PART VII

OF APPEAL REFERENCE AND REVISION

CHAPTER—XXXI

OF APPEALS

404. Unless otherwise provided, no appeal to lie.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Scope and application—The word "appeal" means the right of carrying a particular case from an inferior to a superior court with a view to ascertaining whether the judgment is sustainable. An appeal is a creature of the statute and there is no inherent right of appeal (AIR 1941 Lah. 414). An appeal is a continuation of the trial of the lower court (37 Mad 119). This Chapter declares what sentences or orders are appealable. Ordinarily no appeal lies except as otherwise provided by this code or by any other special law. In a case in which no appeal lies from an order, the proper course is to make an application for revision. Undergoing sentence is not the criterion to determine whether an appeal lies or not. The real criterion is whether there is conviction and the forum of appeal depends on the terms of the sentence (1952 Cr. LJ 702). Article 103 of the Constitution provides for appeal to the Supreme Court from High Court Division in certain cases in respect of criminal proceedings.

34 DLR 222 (SC)—Khondakar Mostaque Ahmed Vs. Bangladesh—Malafide when established, conviction must be quashed. The principle that justice should not only be done, but also appear to be done. A case is the authority for the proposition which it lays down on the facts of the case. Malafide or coram non judice proceedings are not immune from the scrutiny of the Supreme Court notwithstanding any ouster clause in the Martial law proclamation. Mere allegation without real likelihood of bias—Not enough nor unsubstantial grounds or flimsiest pretext will show bias. Malafides of the proceedings vitiated the trial.

33 DLR 77—Atiqullah Vs. The State—No judical record can be called for except by the Supreme Court but certified copy of any paper can be obtained with the necessary permission of the Court.

10 DLR 123—Hari Meah Vs. The State—Appeal does not lie as a matter of course, being merely a creature of law. The provisions of section 8 of Food Act, 1956 do not confer a right of appeal. Previous state of law cannot be taken into account. A Special Magistrate under the Act is not a Magistrate under the Code of Criminal procedure and his order are not appealable.

5 DLR 161 (FC)—S.M.K. Alvi Vs. The Crown—Appeal by Government under Chapter XXXI against acquittal by a Special Judge acting under Criminal Law Amendment Act, 1948 is competent. Special Judge's Court is a "Criminal Court" within the meaning of section 404 Cr. P. C.

Appeal to the Supreme Court—The same principle govern an appeal to the Supreme Court which would not review criminal proceedings unless it was shown that by a disregard of the forum legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice have been done (52 Cr. LJ 231 Pak. FC).

Period of Limitation for appeal and revision—Article 150 of the Limitation Act provides appeal within seven days from a sentence of death passed by a Court of Session. Article 154 of the Limitation Act provides appeal or revision to be filed within thirty days to any court other than a High Court Division from the date of the sentence or order. Article 165 of the Limitation Act provides appeal within sixty days to the High Court Division.

12 DLR 681—Md. Nur Ali Vs. The State—Period of limitation to move the Session Court by way of revision, is that provided in cases of appeals under Article 154 of the Limitation Act. No period of limitation has been prescribed in Limitation Act for revision.

405. Appeal from order rejecting application for restoration of attached property.—Any person whose

application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Scope and application—The Court to which appeals ordinarily lie is the Court to which appeals are normally and in the majority of cases provided for by the Statute (AIR 1919 Lah. 57).

406. Appeal from order requiring security for keeping the peace or for good behaviour.—Any person who has been ordered by a Magistrate under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—to the Court of Session :

Provided that the Government may, by notification in the official Gazette; direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the Chief Metropolitan Magistrate or the District Magistrate shall lie to the Chief Metropolitan Magistrate or, as the case may be, to the District Magistrate and not to the Court of Session :

provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

Scope and application—An appeal lies from the order of any Magistrate under section 118 to the Sessions Judge. This section applies only to an order requiring security under section 118. An order directing security to keep the peace under section 106 is not appealable. This section applies to appeals from orders requiring security for keeping peace or for good behaviour. There is no right of appeal in cases laid before the Sessions Judge under section 123. But the right of appeal is revived if pending disposal of the reference, security is offered and accepted (AIR 1928 Lah. 64). An order passed by a Sessions Judge on reference made under section 123 is not an order of the Magistrate and is therefore, not appealable under section 406 (12 Cr. LJ 257). On an appeal from an order under section 110 Cr. P.C, it is the duty of the Appellate Court to

look into the defence evidence, and after dealing with it to come to a decision, although no reference might have been made to it by the counsel for the appellant during his agruments. In an appeal from an order under section 107 Cr. P.C. the Appellate Court is competent to order a re-trial (27Cr. LJ 945, 18 Cr. LJ 649).

406A. Appeal from order refusing to accept or rejecting a surety.—Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,—

(a) if made by the Chief Metropolitan Magistrate or a District Magistrate, to the Court of Session;

(b) if made by a Metropolitan Magistrate other than the Chief Metropolitan Magistrate, to the Chief Metropolitan Magistrate; or

(c) if made by any other Magistrate, to the District Magistrate.

Appeal—Appeal against order of the District Magistrate and Chief Metropolitan Magistrate lies to the Sessions Judge.

407. Appeal from sentence of Magistrate of the second or third class.—(1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Sub divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) **Transfer of appeals to first class Magistrate.** The District Magistrate may direct that any appeal under this section, or any class of such appeals shall be heard by any additional District Magistrate subordinate to him and empowered by the Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Additional District Magistrate, or, already presented to the District Magistrate, may be transferred to such Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Scope and application—Section 407 (1) makes an appeal ordinarily lie to the District Magistrate for he is to hear all appeals from second or third class Magistrates if they were not transferred under section 407 (2). Section 407 does not apply to an appeal from the order passed by Thana Magistrate under section 118. The appeals that the A.D.M has power to hear are those which are filed against the judgment of second or third class Magistrates. Trial of a case must be taken to be complete on a date on which nothing remains to be done but to deliver the judgment. Therefore where the trial is held by a second class Magistrate who is invested with first class powers before delivering the judgment, though after the completion of the trial, an appeal will lie to the District Magistrate and not to the Sessions Judge (AIR 1932 Cal. 460). But where a second class Magistrate takes cognizance of a case and he is subsequently invested with first class powers, and the greater part of the trial takes place before him as a first class Magistrate, an appeal from conviction by such Magistrate does not lie to District Magistrate but the case fails under section 408 Cr. P.C (AIR 1927 Lah. 398). The amendment empowers the District Magistrate to withdraw any appeal from the court of Additional District Magistrate under the law.

35 DLR 148—Jamsed Ali Vs. Abdus Samad—After the second amendment, the appellate power under section 407 of the Cr.P.C has been given to the Additional District Magistrate who are made subordinate to the District Magistrates. In the present case, the learned Additional District Magistrate without admitting the appeal passed the following order : "Heard the learned lawyer. I find no ground for its admission. Hence rejected." Summary order of rejection of an appeal made under section 407 (2) by the Additional District Magistrate, such disposal of the appeal without considering it on its merits cannot be sustained in law. **Held :** This order shows a total non-application of judicial mind of the court concerned. The High Court Division of the Supreme Court being a court of final revision under section 439 of the Code of Criminal Procedure, is called upon to draw the attention of the learned Additional District Magistrate concerned to keep in mind the

norms of judicial procedure and decorum and dispose of appeals in accordance with law. As it has become normal with the Additional District Magistrate to summarily dispose of appeal before them, they are reminded to follow proper procedure in disposal of appeal. Utmost expedition does not mean disposal alone but disposal in accordance with law and keeping the spirit of dispensation of justice. The Court which is functioning under the Code of Criminal Procedure must dispense justice in accordance with established judical principles.

