Before M. M. Punchhi, J.

JETHA NAND,—*Petitioner.*

versus

THE STATE OF HARYANA,—*Respondent.*

Criminal Revision No. 42 of 1981.

April 12, 1982.

Code of Criminal Procedure (II of 1974)—Sections 239, 386 and 401—Indian Penal Code (XLV of 1860)—Sections 420, 467, 468 and 471—Accused sent up for trial for offences under sections 420, 467, 468 and 471 I.P.C.—Charge framed only under section 420 and the accused discharged of other offences—Order of discharge not challenged in revision—Accused convicted under section 420—Appeal against conviction accepted and retrial of the accused ordered after the framing of a fresh charge under section 467 I.P.C.—Appellate Court—Whether could order such retrial under section 386 of Code of Criminal Procedure.

Held, that Section 386 of the Code of Criminal Procedure, 1973 pertains on the one hand to an appeal from an order of acquittal and on the other to an appeal from conviction. Whereas in an appeal from conviction, the appellate Court is required to touch the finding and sentence; the Court in an appeal from an order of acquittal has no finding or sentence to touch but just to reverse the order of acquittal. And thereafter the Court has the option to find the accused guilty and pass sentence on him in accordance with law or to order retrial of the accused or his committal for the purpose. Another option to the Court is to direct further inquiry to be made. Inquiry in the context means every inquiry other than a trial conducted under the code by a Magistrate or Court (Section 2(g) of the Code). It is thus patently clear that in an appeal from an order of acquittal, the appellate Court can put the proceedings at the pre-trial stage and obviously at a stage before the framing of the charge but after the filing of the police report. No such power is conferred on the Court in an appeal from a conviction. The order of retrial which the appellate court can pass in the context of an appeal from a conviction is retrial for the same offence for which the accused was convicted and not of another, since it would be wrong for the appellate Court to assume that the whole case is before it. When it entertains an appeal against conviction, it has only the appeal from a conviction and not an appeal from an order of acquittal. It has no doubt the proceedings of the entire case before it for purposes of section 401 of the Code of Criminal Procedure and thereunder the High Court as also the Court of session are debarred to

convert a finding of acquittal into one of conviction. It is, therefore, held that an appellate Court whilst ending an appeal from conviction under one offence in an order of acquittal cannot simultaneously order a retrial of the accused for another offence.

(Paras 7 and 8).

Petition for revision of the order of Shri Krishan Kant Aggarwal, Addl. Sessions Judge, Gurgaon, dated 15th November, 1980, remanding the case back to the trial Court, setting aside the judgment dated 12th June, 1975 passed by Shri B. L. Singhal, J.M.I.C. Ballabgarh.

C. D. Dewan, A. S. Chadha and Ramesh Puri, Advocates, *for the Petitioner.*

B. K. Jhingan, Advocate, for A. G. Haryana, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.

(1) Can a Court of criminal appellate jurisdiction, whilst ending an appeal from conviction under one offence in an order of acquittal, simultaneously order a retrial of the accused for another offence, is the intriguing question which falls for determination in this petition for revision. And it arises out of the context of section 386 of the Code of Criminal procedure, the relevant part of which is extracted below:—

> "386. Powers of the Appellate Court.—After persuing 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 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
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> (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;
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> (b) in an appeal from a conviction—
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> (i) 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 trial; or

(ii) alter the finding, maintaining the sentence; or

(iii) with or without altering the fnding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

* * * * *"

