to mention that both of them are wholly wide of the mark. On principle the argument suffers from the basic fallacy of equating the vesting of the surplus area with the declaration thereof. It deserves recalling that under the Punjab Security of Land Tenures Act, the surplus area does not at all vest in the State and is merely utilised for the settlement of tenants. Therefore, the concept of surplus area and the vesting thereof in the State are not necessarily identical terms. The date with regard to which the surplus area is to be determined and the date when it may be vested in the State, therefore, do not have to be necessarily co-terminus. It is otherwise plain that it is only when the area has been declared as surplus in the hands of a landowner that the question of its subsequent vesting could possibly arise. Secondly the fixation of the time of the vesting of surplus area in the State by the relevant provisions of section 12 does not in any way afford an analogy or advance the case of the petitioners.

15. For the foregoing reasons the answer to the question posed in the opening part of the judgment is rendered in the affirmative, i.e., the majority of the son of a land owner is to be determined on the appointed day and consequently the validity of the impugned instructions Annexure P-1 is upheld.

16. Learned counsel for the parties are agreed that the crucial issue of law having been settled, the merits in individual case have now to be determined by the prescribed authority under the Act or the appellate and revisional forums. The individual cases of the petitioners would, therefore, go back for finalisation to the statutory authorities.

17. The writ petitions are dismissed. But in view of the slightly ticklish issues involved the parties are left to bear their own costs.

H.S.B.

Before S. S. Dewan, J.

PASHORI LAL and another,—*Petitioners.*

versus

PUNJAB STATE,—*Respondent.*

Criminal Misc. No. 983-M of 1979.

April 25, 1979.

Code of Criminal Procedure (V of 1898)—Section 423(1)—Conviction of an accused set aside by the appellate Court—Case remanded and a new prosecution witness directed to be examined—Such order—Whether within the competence of the appellate Court.

Held, that the powers of the appellate Court have been prescribed under section 423 of the Code of Criminal Procedure 1898. The Court hearing an appeal against a judgment of conviction can order a re-trial of the accused by a Court of competent jurisdiction but the appellate Court while setting aside the conviction of an accused cannot remand the case with a direction that a new prosecution witness who could not be examined during the trial be examined and a fresh judgment delivered after hearing the arguments on merits. Such an order is not permissible under the Code because once a re-trial is ordered by the appellate Court, the evidence already on record is deemed to be wiped out from the records. Moreover, the power of re-trial should be exercised only in exceptional cases where the court of appeal finds that the court trying the case had no jurisdiction or the trial had been vitiated due to some serious illegality. This power cannot be exercised for allowing the prosecution to fill up the lacuna in its case. (Paras 6 and 7).

R. S. Ghai, Advocate, *for the petitioners.*

D. S. Keer, Advocate, for A.G., Punjab.

JUDGMENT

(1) This judgment will dispose of Cr. Misc. petitions Nos. 983-M and 985-M of 1979. These petitions, under section 482, Code of Criminal Procedure, 1973, turn on the question whether the Appellate Court while setting aside the conviction of the accused has the power to direct the trial court to examine a prosecution witness who could not be examined during the trial and deliver a fresh judgment after hearing arguments on merits. In both these cases the learned Additional Sessions Judge, Rupnagar set aside the conviction and sentence passed against the petitioners by the Judicial Magistrate 1st Class, Kharar and remanded the case to the trial court for fresh decision after examining the Public Analyst. The learned Magistrate convicted the petitioners under section 7 of the Essential Commodities Act and sentenced them to undergo rigorous imprisonment for one year and a fine of Rs. 1,000/- or in default to undergo rigorous imprisonment for two months each.

(2) Now I may deal with the facts in Cr. Misc. petition No. 983-M of 1979. The prosecution case, in brief, is that no receipt of a secret information on 23rd January, 1974, Inspector Charanjit Singh of Police Station, Rupnagar, accompanied by Sita Ram, Dev Raj and some police officials raided the godown of the petitioners in

Camp Mubarakpur and recovered 80 bags of white salt. The petitioners could not produce any permit or licence to keep the white salt. The Inspector took samples from each of the bags and thereafter the bags and the samples were sealed and taken into possession,—*vide* recovery memo Ex. PC. On the basis of *ruqa*, Ex. PF, sent by the Inspector to the Police Station, Mubarakpur, the formal First Information Report, Ex. PF/4, was recorded. The Public Analyst, who examined the samples found it a common salt but it did not contain any iodine either as iodite or iodate. On the completion of the investigation, the petitioners were sent up for trial, At the trial, the prosecution examined witnesses in support of its case but it appears that the Public Analyst could not be examined on behalf of the prosecution. The learned Magistrate on the material placed before him came to the conclusion that the prosecution had proved its case against the petitioners and they were accordingly convicted and sentenced.

(3) Against the said judgment of the learned Magistrate, the petitioners preferred appeal before the Additional Sessions Judge, Rupnagar, who set aside the conviction and sentence and remanded the case to the trial court for a fresh decision with a direction to examine the Public Analyst to prove his reports, which has led to the filing of these petitions for setting aside the impugned order on the ground that it is illegal and without jurisdiction.

(4) During the course of arguments before the Additional Sessions Judge, the learned Public Prosecutor submitted that the reports of the Public Analyst, Exs. P-81 to P-161, could not be legally received into evidence in view of the provisions of Section 293, Code of Criminal Procedure, 1973, whereunder the Govt. Scientific Experts have been detailed. It was urged that the reports of the Public Analyst had been wrongly admitted into evidence and the same could not have been taken into evidence unless the Public Analyst was examined as a witness in the case. In support of his contention, the learned Public Prosecutor cited an unreported decision in case State of Punjab *vs.* Jaswant Singh, Criminal Appeal No. 1512 of 1975, decided by D. B. Lal and Harbans Lal, JJ., of this Court on 6th October, 1978.