5 BLD 218—Mahmud Ali Vs. State—Delay in filing appeal can be condoned.

408. appeal from sentence of Asst. Sessions Judge or Magistrate of the first class.—Any person convicted on a trial held by an Assistant Sessions Judge, a Metropolitan Magistrate, a District Magistrate, an Additional District Magistrate or other Magistrates of the first class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Magistrate of the first class, may appeal to the Court of Session.

Provided as follows :

(a) Repealed.

(b) When in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding five years or any sentence of imprisonment for life the appeal of all or any of the accused convicted at such trial shall lie to the High Court Division.

(c) When any person is convicted by a Magistrate of an offence under section 124A of the Penal Code, the appeal shall lie to the High Court Divisions.

Scope and application—This section must be read subject to the exceptions and modifications embodied in sections 412, 413 and 414 (AIR 1937 Cal. 423). The right of appeal given in this section is given only to a person who is convicted at the trial, and is not given to the prosecution. A Magistrate in section 408 (b) has been omitted by Ord. LXX of 1984 dated 1. 12. 84. Appeal lies to the Sessions Judge for any sentence

passed by first class Magistrate. The word "imprisonment" means a substantive sentence of imprisonment and does not include an award of imprisonment in default of payment of the fine, the operation of which is contingent only on the fine not being paid. The two sentences—one substantive and another in default of payment of fine cannot be combined to give the prisoner a right of appeal. Special Powers Act, 1974 and Act XL of 1958 confer a right of appeal on the aggrieved party from the judgment of the Special Tribunal and Special Judge. The Judges of these aforesaid courts are deemed to be a Court of Session. If during the course of the trial and before hearing is complete, an Assistant Sessions Judge is invested with the power of Additional Session Judge the trial is said to be held by an Additional Judge and the appeal lies to the High Court Division.

45 DLR 184—Mahirun Nessa Vs. State—The delay in taking the Criminal Appeal, though inordinate, is condoned in view of the exceptional facts that the appellant, an old woman after being dispensed with attendance in Court became unaware of her trial and the order of conviction.

42 DLR 15—Lal Meah Vs. State—For compelling an absconder accused to be brought to trial, coercive power under sections 87 and 88 could be used—section 339B added to the Code to provide for trial in absentia. Interpretation of statute Procedures though apparently procedural are substantive in nature. Failure to observe these would render subsequent proceeding coram non judice and a nullity. 30 days time for appeal to be counted from the date of knowledge of conviction when relevant Statutes do not prescribe any date from which limitation is to run.

41 DLR 395 (FB)—Nurul Huda Vs. Bahar Uddin—Appeal will lie to the Court of Sessions if the Assistant Sessions Judge deemed to be an Additional Sessions Judge passes a sentence of imprisonment for a term of five years or less. Under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge. Consequence of change brought ir section 29C and section 31 (4) of the Code of Crimina.

Procedure—An Assistant Sessions Judge deemed to be an Additional Sessions Judge shall not be deemed to be an Additional Judge for all purposes under the Code, namely, for hearing appeals, revisions, references and reviews if they are made over and transferred to him by Sessions Judge. Distinction between Court of Sessions and Sessions Judge—Court of Sessions is a Court and the Sessions Judge an is office. Assistant Sessions Judge deemed to have been appointed as Additional Sessions Judge does not acquire the status of an Additional Sessions Judge (Ref : 10 BCR 19FB, 6 BLD 367).

40 DLR 472—Sayed Nurul Islam Vs. The State—Appeal is a creature of Statute—An appeal preferred by a convicted person can be withdrawn and dismissed for non-prosecution. The appeal is dismissed by the Court for non-prosecution on the basis of principles enunciated by Supreme Court of Pakistan in II DLR (SC) 250.

40 DLR 281 (AD)—Saidur Rahman alias Chan Meah Vs. The State—The Sessions Judge found the appellants guilty of charge under section 147 P.C and granted interim bail pending filing of appeal. Leave was granted to consider whether the impugned order was a just and proper order.

29 DLR 277—Satish Chandra Biswas Vs. Mainuddin Dai—Criminal Trial Cost—No provision to award cost to a respondent by a court of appeal in a criminal appeal.

21 DLR 46 (WP)—Qasu Vs. The State—Direction to suffer imprisonment in default of payment of fine is not a sentence for the offence. It may be called a punishment for contempt of court. Therefore imprisonment awarded in default of payment of fine cannot add to the substantive sentence of imprisonment to enable the convict to prefer appeal to the High Court instead of, to the Sessions Court.

21 DLR 2—Alok Kumar Mitra Vs. The State—Appeal against a first class Magistrate's order imposing sentence (for offence) under item (8) and (81) of section 167 of the Sea Customs Act would lie to the Sessions Judge, since proviso (b) to section 408 not attracted in a case where Magistrate is empowered to act under section 193B Sea Customs Act.

11 DLR 172—Monoranjan Dey Vs. The State—When the goods in respect of which a trial has been held are not goods falling within the notified order under the East Pakistan Control of Essential Commodities Ordinance, 1956, the mere fact that the Magistrate who tried the offence was a Special Magistrate and whose decision as a Special Magistrate is non-appealable will not render his decision as a decision of a Special Magistrate and therefore an appeal against his decision will lie in usual course (Ref : 10 DLR 123).

4 BLD 5—Shahizuddin Vs. The State—Forum of appeal—"Sentence of imprisonment for a term exceeding 5 years" in proviso (b) of section 408 Cr. P.C do not include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. Appeal means returned.

51 DLR 439—Moktar Ali Bepari Vs. State—Except under the provisions of section 417A of the Code there is no other provision for filing appeal for enhancement of sentence. In an appeal from a conviction, sentence may be reduced by an appellate Court but sentence can be enhanced only in an appeal for enhancement of sentence and that can be done after giving the accused an opportunity of showing cause against enhancement.

409. Appeals to Court of Session how heard.—An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge;

Provided that an Additional Sessions Judge shall hear only such appeals as the Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Scope and application—The Additional Sessions Judge has no jurisdiction to transfer an appeal from the file of the Court of, Session to himself and to hear it. Where the Additional Sessions Judge transfers appeal to his own file and decides it the judgment given is without jurisdiction and nullity inspite of the fact that the parties did not object to his exercising the jurisdiction. The Additional Sessions Judge will

try only those appeals which would be made over to him by the Sessions Judge, but that does not oust the jurisdiction of the Sessions Judge over those appeals and he can afterwards withdraw the appeal from the latter and take it on his own file and decide it.

43 DLR 77AD—Abul Kashem Vs. State—An Assistant Sessions Judge to be appointed as Additional Sessions Judge has the limited power of passing higher sentences except a Death Sentence in those sessions cases which are now triable by him by deeming and treating him to be an Additional Sessions Judge, consequent upon the changes brought. He shall not be deemed to be an Additional Sessions Judge for all the purposes under the Code e.g. for hearing appeals, revisions, reference and reviews if they are made over or transferred to him by the Session Judge. Under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge deemed to have been appointed as an Additional Sessions Judge. The dismissal in the instant appeal by the High Court Division in revision are therefore by the High Court Division in revision are therefore illegal. The appeal against conviction is therefore allowed and it is directed that the Sessions Judge may himself dispose of the appeal or transfer it to an Additional Sessions Judge for disposal (Ref : 10 BCR 19FB)

41 DLR 395 FB—Nurul Huda Vs. Bahar Uddin—Under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge. Appeal will lie to the Court of Sessions if the Assistant Sessions Judge deemed to be an Additional Sessions Judge passes a sentence of imprisonment for a term of five years or less. Canon of construction of provisos—Jurisdiction occurring in sub-section (3) of section 9 is limited to trial jurisdiction if read with section 28, Interpretation of statute—A proviso is subservient to the main provision—It is not an enacting clause independent of the main enactment.