(2) A police report under section 173, Criminal Procedure Code, was presented to the Judicial Magistrate, 1st Class, Palwal, of the area charging the accused Jetha Nand and another of offences under section 420, 467, 461 and 471 of the Indian Penal Code. The allegations contained therein were founded on facts which may broadly be stated herein. One Ram Chand Motwani stood surety for payment of a loan due to the accused Jetha Nand and three others to the tune of Rs. 35,000. One of the terms of the surety bond was that in the event of non-payment of the said loan, the surety Ram Chand Motwani would sell, and to which he had agreed, some plots situated in N.I.T. Faridabad at a total sale consideration of Rs. 40,000. Ram Chand Motwani died on 24th July, 1972, and his estate was succeeded by his widow Smt. Krishna Devi. On 6th February, 1973, a sale deed was executed and registered whereby the afore-referred two plots at N.I.T. Faridabad, were sold in favour of Jetha Nand and three others for a sum of Rs. 40,000. Jetha Nand accused signed it on behalf of the vendees. Saudagar Singh co-accused signed it as a witness and so did Shri C. L. Taneja, Advocate, Ballabgarh. These two witnesses of the sale deed identified the vendor Smt. Krishna Devi, who thumb-marked the same as the executant, as also having done so before the Sub-Registrar. Sometimes later, Smt. Krishna Devi, complained to the police authorities that somebody had played a fraud upon her and in fact she never got executed any sale deed. Complaining that she had been deprived of the ownership of the plots in question, she wanted the investigatory process to be set into motion. Accordingly, the police registered the case and embarked upon investigation. The police did not discover who was the lady who appeared before the Sub-Registrar though the accused were insistent that it was Smt. Krishna Devi and none other. Finally, the prosecution presented its report against Jetha Nand accused and his co-accused Saudagar Singh for the commission of the above-referred to offences. Shri L. N. Mittal, the Sub-Divisional Judicial Magistrate, Ballabgarh,—*vide* his reasoned order dated 12th June, 1975

discharged the accused of offences under sections 467, 468 and 471, Indian Penal Code, and ordered charge under section 420, Indian Penal Code, to be framed individually against both the accused. After trial, his successor Shri B. L. Singhal, Judicial Magistrate, 1st Class, Ballabgarh, acquitted Saudagar Singh accused but convicted Jetha Nand accused-petitioner under section 419, Indian Penal Code, and sentenced him to two years' rigorous imprisonment and to pay a fine of Rs. 500. Aggrieved against the said order, Jetha Nand, petitioner filed an appeal against his conviction which was allowed by Shri Krishan Kant Aggarwal, Additional Sessions Judge, Gurgaon, on 15th November, 1980. He took that view following a decision in *Madhavan Ayyappan* v. *State and another* (1), which he found to be a case similar on facts. Nevertheless, the learned Judge observed that it was not a case in which the accused should be allowed to take benefit of the technicalities of the framing of charge against him under a wrong section. Observing that the accused had actively participated in getting the sale deed, Exhibit P.A., executed in his favour as also attesting the said sale deed and appearing before the Sub-Registrar appending his signatures thereto along with the fictitious Krishna Devi, the offence under section 467, Indian Penal Code, was made out against the accused. Thus, whilst accepting the appeal and setting aside the conviction of the appellant under section 419, Indian Penal Code, he ordered that the appellant be tried on a fresh charge under section 467. Indian Penal Code, to be framed by the learned Magistrate in the light of the observations made by him in his judgment. He further observed that the evidence already on the file shall be treated as the evidence in the case subject to the condition that the accused would be at liberty to request for recalling the prosecution witnesses already examined for further cross-examination. Consequential orders which he thought fit were also passed which need not be detailed here. It is to challenge this order that the present revision petition has been filed by Jetha Nand, petitioner.

(3) Before coming into grips with the legal question, one fact which has pertinently emerged must be noticed. Nowhere in the order under revision did the learned Additional Sessions Judge refer to the order of discharge dated 12th June, 1975, passed by the trial Magistrate. As said before, this order was a reasoned one and had to be reasoned in view of section 239 of the Code of Criminal Procedure which now makes imperative on the Magistrate to record reasons for discharging the accused. The Law Commission in its

(1) AIR 1953 Travancore Cochin 34.

