

P L D 1959 Supreme Court (Pak.) 119

Present: Muhammad Munir, C. J., M. Shahabuddin, A. R. Cornelius, Amiruddin Ahmad and S. A. Rahman, JJ

MUHAMMAD ASLAM-Appellant

Versus

THE STATE-Respondent

Criminal Appeal No. 41 of 1958, decided on 2nd March 1959.

(On appeal from the judgment and order of the High Court of West Pakistan Lahore, dated the 26th May 1958, in Criminal Appeal No. 84 of 1958).

Criminal Procedure Code (V of 1898),

S. 423-Convicted person may withdraw his appeal-Whether appeal from acquittal may be withdrawn by Government (Quaere)-I L R (1942) 23 Lah. 241 overruled.

The appellant was accused of having committed criminal breach of trust in respect of an aggregate sum of Rs. 6,309-11-3. This amount had been misappropriated from seven different funds during a period exceeding one year. The trial Judge found him guilty and sentenced him to one year's imprisonment and a fine of Rs. 6,400. On appeal to the High Court one of the grounds taken by his counsel was that the trial being in contravention of subsection (2) of section 222 and section 234 of the Code of Criminal Procedure the conviction and the sentence were a nullity. When in the course of arguments the learned Judge hearing the appeal indicated to the appellant's counsel that if the contention raised by him were given effect to, the result would be a retrial, counsel withdrew the objection. The Judge, however, ruled that despite counsel's withdrawal of the objection he would hear arguments on the legal question. On this, counsel for the appellant put in a written application stating that his client did not wish to prosecute the appeal and that he should be allowed to withdraw it. The Judge feeling himself bound by the Full Bench decision in *The Crown v. Ghulam Muhammad* I L R (1942) 23 Lah. 241 (F. B.), refused to allow the appeal to be withdrawn and ordered a retrial.

Held, that the order was bad and the appeal should have been dismissed as having been withdrawn.

So far as an appeal by a convicted person is concerned he is as much at liberty to withdraw it as he was at liberty to file it, and in such cases the obvious duty of the High Court is to dismiss the appeal. If, however, the High Court considers that an order or finding recorded in appeal should be set aside, or a retrial ordered or the sentence enhanced, the proper course for it is to act on the revision side.

An appeal is the creation of statute and is essentially in the nature of a right. A convicted person is not bound to appeal even where the law gives him such right and that being so there appears to be no general principle which stands in the way of his withdrawing the appeal. If he can accept the finding and the sentence by electing not to appeal, there is no reason why the mere fact of his having filed an appeal should, in the absence of sortie principle akin to estoppel, be considered to be a bar to his subsequently waiving the right.

Cases taking a contrary view were decided at a time when, unlike the present law, an Appellate Court, had the power to enhance the sentence in an appeal from conviction. Under the present law, however, the powers of an Appellate Court have been exhaustively defined by section 423 of the Code of Criminal Procedure and 'these do not include, in fact they expressly exclude, the power to enhance the sentence. If the High Court wishes to enhance a sentence, the only provision under which it can do so is section 439 of the Criminal Procedure Code which invests the High Court with all the powers of an Appellate Court as well as with the power to enhance the sentence whether there be or not an appeal before it.

An appeal by the prisoner creates no right in any one else and gives to the High Court no higher powers than are possessed by it as a Court of revision. There is therefore no injustice to anyone or deprivation of any right or power involved in the mere withdrawal of an appeal.

The real question appears to be whether there is any express or implied prohibition against the withdrawal of an appeal, and as there is no such prohibition the right to withdraw an appeal must be conceded to a convicted person.

The Crown- v. Ghulam Muhammad I L R (1942) 23 Lah. 241

In re Chunder Nath Deb and others 5 C L R 372; In the matter of Dwarka Manjhee and others 6 C L R 427; King-Emperor v. Dahu Raut I L R 62 Cal. 983 P C ; Income-tax Special Commissioner, ex-parte Elmhirst I L R 1936, 1 K B 487 and Commissioner of Income-tax v. Nawab Shah Nawaz I L R 1938 Lah. 359 ref.

An appeal against acquittal by the Government stands on a different footing because the High Court acquires on such appeal the power to convict an acquitted person.

Their Lordships, however, expressed no opinion about the correctness of the judgment in The Crown v. Ghulam Muhammad [I L R (1942) 23 Lah. 241 (F.B.)] so far as it related to the withdrawal of an appeal by Government.

Mushtaq Hussain Khan, Advocate, Supreme Court, instructed by Yaqub Hussain, Attorney for Appellant.

S. K. Ahmad, Advocate; Supreme Court, instructed by Ijaz Ali, Attorney for Respondent.

Date of hearing: 2nd March 1959.