Distinction between Court of Sessions and Sessions Judge—Court of Sessions is a Court and the Sessions Judge is an office (Ref : 36 DLR 93, 4 BCR 24, 5 BLD 41 over rulled).

7 BLC (HC) 340—Kamal Mia (Md) @ Nasim Vs. State, represented by the DC and others (Criminal)—It is unfortunate that the learned Sessions Judge ignored the settled principle of law in dismissing the appeal for default. Accordingly, the case was sent back on remand to the learned Sessions Judge for hearing the appeal afresh and to dispose of it in accordance with law.

410. Appeal from sentence of Court of Session.—Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court Division.

Scope and application—This section gives jurisdiction to the High Court Division to hear appeals against conviction. Once a criminal appeal is admitted it must be decided on merits and cannot be dismissed for non-prosecution. The absence of the appellant or his advocate does not relieve the court from the duty of perusing the record and giving reasons its support of the judgment that there is no sufficient ground for interfering with the conviction and sentence of the appellant (22 DLR 63 (SC)).

47 DLR 185—Muslim Vs. The State—Charge—charge under sec. 201 P.C was framed against the appellants and although no charge u/s. 302/34 P.C was framed but they were convicted there under. Conviction without such a charge being framed is illegal.

10 BCR 19 FB—Nurul Huda Vs. Bahar Uddin—It may be further held that under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge deemed to have been appointed as an Additional Sessions Judge.

42 DLR 94—State Vs. Jahaur Ali—Learned Sessions Judge did not take any step for proper arrangement of defending the condemned prisoners who were denied the substantive right of

being defended through a lawyer at the cost of the State—Conviction not sustainable in law.

7 BCR 404 (AD)—Afsar Ali Vs. The State—The cases of the non-appellant who had not moved the Appellate Division earlier were considered and their sentences were reduced to 10 years R.I. each though their conviction u/s. 304. Part-1 was maintained in line with the decision in Criminal Appeal No. 44 of 1984.

41 DLR 257—Jagodish Chandra Dutta Vs. M. H. Azad—Order of sentence passed by the Labour Court under the provisions of employment of labour (standing orders) Act is not appealable to the Appellate authority under the Code of Criminal Procedure as there is no provision for such appeal under the Employment of Labour (Standing Orders) Act, Labour Court was not constituted under Code of Criminal Procedure—There is no provision for appeal or revision against any order passed under section 26 of the Employment of Labour (Standing Orders) Act.

8 BLD 217 (AD)—Saidur Rahman Vs. The State—"Fugitive from Law"—When appellants cannot be called fugitives and their petition of appeal cannot be summarily rejected on such ground—The appellants surrendered before the Sessions Judge upon conviction and obtained an interim bail—It is true the order was illegal but the fact remains that they submitted themselves to the sentence passed and obtained bail albeit wrongly— In the facts of the case it will be less than charitable to attribute to them that they were "fugitives from law"—Since the appellants were not covered by a legal order of bail, the proper order the learned Judge of the High Court Division ought to have passed was to direct them to surrender within a certain time before taking up the petition of appeal for hearing—Since the appeal has not been heard on merit an order of remand is called for (Ref : 40 DLR 281 (AD)).

7 BCR 150 (AD)—Md. Mujibur Rahman Vs. Mahtabuddin—The High Court Division, Rangpur Bench in a cryptic order discharged the Rule by observing that the judgment passed by the trial Court is quite elaborate on consideration of evidence

on record. The High Court Division did not consider the evidence nor applied its mind as to whether the facts and circumstances warranted the order of acquittal passed by the Additional Sessions Judge, Rangpur.

5 BLD 193 (AD)—Maqbul Hossain Vs. Bangladesh Milk Producers Co-operative Union Ltd.—An appeal lies to the High Court Division against conviction and sentence passed by the Labour Court as it is deemed to be a Court of Sessions for the purpose of appeal from all sentences when offences are tried the Labour Court acts as a Magistrate 1st Class but when punishment is given and sentence is recorded by it then for the purpose of appeal it shall be deemed to be a Court of Sessions—All appeals from a Court of Sessions lie to the High Court Division.

21 DLR 109 (SC)—Gul Hassan Vs. The State—If a prisoner decamps on whom a sentence of death has been passed by the trial court, he thereby forfeits the right of audience before the High court and the sentence of death may be confirmed in his absence.

11 DLR 226 (SC)—Asker Ali Vs. The State—Assistant Sessions Judge became Additional Sessions Judge in the course of trial. Conviction by the Judge must be regarded as a conviction by the Additional Sessions Judge from which an appeal lies to the High Court.

48 DLR 287—Arzan @ Iman Ali Vs. State—Non-appealing—accused—Benefit of acquittal—In the face of clear illegality committed by the learned Additionl Sessions Judge in convicting all the 3 accused of the offene under section 396 of the Penal Code, if we do not record an order of acquittal in favour of acused Fazlul Huq, the non-appealing accused, it means that we are allowing an illegal order to perpetuate. In that view of the matter, we hold the entire order of conviction and sentence be set aside and the absenting accused Fazlul Huq is also entitled to get the benefit of this order.

4 MLR (AD) 256—Alauddin Vs. The State—Appeal from sentence of Court of Sessions—and grant of bail—Bail in appeal against short sentence like two years may usually be

granted and realisation of the stayed where such appeal can not be decided expeditiously; otherwise the purpose of appeal will be frustrated.

52 DLR (HC) 567—Shah Alam and others Vs. State—Section 410—Accused Ali Mia, though did not prefer any appeal against his conviction and sentence, there is no reason to keep him in custody on the basis of illegal evidence.

20 BLD (AD) 249—Mahmudul Islam @ Ratan Vs. The State—Section 410— If a superior Court disposes a criminal matter, more particularly a criminal appeal of such a great importance in such a light hearted manner without any application of judicial mind then that will have a demoralizing effect on the subordinate judiciary in disposing criminal justice in Bangladesh.

5 MLR (AD) 205—Altaf Hossain Vs. The State—Section 410—Appeal against conviction and sentence passed by Sessons Judge— The appellate Court has to discuss the evidence on record while deciding an appeal. When the appellate court without discussing the evidence in details affirmed the findings of the trial court, the Appellate Division upon scrutinising of evidence on record found nothing wrong in the judgment of the appellate court and as such the same is not interfered with.

53 DLR 569—Hussain Muhammad Ershad Vs. Abdul Muqtadir Chowdhury and another (Spl. Original)—The date of conviction and sentence pronounced by the trial Court should not be taken to be the starting point for the disqualification against the convict sitting Member on account of such conviction in a criminal case involving moral turpitude.

411. Omitted.

411A. Omitted.

412. No appeal in certain cases when accused pleads guilty.—Notwithstanding anything hereinbefore contained where an accused person has pleaded guilty and has been convicted by a Court of Sessions, or any Metropolitan Magistrate or Magistrate of the first class on such plea, there

shall be no appeal except as to the extent or legality of the sentence.