41st report, while giving objects and reasons for the change to be introduced in section 251-A (2) of the old Code, had observed that since the order of the Magistrate was subject to revision, it was obviously necessary that he should record his reasons in the order. Accordingly, the change which was recommended by the Law Commission found way by explicit words in section 239 of the Code of Criminal Procedure. No revision was filed against the order of discharge and the prosecution remained content with proceeding against the accused under section 420, Indian Penal Code, for nearly five years when the accused was convicted for that offence on 25th March, 1980.

(4) The portion of section 386, Criminal Procedure Code, extracted earlier pertains on the one hand to an appeal from an order of acquittal and on the other to an appeal from conviction. It goes without saying that the appeal before the learned Additional Sessions Judge was an appeal from conviction and not an appeal from an order of acquittal. An appeal from an order of acquittal even does not lie before him. Thus he was confined to his powers as conferred by the Code in part (b) of section 386 of the Code of Criminal Procedure. Apparently, he has reversed the finding and sentence under section 419 Indian Penal Code, and acquitted the accused. He has not ordered a retrial or committal for trial of the accused for offence. He has even not maintained or reduced the sentence or its nature and extent thereunder with or without altering the finding. He has just altered the finding on those facts on which the accused-petitioner had been discharged and has ordered a fresh framing of charge under section 467, Indian Penal Code. Now could this be done under section 386 of the Code of Criminal Procedure in this situation is the moot point.

(5) Mr. C. D. Dewan, learned counsel for the petitioner, placed firm reliance on *The State of Andhra Pradesh* v. *Thadi Narayana* in which the scope of section 423(1)(b)(i) and (ii) of the Code of Criminal Procedure, 1898, was spelled out and it was held therein that the expression "alter the finding" has only one meaning and that was "alter the finding of conviction and not the finding of acquittal". It was held therein that in exercise of its powers conferred on it by section 423(1)(b), the High Court cannot convert acquittal into conviction for that can be done by adopting the procedure prescribed in section 439 of the Code of Criminal Procedure. And similarly reliance was placed on a Single Bench decision of the Bombay High Court in *State of Maharashtra* v. *Shriram and others* (2), to contend that if the appellate

(2) 1980 Cr. Law Journal 13.

(2A) AIR 1962 S.C. 240.

Court directs retrial, the framing of charges and retrial can only be for the charges for which the accused was convicted and not for the charges he was acquitted. It was observed therein that if that be not the construction, the accused by merely appealing against his conviction would stand perilled of double jeopardy because the filing of an appeal would make him run the risk of being retried once again on the same count without there being an appeal competently lodged.

(6) On the other hand, the learned counsel for the State relying on *Matukdhari Singh and others* v. *Janardan Prasad* (3), contended that if the Magistrate ignores offences over which he had no jurisdiction and chooses to try the accused of offences over which he has jurisdiction, then while hearing an appeal against an order of acquittal under section 417 (3) of the Code of 1898, the High Court could direct the Magistrate to frame a charge for an offence which was *prima facie* established by the evidence and also to order that the accused be committed. In that case, it was held that if the Justice of the case clearly demanded such course, the High Court had jurisdiction to set aside an order of acquittal and order retrial. It was also argued on the strength of *Rajeswar Prasad Misra* v. *The State of West Bengal and another* (4), to contend that the appellate Court's power in disposing of the appeals of both kinds are in essence the same, though indicated separately in the Code and that the appellate Court was given a wide discretioin to deal appropriately with difference cases.

