminal Procedure cannot be ignored. According to that section, whenever a, case is decided on appeal by the High Court, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed, and the Court to which the High Court certifies its judgment or order has thereupon to make such orders as are conformable to the judgment or order of the High Court, and if necessary, the record has to be amended in accordance therewith.'

If the High Court confirms a conviction under Section 326 Indian Penal Code the order is certified to the Sessions Court. The Sessions Court makes a note that the High Court confirmed the conviction under Section 326 Indian Penal Code and the sentence passed thereon. If subsequently, in an appeal from acquittal, the High Court convicts the accused persons under Section 302 and sentences him to imprisonment for life, the High Court can certify the order to the Sessions Court and the 'Sessions Court will make a record of the fact that in an appeal from acquittal, the accused has been convicted under Section 302 Indian Penal Code and sentenced to imprisonment for life. By doing so, the provisions of Section 425 Criminal Procedure Code are in no way contravened. If the High Court convicts the accused under Section 302 Indian Penal Code and sentences him to imprisonment for life, if would make clear that its sentence is subject to the provisions of section 71 Indian Penal Code. It would make clear in the judgment that the accused should not Buffer a more severe 'punishment than imprisonment for life, notwithstanding the fact that he has been convicted under Section 326 and also under Section '302 Indian Penal Code.

15. With great 'respect, therefore, we differ from the views expressed by the Full Benches of the Madhya Bharat .High Court and the Punjab High Court and with the contention advanced by the learned counsel for the respondents. The real overriding considerations are the provisions contained in the Criminal Procedure Code itself. The Criminal Procedure Code gives a right to the State to file an appeal against acquittal and it makes it obligatory on the High Court to hear the appeal if the High Court gives notice under section 422 Criminal Procedure Code. Once such a notice is given it is obligatory on the High Court to hear and decide the appeal and to pass judgment thereon. This right cannot be affected by what a Bench of the High Court does and is not affected even if the High Court hears the appeal from conviction earlier than the appeal by the State from acquittal. A right given by the -Criminal Procedure Code cannot be taken away by anything other than an express provision to the contrary in a statute. While hearing the appeal against acquittal, however, the Bench hearing the appeal must bear in mind the provisions of section 430 Criminal Procedure Code and Section 71 Indian Penal Code. The findings of the First Bench of the High Court deciding the appeal from the conviction on all points which arose for its determination are final and cannot be touched by the High Court 'when hearing the appeal against acquittal. It cannot also order a retrial because by so doing, it would upset the finality of the decision of the First Bench which had heard the appeal against conviction. Subject to these qualifications, the appeal which is competent, must be heard and decided and must result in a judgment either allowing the appeal or dismissing the appeal as provided in Section 423 (i) (a) Criminal Procedure Code. We, therefore, hold that this appeal against acquittal must be heard and decided'.

16. As already observed, while so doing, we must bear in mind the provisions of Section 430 Criminal Procedure Code. We, therefore, have to see what were the points for determination before the Division Bench which decided Criminal Appeal No. 645 of 1960 and what were its decisions. The Sessions Judge convicted the

accused under section 304 Indian Penal Code and this finding was confirmed by the High Court in appeal. This finding is, therefore, that the accused was guilty of the offence of culpable homicide not amounting to murder. That finding is final under Section 430 Criminal Procedure Code and in this view of the matter, we cannot hold that the accused was guilty of the offence of culpable homicide which amounts to murder. Although two views are possible, technically and strictly speaking the two findings would be contradictory. We cannot therefore allow the appeal against acquittal under Section 302 I. P. C. because the accused were convicted under Section 304 I. P. C. and the conviction is confirmed. The appeal against the acquittal under Section 302 Indian Penal Code of accused No, 2 who was convicted under Section 304 Indian Penal Code must be dismissed.

(The rest of the judgment is not material forthis report.)