(5) The question is whether the present petition lies against the order passed by the learned Additional Sessions Judge remanding the case to the trial court for a fresh decision on the evidence already

recorded by it along with the evidence to be taken by him. It was contended by the learned counsel for the petitioners that these petitions may be treated as petitions in revision under section 435/439 of the old Code and at any rate the High Court exercising supervisory jurisdiction over the subordinate courts can set aside an order if found to be illegal and unjust and do justice to the parties affected thereby. The learned counsel appearing for the State is unable to repel this contention of the petitioners. The matter having been brought to my notice, this Court has the power to interfere with the orders impugned in exercise of its revisional powers.

(6) The learned counsel for the petitioners has urged that under the Code of Criminal Procedure, a remand of the kind ordered by the learned Additional Sessions Judge is unknown. In my opinion, there is substance in the contention of the learned counsel. Powers of the Appellate Court have been prescribed under section 423 of the old Code. The Court hearing an appeal against a judgment of conviction can order a retrial of the accused by a court of competent jurisdiction. The relevant clause (b) of Section 423(1) of the old Code of Criminal Procedure is as follows :—

> "The Appellate Court shall then send for the record of the case if such record is not already in Court. After persuing 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—
>
> x x x x
>
> (b) in an appeal from a conviction ;
>
> (1) reverse the finding and 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, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the

nature of the sentence but, subject to the provisions of Section 106, sub-sec. (3), not so as to enhance the same ;

x x x x

(7) This type of order is not permissible under the Code of Criminal Procedure because once retrial is ordered by the Appellate Court, the evidence already on record is deemed to be wiped out from the records. Moreover, this power of retrial should be exercised only in exceptional cases where the Court of Appeal finds that the Court trying the case had no jurisdiction or the trial had been vitiated due to some serious illegality. This power cannot be exercised for allowing the prosecution to fill up the lacuna in its case. The facts in case State of Punjab *vs* Jaswant Singh (*supra*) relied upon by the learned counsel for the State are entirely different and have no application to the facts of our case. That was a case where the two affidavits of the link witnesses were duly filed and accepted by the trial court. It was only at the appellate stage that the defects were pointed out which were purely technical and the Hon'ble Judges of the Division Bench allowed such defects to be removed by producing fresh affidavits of the very same witnesses. The case was remitted to the trial Magistrate for affording an opportunity to the prosecution either to file fresh affidavits of the link witnesses including the affidavits in place of Exs. PH and PI or to adduce witnesses in lieu thereof with opportunity to the defence to cross-examine such deponent or witnesses. The trial Magistrate was directed to decide the case afresh on merits. The observations in that case, therefore, have no application to the facts of our case.

(8) In case *Ukha Kolha* v. *The State of Maharashtra*, (1) the Hon'ble Judges of the Supreme Court observed :

"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it

(1) A.I.R. 1963 S.C. 1531.

appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

(9) In my opinion, the impugned order cannot be construed to be an order for retrial and even if it is to be so construed no sufficient reasons have been given by the learned Additional Sessions Judge for ordering a retrial. Under section 428 of the old Code if the Court of Appeal thinks that additional evidence is necessary to be taken, it may either take such evidence itself or direct it to be taken by the Magistrate concerned. The relevant portion of section 428 of the Code reads as under :—

"428 (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necesssary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal."

Under this section if the Court of Appeal directs the trial Court to take additional evidence then the trial court has to record the evidence as directed by the Appellate Court and then to send such evidence to the Appellate Court which shall proceed to dispose of the appeal taking into consideration such additional evidence. From the order of the learned Additional Sessions Judge it does not appear that he has exercised his power under section 428, Cr. P.C., because in that case there was no question of setting aside the judgment passed by the trial court and directing it to deliver a fresh judgment after examining the witness and after hearing arguments on merits. In my opinion, the learned Additional Sessions Judge has adopted a hybrid procedure which is foreign to the scheme of the Code.

(10) For the reasons given above I am of the opinion that the orders of the learned Additional Sessions Judge are bad in law and have to be set aside.

(11) In the result, the petitions are allowed, the orders of remand passed by the learned Additional Sessions Judge, Rupnagar are set aside and Cr. Appeals No. 33/1978 and 32/1978 are restored to their respective files. The learned Additional Sessions Judge will dispose of the appeals in accordance with law in the light of the observations made above. The parties through their counsel are directed to appear in the said Court on 17th May, 1979. As the appeals appear to be old ones the learned Additional Sessions Judge will see that these are disposed of at an early date.

H.S.B.

Before M. R. Sharma and C. S. Tiwana, JJ.

STATE OF PUNJAB,—*Appellant.*

versus

KARTAR SINGH,—*Respondent.*

Criminal Appeal No. 1083 *of* 1976.

April 26, 1979.

Arms Act (LIV of 1959)—*Sections* 2(1) (b) & (c) *and* 25—*Country made pistol and live cartridges recovered from an accused—Statement of investigating officer based on visual examination of the recovered material—No challenge by the accused regarding recovered material being on 'arm' and 'ammunition'—Accused—Whether can be convicted on such evidence.*

Held, that parts of an arm also fall within the definition of 'arms' as given in section 2(1) (c) of the Arms Act 1959 and live cartridges are covered by the definition of 'ammunition' as stated in section 2(1)(b). Where a country made pistol and live catridges are recovered from the accused, the statement of the police officer who extensively deals with such materials in the official discharge of his duties and which is not challenged in cross examination by the accused is sufficient to hold that the articles recovered from the accused answer the description of the terms 'arms' and 'ammunition'. In such circumstances, it is not necessary for the prosecution