(7) It is noticeable that *Thadi Narayana's case* (supra) arose in the context of an appeal from conviction and *Matukdhari Singh's case* (supra) from an appeal against acquittal. Whilst in the first referred to case, the Supreme Court authoritatively pronounced that in an appeal from conviction, the High Court could alter the finding of conviction and not the finding of acquittal but in the second referred to case, it held that in an apeal against acquital, the High Court could direct the trial Court to frame a charge for an offence which was *prima facie* established by evidence and also to order that the accused be committed. It is on that strength that the learned counsel for the State contends that what an appellate Court can do in an appeal from an order of acquittal, it can do the same thing in an appeal from conviction as in either case, the Court has to alter a finding. The fallacy of the argument is noticeable on a

(3) AIR 1966 S.C. 356.
(4) AIR 1965 S.C. 1887.

comparative reading of parts (a) and (b) of section 386, Criminal Procedure Code. Whereas in an appeal from a conviction, the appellate Court is required to touch the finding and sentence; the Court in an appeal from an order of acquittal has no finding or sentence to touch but just to reverse the order of acquittal. And thereafter the Court has the option to find the accused guilty and pass sentence on him in accordance with law; or to order retrial of the accused or his committal for the purpose. Another option to the Court is to direct further inquiry to be made. Inquiry in the context means every inquiry other than a trial conducted under the Code by a Magistrate or Court [section 2(g) of the Code]. It is thus patently clear that in an appeal from an order of acquittal, the appellate Court can put the proceedings at the pre-trial stage and obviously at a stage before the framing of the charge but after the filing of the police report. No such power is conferred on the Court in an appeal from a conviction. The order of retrial which the appellate Court can pass in the context of an appeal from a conviction is retrial for the same offence for which the accused was convicted and not of another since it would be wrong for the appellate Court to assume that the whole case is before it. When it entertains an appeal against conviction, it has only the appeal from a conviction and not an appeal from an order of acquittal. It has no doubt the proceedings of the entire case before it for purposes of section 401 of the Code of Criminal Procedure and thereunder the High Court as also the Court of session are debarred to convert a finding of acquittal into one of conviction.

(8) In the instant case, there were no proceedings of revision before the Additional Sessions Judge against the order of discharge dated 12th June, 1975, as observed earlier. It seems that the learned Additional Sessions Judge was not aware of its existence. Though this Court as also the Court of Session was not debarred from exercising powers under section 401 of the Code of Criminal Procedure and set aside an order of acquittal, yet that power is not lightly exercised but only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction, the High Court does not ordinarily invoke or use merely because the lower Court has taken a wrong view of the law or mis-appreciated the evidence on record. Now here the order of discharge for offence under section 467, Indian Penal Code, and other allied offences could well have been challenged at the appropriate time before a revisional Court within

limitation. It is for this reason that section 239 of the Code of Criminal Procedure now warrants a reasoned order of discharge so that it can be challenged by way of rev ision. The State having remained content with it cannot be allowed to agitate and claim that it must put to trial the accused under section 467, Indian Penal Code, by framing a charge. Thus, it is held that the learned Additional Sessions Judge had no power to order a fresh trial of the accused on framing of a charge whilst hearing an appeal against an order of conviction of another offence. It is further held that the appellate Court in the instant case did not exercise its revisional power suo motu or otherwise for it was oblivious of the order of discharge dated 12th June, 1975. And this Court shall not undertake the exercise of revision, for it is not a case for interference, more so after a long and protracted proceedings in the Courts below.

(9) For the foregoing reasons, the question posed at the very outset has to be answered in the negative.

(10) Resultantly, this revision petition is allowed; the impugned order so far as it relates to the ordering of a fresh trial of the petitioner for offence under section 467, Indian Penal Code, is hereby set aside but otherwise his order of acquittal for offence under section 419, Indian Penal Code, remains unchallenged. Ordered accordingly.

N.K.S.

Before M. M. Punchhi, J.

AMAR NATH and others,—*Petitioners.*

versus

JHANDHU LAL and others,—*Respondents.*

Civil Revision No. 2926 *of* 1981.

May 5, 1982.

Partition Act (IV of 1893)—Sections 2, 3, 4 & 8—Code of Civil Procedure (V of 1908)—Sections 2(d) and 115—Suit for partition of immovable property—Property considered to be not divisible and auction ordered—Requirements of sections 2 & 3 of the Partition Act not complied with—Such order directing auction—Whether