Scope and application—Under this section, the right of appeal, when accused has pleaded guilty, is limited to such matter as may be a special ground of complain with respect to the sentence, whether on the ground that the sentence is beyond what the circumstances of the case required, or that the sentence is illegal or not authorised by law. But where no sentence was passed the right of appeal is absolutely barred (18 Cr. LJ 401). The principle is sound. Where the facts alleged by the prosecution do not amount to an offence, the plea of guilty of an accused person cannot stand in the way of his acquittal and this section cannot bar an appeal from his conviction (AIR 1965 MP 137). Under this section, persons who plead guilty can only apeal on the ground of extent and legality of sentence. They are entitled to satisfy the court that there was in fact no plea of guilty. A plea obtained by trickery is not a plea of guilty within the meaning of the Code and would not preclude from asking for any relief except reduction of sentences (AIR 1944 Cal. 120). This section does not apply to a conviction by Magistrate of the second and third class (AIR 1943 Pat. 380).

22 DLR 217—District Council, Kushtia Vs. Abdul Gani Accused can be convicted on his pleading guilty. But such conviction is not proper without materials on record to support it (Ref : 5 BCR 265 (AD)).

20 DLR 461—Md. Rezakul Islam Vs. The State—An accused person who pleads guilty before a Magistrate and is convicted can contend in his application for revision that his conviction is illegal. A conviction without taking of any evidence purporting to be based on a plea of guilty cannot be sustained when the accused denied having pleaded guilty and the said plea is not found recorded in accordance with the provisions of section 243 of the Cr. P. C.

15 DLR 76 (WP)—M. Anwar Vs. Saddat Khayali—An accused person does not plead to a section of criminal statute. He pleads guilty or not guilty to the facts which purport to disclose an offence under that section.

413. No appeal in petty cases.—Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or District Magistrate or Metropolitan Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty taka only.

Explanation—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

Scope and application—Section 413 takes away the right of appeal in certain petty cases. Any restrictive provision on the right of appeal must be strictly construed and in favour of the subject (33 Cr. LJ 90). Once a sentence exceeding the limits prescribed by the section is passed an appeal will lie, as of right, whether the sentence was legal or not. Two conditions must exist in order to make section 413 applicable to the Magistrates, viz, (a) the sentence must be of fine only; and (b) the amount of fine imposed on the convicted person must not exceed taka fifty. If the sentence is not of fine only in the sense that besides fine, some other kind of punishment also is inflicted, this section does not apply (AIR 1954 All 642). In the case of a Court of Session, fine may be combined with imprisonment, Hence, two conditions are to be satisfied for the application of the section, namely (a) the sentence is not the one exceeding the prescribed limit; and (b) it is passed by a court specified in the section (AIR 1947 Cal 394). Where a person is charged with two seperate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies or not (49 Cr. LJ 461 Mad).

414. No appeal from certain summary conviction.—Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred taka only.

Scope and application—The bar operates only when the specific non-appealable sentence mentioned in the section is awarded. The words 'fine not exceeding taka two hundred' mean one sentence of fine. If in a summary trial, a Magistrate imposes two sentences of fine, one of taka sixty and another of taka thirty, the case is one in which two punishments are combined and an appeal lies (37 Cr. LJ 455).

415. Proviso to section 413 and 414.—An appeal may be brought against any sentence referred to in section 413 or section 414 by which any punishment therein mentioned is combined with any other punishment, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

Scope and application—Section 53 of the Penal Code has enumerated the different kinds of punishment including "forfeiture of property". Therefore, when forfeiture is added to the sentence of fine, an appeal would lie under section 415, even though the sentence of fine itself may not have been appealable (AIR 1948 All 107). In cases which would come under section 413, an appeal would be allowed under section 415, in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. In cases which come under section 414, an appeal would be allowed under section 415, if the sentence of fine is combined with any other sentence. No appeal would be allowed under section 415, in cases which otherwise come under section 413, unless the aggregate sentence of imprisonment exceeds one month in the case of a sentence by a Court of Session or a sentence of fine exceeding taka fifty, is passed in case of such fine being imposed by the Court of Sessions or the District Magistrate or other Magistrate of the first class (AIR 1947 All 169).

415A. Special right of appeal in certain cases.— Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Scope and application—This section recognises the right of appeal on behalf of an accused person against whom a non-appealable sentence is passed in trial in which an appealable judgment is passed against any of the accused persons (AIR 1935 Mad, 157).

416. Repealed.

417. Appeal in case of acquittal.— (1) Subject to the provisions of sub section (4) the Government may, in any case, direct the Public Prosecutor to present an appeal,

(a) to the High Court Division from an original or appellate order of acquittal passed by any Court of Sessions.

(b) to the Court of Session from an original or appellate order of acquittal passed by any Magistrate.

(2) Notwithstanding anything contained in section 418, if such an order is passed in any case instituted upon complaint, and if the order involves an error of law occasioning failure of justice, ~~the~~ the complainant may present an appeal :

(a) to the High Court Division from an original order of acquittalpassed by any Court of Session;

(b) to the Court of Session from an original order of acquittal passed by any Magistrate.

(3) No appeal by the complainant from an order of acquittal shall be entertained by the High Court Division or a Court of Session after the expiry of sixty days from the date of the order of acquittal.

(4) If, in any case, the admission of an appeal from an order of acquittal is refused, no appeal from that order of accquittal shall lie under sub-section (1).

Scope and application—An appeal under this section lies only to the High Court Division. A Sessions Judge or a District Magistrate has no right to entertain an appeal against an order or acquittal. The appeals against acquittals should be heard by the High Court Division to avoid miscarriage of justice and to secure a uniform standard in dealing with such appeals. It is open to the High Court Division on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, keeping in view the well established rule that the presumption of innocence of the accused is strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of the witnesses. Subject as aforesaid, the court of appeal has as wide powers of appreciation of evidence in a appeal against acquittal as in the case of an appeal against an order of conviction (AIR 1953 (SC) 122, AIR 1956 (SC) 807). Only the Public Prosecutor appointed under section 492 can file appeal on behalf of the State. The Government cannot direct any other person to appeal. The Legal Remembrancer is a Public Prosecutor within the meaning of this section (7 PLD 79 FC, 46 Cal. 544). The right given by section 417 (2) is only available to a complainant whose complaint ended in acquittal. It is clear from the definition of the expression 'complaint' that it is only the person who makes an allegation orally or in writing to a Magistrate who has been given the right under this section. An appeal under this section abates on the death of the accused and not otherwise. Once an appeal is admitted, it becomes the duty of the High Court Division to decide it (AIR 1971 (SC) 66). The amendment by LRO shows that by addition of the words "in case," enlarges this power to cover all types of State case and private complaint case. This power is of course, subject to the provisions of sub-section (4) of section 417. The addition of sub-section (2) in section 417 is nothing but the conferment of the right on a citizen to move the High Court Division directly

against the order of acquittal passed in a complaint case (PLD 1979 Pesh 174). This section does not control the powers of the High Court Division under section 435 and 439 Cr. P. C (AIR 1934 All 842. AIR 1959 Mys 54). Only in very rare and exceptional cases the private complainant should seek his remedy from the High Court Division as contemplated under section 417 (2) Cr. P. C. The High Court Division will not interfere merely because it might itself, sitting as a court of original jurisdiction, have arrived at a different conclusion (44 Cr. LJ 772), but it must be shown, before an appeal can be accepted, that the judgment of the lower court was so clearly wrong or perverse or unreasonable that its maintenance would amount to a miscarriage of justice. An appeal against conviction or acquittal under Act XIV of 1974 can be filed according to the provision of section 30 of that Act. The words "any court" do not include a Special Court created under a Special Act. Appeal against acquittal shall be made to the High Court Division only and the power of filing appeal rests with the Government. The District Magistrate if he is dissatisfied with an order of acquittal should move the Government for setting aside an acquittal. The section applies also to partial acquittal. Order under section 118 and 119 Cr. P. C is not a conviction or acquittal and no appeal lies against the order of Sessions Judge setting aside an order to give security. Appeals from acquittal are allowed only in exceptional circumstances to cure a manifest injustice. (AIR 1943 Sind. 130). The accused starts with a double presumption in his favour, firstly, the presumption of innocence and secondly, the accused having secured an acquittal the court will not interfere until it is shown conclusively that the inference of guilt is irresistible (29 Cr. LJ 301). The burden is on the Government or the complainant to show that the acquittal is wrong. When there is reasonable doubt as to the guilt of accused the High Court Division will not interfere.

43 DLR 83 (AD)—The State Vs. Ashraf Ali—Review of evidence—The reason given by the Judges of the High Court Division to disregard the evidence of PWs 2, 3, & 4 relying only

upon the evidence of PW 7 is rather artificial. In an appeal by the State against acquittal it is quite open to the Court to review the evidence in order to see whether finding on which acquittal is based is perverse being in wanton disregard of good and unblemished evidence given by other witnesses. (Ref : 11 BLD 117 (AD), 42 DLR 31 (AD), 10 BLD 25 (AD).

43 DLR 129 (AD)—Fazal Ali Vs. Fazar Ali—Maintainability of appeal by witness against order of acquittal—The State u/s. 417 (1) (a) of the Code is authorised to present an appeal against an order of acquittal passed by the Court of Sessions. But in the present case, the appeal was not preferred by the State. The appeal was filed before the High Court Division by a witness who is also the petitioner in the present petition for leave to appeal. Hence this leave petition is not maintainable in law.

43 DLR 60 (AD)—Kazi Mobarak Ali Vs. Md. Yeasin Mazumder—There is no express provision in the Ordinance barring the jurisdiction of a civil court to question the legality or propriety of the Village Court's decision—Respdts, in a civil suit alleged that they did not nominate any representative but the Chairman concerned out of grudge brought two of his men and showed them being nominated by the Respds. In Village Court—Applt (Defdt) proceeded for rejection of the plaint in the face of these allegations—Plaint in civil suit, cannot be rejected. To decide the truth of the matter evidence is necessary which can be available only in course of final of the suit which is prima facie maintainable. (Ref : 1 BSCD 170 (SC); 28 DLR 34).

42 DLR 12 (AD)—Mostoshir Ali Vs. Arman Ali—State filed a leave petition against the order of accquittal by the High Court Division which was dismissed after hearing—Subseqnently the informant filed another leave petition. Held : There is no scope for hearing the second petition at the instance of the informent. (Ref : 42 DLR 13).

42 DLR 107—Jalaluddin Vs. Mrs. Bilkis Rahman—Petitioner acquitted of the charge of dacoity by the trial Judge—Government had not preferred any appeal u/s. 417 Cr.

P.C Sec. 439 Cr. P. C does not authorise High Court Division to convert a finding of acquittal into one of conviction. Held : the Rule issued suo motu by the High Court Division was without jurisdiction. (Ref : 8 BLD 198 (HC); 1987 BCR 150 (AD)).

11 BLD 142 (AD)—Bangladesh Vs. Mohammad Ali—Power of conversion of acquittal into conviction, whether can be exercised though not specifically provided-exercise of jurisdiction by the Government in the absence of specific provision whether is void. Held : Unless the power of conversion of acquittal into conviction is specifically provided in a statute, such power can not be read into it and exercised. In the absence of any specific provision for converting acquittal into conviction, the Government exercised jurisdiction which was not vested in it and the impugned order of conviction is void.

13 BLD 202 (AD)—State Vs. Nuru Mira—Whether ordinarily an order of acquittal is not interferred with except to meet the cause of justice. Held : (1) If the hook of a Teta enters the body up to its full length and then is brought out, the injury caused may be lacerated; but if the hook does not penetrate there will be hardly any difference between an wound acused by a shorki and that caused by a teta.

11 BLD 133—Jabeda Khatun Vs. Abdur Rahim—Acquittal, matter of, when superior court may interfere. Held : In a matter of acquittal the superior court will interfere only if the judgment delivered by the Court of first instance is not only illegal but also perverse and if the inference drawn by the court in coming to a finding of fact was reasonably possible, then only because the superior Court may differ with that, shall not call for any interference. No authority exists from 1972 to 1983 for seeking permission for 2nd marriage.

40 DLR 106 (AD)—The State Vs. Abdur Rashid Piada—P. Ws. evidence was rejected as doubtful by the appellate court as they did not disclose the story to anybody including the investigating-officer until after 20 days of the incident (Ref : 9 DLR 13 Wp, 21 DLR 206 (SC)).

40 DLR 286 (AD)—Mafizuddin Vs. The State—A finding of acquittal can be converted into conviction only in an appeal under section 417 Cr. P. C which being in accord with section 423 Cr. P. C is the correct view (Ref : 27 DLR 652, 21 DLR 206 (SC), 8 PLD 139 Kar).

40 DLR 346—The State represented by the Solicitor to the Government of Bangladesh Vs. Wanur Rahman—Appeal filed under section 417 (2) Cr. P. C against the judgment and order of acquittal passed by a Special Tribunal is not maintainable—An appeal against a judgment of Special Tribunal will have to be filed under section 30 (1) of the Special Powers Act—The Code of Criminal Procedure shall not affect any special forum of procedure prescribed by any law (Ref : 40 DLR 346).

39 DLR 166 (AD)—The State Vs. Fazal—Acquittal—Interference by the appellate Division with acquittal order by the High Court Division of Supreme Court. The prosecution failed to re-examine the witness to get over his damaging statement. (Ref : 28 DLR 170 (SC), 28 DLR 34).

38 DLR 27—Authorised Officer, C.D.A. Vs. The State—High Court Division not competent to condone delay in case of an appeal filed after the expiry of 60 days under section 417 (3) Cr. P. C from the date of acquittal. The Limitation Act is a general Law on limitation whereas the Criminal Procedure Code which prescribes filing appeal against acquittal under section 417 is a special act and in view of the provision of section 29 of the Limitation Act, provision of section 5 of the Limitation Act cannot be invoked for extending time for filing appeal against acquittal. Under section 417 Government only can file an appeal against an order of acquittal (Ref : 6 BLD 91).

8 BLD 117—Mst. Azivan Khatun Vs. Abu Tayeb Md. Iqbal —Non-appearance of the complainant in a complaint case on the date of hearing—Consequence of Such non-appearance—Whether acquittal of the accused for such non-appearance of the complainant is a must—Acquittal is mandatory if the complainant fails to appear in court unless the Magistrate adjourns the case for the some cogent reason recorded.

37 DLR 167 (AD)—The State Vs. Md. Haroon—State moves the Appellate Division against acquittal by the High Court Division. Principle which guides the court on such a matter. "State has filed this petition for special leave against the order of acquittal. It is well settled that in criminal matters this Court does not re-appraise evidence unless it is shown that inferences drawn from the evidence are perverse and the benefit of doubt that has been given was not in accordance with the established principles of law." High Court Division's order not being based on cogent reasons, benefit of doubt given by the High Court Division reversed. In view of the Nature of the evidence and circumstances the trial court did not find any extenuating circumstances for imposing lesser penalty on the accused and accordingly sentenced him to death. On the contrary, the High Court on analysis of the evidence concluded that the case was doubtful for which benefit of doubt could be given. Those circumstances have been considered by us as noticed earlier and the opinion is that the finding by the High Court are not based on cogent reasons and the benefit of doubt that has been given was not in accordance with the established princiles of law (Ref : 36 DLR 188).

1 BSCD 150—Abdur Rashid Vs. The State—Advocate, duty of, who accepts dock brief and undertakes to defend an accused of capital sentence—Plea of ALIBI—Murder case—Failure on the part of defence to substantiate the Plea taken by it does not necessarily prove the guilt of the accused. According to the settled principle of law the burden to prove the guilt of the accused is primarily upon the prosecution (Ref: 1 BSCD 149, 150).

21 DLR 206 (AD)—Ghulam Mohammed Vs. Muhammad Sharif—When the High Court should interfere with an order of acquittal. The view expressed by the learned Judges that High Court will interfere with an order of acquittal only if the appreciation of evidence by the trial Judge is perverse or foolish is not correct. The State has under section 417 Cr.P.C the right to appeal from an order of acquittal both on facts and law. Normally court of appeal will not interfere with an

order of acquittal if the evidence is open to the view formed by the trial court. But if the reasons given by the trial Judge are of speculative and artificial in nature or the conclusion drawn by him are perverse or foolish resulting in miscarriage of justice, the court of appeal will in such a case re-examine the evidence and draw its own conclusions from it.

19 DLR 93 (WP)—The State Vs. Umed Ali—In deciding an appeal against acquittal what is to be borne in mind is : (1) The view of the trial Judge as to the credibility of the witnesses. (2) The presumption of innocence in favour of an accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial. (3) Right of an accused person to the benefit of any doubt. (4) The slowness of Appellate Court in disturbing the finding of fact arrived at by a Judge who had the advantage of seeing the witnesses (16 DLR 94 (SC), 55 (SC) and 127 (SC)].

7 DLR 78 FC—The Crown Vs. Sultan Mahmood and others— In a revision petition from acquittal in a murder case, made by a private party, the Advocate—General upon notice from the High Court admitted that the Government did not like to appeal from the order of acquittal. Thereupon the revision petition was disposed of by the High Court declaring that the order of acquittal was wrong but High Court refused to direct a retrial. The Government thereupon put in an appeal from acquittal in which the only grounds stated were that the appeal was within time and that the order of acquittal was improper. Held : The appeal was incompetent. The communication of the Government's decision not to appeal was final. High Court is not bound to hear appeal on merits in all circumstances.

3 DLR 378 FC—Ahmad Vs. Crown—Before an order of acquittal passed by the Sessions Judge is reversed, it must be shown that the judgment of the Sessions Judge was unreasonable and manifestly wrong. If two conclusions were equally possible, an order of acquittal should not have been reversed (Ref : 2 PLD 24 Bal, 4 PLD 26 BJ, 2 PCR 174, 6 DLR 130 (WP)).

19 BLD (AD) 1—Abdul Hafez Howlader alias Habibur Rahman and others Vs. The State—As a matter of practice the High Court Division normally grants bail to the persons who are acquitted after a full fledged trial when the State prefers an appeal against the order of acquittal. The normal order upon admitting the Government appeal is to direct the deputy Commissioner concerned to take the acquitted persons into custody and release them on bail to the satisfaction of the Deputy Commissioner.

51 DLR (AD) 67—Abdul Hafez Howlader alias Habibur Rahman and others Vs. State—As a matter of practice the High Court Division normally grants bail to the persons who are acquitted after a full-fledged trial when the State prefers an appeal against the order of acquittal.

50 DLR 19—Abu Taher and others Vs. Hasina Begum and another—Where the State has not filed any appeal against the order of acquittal passed by a Magistrate in a police case the informant is competent under section 439A of the Code to prefer revision before the Sessions Judge who can look into the legality or propriety of the order of acquittal. Ref : 3 MLR (HC) 69.

4 MLR 87 (HC)—Ali Akbor (MD.) Vs. The State and others—The scope of section 417 Cr. P. C. as to appeal against acquittal is limited. Under this section the state can prefer appeal against acquittal. The complainant can file revision under sec. 439 against acquittal only when the state does not prefer appeal. In revision the acquittal not be converted into conviction. Moreover the law as to procedure of trial need be referred with similar responsibility to place the defence by the accused. The lapses on the part of investigating police officer should be dealt with sternly. For providing effective trial procedure sections 162, 417 and 439 Cr. P. C. have been suggested for immediate reform.

52 DLR (HC) 617—State Vs. Shamima Arshad—Section 417 (1)— Finding of acquittal cannot be said to be perverse if it is not absolutely against the evidence. (Ref : 20 BLD (HC) 315).

LIMITATION—The period of limitation for filing an appeal by the Government under sub-section (1) of this section is six months as prescribed by Act 157 of the Limitation Act and sixty days where the private complainant files appeal under section 417 (3) Cr. P. C. Where an appeal is filed after the expiry of the period of limitation, it cannot be entertained (1968 P Cr. LJ 701).

5 BLC 701—Abdul Khaleque Vs. State—Section 417 (2), 439 & 439A—Against an order of acquittal passed by the appellate Court in a case instituted upon a complaint the complainant shall have to file an appeal before the High Court Division under sub-section (2) of section 417 and filing of revision shall be barred under sub-section (5) of section 439 of the Code.

417A. Appeal against inadequacy of sentence.—(1) The Government may, in any case of conviction on a trial held by any Court, direct the Public Prosecutor to present an appeal to the High Court Division against the sentence on the ground of its inadequacy.

(2) A Complainant may, in any case of conviction on a trial held by any Court, present an appeal to the Appellate Court against the sentence on the ground of its inadequacy :

Provided that no appeal under this sub-section shall be entertained by the Appellate Court after the expiry of sixty days from the date of conviction.

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the Appellate Court shall not enhance the sentence except after giving to the accused reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

Scope and application—According to the provisions of this section State can appeal against inadequacy of sentence before the High Court Division within the prescribed period of limitation of six months. In an appeal against inadequacy of sentence, it is not permissible to alter the conviction to an aggravated category of offence for which the accused was not convicted. The prosecution can only argue that "the sentence

is inadequate on the charge framed or even on an altered less graver charge" (AIR 1977 (SC) 1117). Its effect is that when the accused is asked to show cause against enhancement of sentence he acquires the right to challenge also the conviction and he will be entitled to plead for his acquittal or reduction of sentence. This right is designed to be a safeguard against frivolous applications for enhancement of sentence. It is the price which the State or any other person must be prepared to pay for making an application for enhancement of sentence. When showing cause against enhancement, the accused is entitled to show that the whole trial was illegal (27 Cr. LJ 305). In a complaint case, the appeal against inadequacy of sentence may be preferred to the appellate court against the sentence. The High Court Division has no power to enhance a sentence so as to alter its nature and extent in a police case.

55 DLR (HC) 568—Dilruba Akter Vs. AHM Mohsin—The Code drew no distinc-tion between an appeal from an acquittal and an appeal from a conviction and no such distinction could be imposed by Judicial decision.

44 DLR 594—Abdul Aziz Vs. the State—Appeal by informant—Competency—The contention that an appeal at the instance of an informant from an inadequate sentence lies under section 417A has no substance. (Ref : 8 PLD 517 Lah.).

1982 P. Cr. LJ 448—Muzaffar Vs. State—Sentence of enhancement of—No positive evidence as to complainant's arm having been amputated on account of gunshot injury caused by accused—Occurrence taking more than 10 years ago while accused already serving out his imprisonment—Held : Not a fit case for enhancement of sentence, in circumstances.

42 DLR 31 (AD)—Shah Alam Vs. State—Acquittal—Full power to review the evidence upon which the order of acquittal was founded—No limitation should be placed upon that power. (Ref : 10 BLD 25 (AD)).

10 DLR 55 (WP)—Ghulam Ahmed Khan Vs. The State—Sentence—Protracted trial may be ground against enhancement. Accused's letters about the occurrence stating that he acted in self defence—Such letters cannot be used as confession but can be used to show his presence at the scene.

Letters written by the deceased prior to the occurrence showing strained relationship with the accused admissible.

7 DLR 92 (FC)—Talib Vs. The Crown—Enhancement of sentence—Principles—Discretion of trial judge in the matter of sentence and of High Court in revision—Application for enhancement by private party not barred—Lesser penalty for murder (Ref : 7 DLR 271 Lah).

19 BLD (HC) 259—Moktar Ali Bepari Vs. The State and another—Sentence can be enhanced by the High Court Division after giving a reasonable opportunity of showing cause against such enhancement when an appeal is filed under section 417A of the Code by a complainant against any sentence on the ground of its inadequacy. In view of the provisions of section 404 of the Code no appeal shall lie from any judgement or order of criminal court except as provided by the Code. So, except under the provisions of section 417A of the Code, there is no other provisions for filing any appeal for enhancement of any sentence.

418. Appeals on what matters admissible.—An appeal may lie on a matter of fact as well as a matter of law.

Explanation—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

Scope and application—This section applies equally to all criminal appeals, whether made by the Government against an acquittal or inadequacy of sentence and to appeals made by an accused person against a conviction (AIR 1936 Oudh 108). Severity of sentence and the fact that burden of proving innocence putting on accused are errors of law (AIR 1939 Sind 209). It is a question of fact whether a statement made to a police officer in the course of an investigation comes under section 162 or is made by way of complaint to commence an investigation under section 154 (AIR 1930 Cal 130).

419. Petition of appeal.—Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every such petition shall unless the Court to which it is presented otherwise directs be accompanied by a copy of the judgment or order appealed against.

Scope and application—This section prescribes the form in which a petition of appeal, whether from jail or otherwise, is to be presented. When several persons are convicted at a single trial, all persons or some of the convicted persons can file one joint appeal. It is not necessary for them to file separate appeals with separate petitions (AIR 1944 Cal. 239). The appeal should be presented by the appellant in person or by his advocate. The petition should be delivered to the proper officer of the court. The memo of appeal should be accompanied by certified copy of the judgment or order appealed against.

13 DLR 1—Babulal Agarwala Vs. The State—Practice of the Dhaka High Court is not to hear an application under section 419 Cr. P. C unless the appellants had surrendered (Ref : 38 DLR 27).

420. Procedure when appellant in jail.—If the appellant is in Jail, he may present his petition of appeal and the copies accompanying the same of the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court.

Scope and application—Every facility should be given to a prisoner appealing from Jail. Writing materials i. e. pen, ink etc. should be allowed to him to prepare the petition of appeal. There is only one right of appeal. A court cannot dispose of a jail appeal without affording an opportunity to the accused to argue his case if he is represented by counsel. The presentation to the officer-in-charge of the jail is good and sufficient whatever delay there may be in forwarding the petition to the appellate court. Where an appeal presented by an accused person from jail has been disposed of, a subsequent appeal by such person through counsel cannot be entertained (AIR 1961 (SC) 586). Where however the jail appeal and appeal through counsel are both pending, it is as if there are two appeals by the same individual and the court cannot dispose of any one of the them without notice to the counsel of the accused person (AIR 1965 Mad. 211).

23 DLR 12 (WP)—Rahman Gul Vs. The State—Jail appeal filed beyond time and not also accompanied by an application for condonation of delay. High Court suo moto condoned the delay and admitted the appeal to prevent miscarriage of justice committed by the lower court. Time barred appeal may by converted by the High Court into a revision and powers under section 423 can therein be exercised.

18 DLR 130 (WP)—Shada Vs. The State—When an accused had preferred two appeals, one from Jail and the other through counsel, to the same court, the dismissal of the jail appeal is not a bar when the appeal filed through counsel is pending before the court for hearing. So also the subsequent dismissal of the appeal filed through counsel, (on the ground that the court had no jurisdiction in view of the previous dismissal of the jail appeal), is illegal.

421. Summary dismissal of appeal.—(1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily.

Provided that no appeal, presented under section 419 shall be dismissed unless the appellant or his advocate has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

Scope and application—This section deals with the summary hearing and dismissal of appeal under section 419 and 420 Cr. P. C. The Section applies both to appeals from convictions and to appeals from acquittal. Once an appeal is admitted it should not be dismissed merely because the appellant or his advocate filed to appear to support the petition but the appellate court must consider whether there exist sufficient grounds for its interference and must judicially determine the appeal on merits. There is no provision for dismissal of appeals on default of prosecution. Appellate Court cannot admit an appeal with regard to sentence only. The

whole appeal will be open to consideration for the final hearing (AIR 1960 (SC) 748, AIR 1942 Pat, 46). An appeal preferred out of time and without any explanation of the delay, may be dismissed at once, but if the appellant is represented by an advocate he should be given an opportunity of being heard in the matter of determining whether the delay should be excused and the appeal admitted (AIR 1927 Bom. 445). The section gives the Appellate Court power to dismiss an appeal summarily, but that power cannot be exercised in an arbitrary manner. While exercising its powers under section 421, the court must take care that the power has been exercised with due regard to judicial considerations (AIR 1953 (SC) 282, PLD 1967 (SC) 498, 42 DLR 15).

38 DLR 35 (AD)—Md. Jashimuddin Vs. The State—When an appeal is filed it is an appeal against conviction and sentence and it is not permissible for an Appellate Court to direct that it shall be heard only on the question of sentence. Our interpretation of section 421 and 422 is in keeping with the interpretation of these sections by the Privy Council in Dahu Raut's case. 62 Ind APP—129 (AIR 1935 P.C 89 7 BCR 68 (AD)).

32 DLR 48—Ekabbar Ali Vs. The State—Session court on appeal under section 421 Cr. P.C should not dismiss it summarily but give reasons in its judgment showing that points arising in the case have been duly considered on perusal of the judgment of trial Magistrate as well as memo of appeal presented before him. Mere perusal of the impugned judgment and order is certainly not enough for disposing of an appeal.

22 DLR 63 (SC)—Md. Ashiq Fakir Vs. The State—Summary disimissal of criminal appeal for non-prosecution is illegal (Ref: 21 DLR 642, 4 DLR 199 FC, 4 DLR 200, 4 DLR 588).

19 DLR 486 (SC)—Abdur Rashid Munshi Vs. The State—Order dismissing an appeal summarily must show that the court dismissing it as such applied its judicial mind to the question of fact and law though it need not write a full judgment as required under section 421 (Ref : 13 DLR 1).

5 DLR 39 (FC)—Khalil Vs. The Crown—Summary dismissal of an appeal, if proper, when complicated questions of facts and law are involved even when they are sufficiently dealt with by the trial court.

Revision—In a revision against an order under this section the High Court Division can after considering the facts of each particular case either remand the appeal to the lower apellate court to hear on merit or go into the case itself and dispose of it (37 Cr. LJ 904). To give reasonable opportunity of being heard is mandatory. A particular day should be fixed for hearing. No man should be condemned unheard. There is no provision for withdrawal of an appeal whether by the Government or by the accused.

422. Notice of appeal.—If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his advocate, and to such officer as the Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

Scope and application—Section 422 is the stage after an appeal is admitted. Notice is then to be given as provided in this section. Appeal cannot be admitted on a restricted ground, that is for sentence only, if so admitted, such an order is invalid and the appellant is entitled to be heard on merit. It the appellant is in jail and is not represented by an advocate notice must be given to him (29 Cr. LJ 384 FB). If a person absconds after conviction and an appeal is filed on the basis of the power of attorney given by him before he absconded, he loses his right of audience in court because he has refused to submit to the court. In such a case the court may dismiss his appeal without notice to him.

33 DLR 12—Khalilur Rahman Vs. The State—A fugitive from justice (so long as he remains beyond the reach of the court) is not entitled to any relief.

21 DLR 109 (SC)—Gul Hassan Vs. The State—Attorney and members of the bar will bear in mind the serious consequences of committing contempt of court in moving on behalf of a prisoner who is a fugitive from law.

1957 PLD 75 Pesh—Awal Khan Vs. The State—Appellant is a fugitive from jail. Appeal may be decided in his absence after hearing his counsel.

18 BLD (HC) 187—MD. Kamal Miah alias Nasim Vs. The State and another—Notice of appeal—After a complaint case ends in conviction and sentence of the accused, the State comes to the picture as it is the duty of the State to execute the verdict of conviction and sentence imposed upon the accused. The complainant cannot claim any right of audience in an appeal preferred against an order of conviction and sentence passed by the trial Court. Notice of appeal under section 422 Cr. P. C is required to be given to the appellant or to his lawyer as well as to the State and none else.

18 BLD (HC) 187—Md. Kamal Miah alias Nasim Vs. The State and another— After a criminal appeal is admitted it is required to be disposed of only on merit. A criminal appeal cannot be dismissed for default.

50 DLR 224— Kamal Miah (Md) alias Nasim Vs. State and another— Once the complaint has ended in conviction it was the State that came into picture and the State had to be given notice to sustain the conviction and complainant had no right to be given notice.

50 DLR 224—Kamal Miah (Md) alias Nasim Vs State and another—A criminal appeal cannot be dismissed on technical grounds once it is admitted for hearing by the court. After admission, a criminal appeal can be disposed of only on merit.

423. Powers of Appellate Court in disposing of appeal.—(1) 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 advocate, if he appears and the Public Prosecutor, if he appears and in case of an appeal under 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 sent for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(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 sent for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce 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-section (3), not so as to enhance the same.

(bb) in an appeal for enhancement of sentence, (1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court competent to try the offence, or (2) alter the finding maintaining the sentence, or (3) with or without altering the finding, alter the nature or the extent or the nature, and extent or the sentence, so as to enhance, or reduce the same;

(c) in an appeal from any other order, after or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper :

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement :

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed than might have been inflicted for the offence by the Court passing the order of sentence under appeal.

(2) Omitted.

Scope and application—The duty of an appellate criminal court is the same whether the appeal is on law only or both on law and fact (40 CWN 692 PC). It is the duty of the appellate court to look into the evidence of both sides in order to come to a decision. The court is bound to peruse the record and to hear the appellant or his advocate if he appears as well as the Public Prosecutor. If the appellant or his advocate is absent, the court is bound to peruse the record itself and to decide the appeal on merits. The Court cannot summarily dismiss the appeal. The Court is not entitled to dismiss an appeal for default of appearance of the appellant. The word "reverse" means to make void to set aside or annul, turn into something completely opposite in character (23 Lah. 129 FB) Hence, the expression "reverse the finding and sentence" occuring in clause (b) and (bb) means the reversing of the finding upon which the conviction is based. A re-trial of criminal case is ordered in exceptional circumstances and only when the appellate court is satisfied : (a) that the court trying the accused had no jurisdiction to try him, or (b) that the trial was vitiated by serious illegalities or irregularities on account of misconception of the nature of the case and on that account in substance there had been no real trial, or (c) in the interest of justice the appellate Court deems it appropriate that the accused should be put on his trial again. An order for re-trial wipes out the earlier proceeding and exposes the accused to another trial and the prosecutor gets an opportunity to remove the infirmities disclosed in the earlier trial. It is rather for supplying formal defects that an appellate Court orders re-trial (32 Cr. LJ 749). A re-trial in a criminal case should not be ordered too lightly and should be avoided as much as possible (40 CWN 368). This Section may be read along with section 417A Cr. P.C. The test to enhancement of sentence must be found not among the technicalities of penal definition, but by answering the hard questions, An additional order passed by the appellate court directing the accused to furnish security to keep the peace does not amount to an enhancement of sentence (20 Cr. LJ 760). This section deals with the powers of all appellate court including the High Court

Division or the lower appellate court except relating to appeal from acquittal. Section 423 is clearly confined to appeals preferred against conviction and sentence and the powers under it cannot be exercised for reversing an order of acquittal passed in favour of an accused. The powers which the appellate court including the High Court Division can exercise in an appeal from a conviction and sentence are contained in this section. The appellate court can (i) reverse the finding that is set aside or annul the finding of guilt and sentence and then either acquit or discharge the accused or order him to be retried or sent for trial : (ii) alter the finding of conviction to any other finding of guilt and sentence that it considers proper: (iii) with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence. The appellate court has been put on at par with the revisional powers of the High Court about the enhancement of sentence.

55 DLR 527 (HC)—Goutam Chandra Das alias Kumar Das Vs. State—The appellant had already undergone the ordeal of trial and after the conviction during pendency of the appeal before this court continued to suffer inprisonment which was imposed on him in the mistrial, so in the interest of justice a retrial should not be directed.

54 DLR 221 (HC)—Mofizal Islam Vs. State—Since the prosecution has totally failed to prove its case against any of the accused persons, non-appealing co-accused is also aequitted of the charge under section 382 Penal Code.

45 DLR 49—Harun Sarker Vs. The State—Retrial is to be allowed to give the prosecution reasonable opportunity to prove its case—It is true ordinarily retrial should not be directed as it gives a chance to the prosecution to fill up the lacuna of its case, if any, but in a case where inspite of the best efforts two material witnesses could not be produced, justice demands that reasonable opportunity should be given to the prosecution to prove its case. (Ref : 43 DLR 16, 6 BLD 189).

43 DLR 59 (AD)—Abdul Mannan Vs. Akram All—Remand—Evidence on record—No remand to trial Court for retrial. The Appellate Division directed that the Revisional Applications be

disposed of by the High Court Division on merit (at Dhaka) on the basis of the evidence on record without sending the case on remand to the trial court.

42 DLR 142 (AD)—Moslehuddin Vs. The State—It is only in a rare case that a remand order such as in the present case is, should be made for the purpose of only writing a proper judgment in accordance with section 367 Cr. P. C That merely because there have been some omissions made by the trial court in not considering a piece or pieces of evidence will hardly afford a valid ground for sending the case back on remand for writing a proper judgment (42 DLR 160 (AD), 4 BLD 145).

42 DLR 107—Jalaludin Vs. Mrs Bilkis Rahman—A finding of acquittal can be converted into one of conviction only under clause (a) of sub-section (1) of section 423 Cr. P. C. The suo moto Rule is without jurisdiction.

42 DLR 31 (AD)—Shah Alam Vs. State—Acquittal—Full power to review the evidence upon which the order of acquittal was founded—No limitation should be placed upon the power. (Ref : 10 BCR 203 (AD)).

40 DLR 472—Syed Nurul Islam Vs. State—Appeal is a creature of Statute—An appeal preferred by a convicted person can be withdrawn and dismissed for non-prosecution. The appeal is dismissed by the court for non-prosecution on the basis of principles enunciated by Supreme Court of Pakistan in 11 DLR (SC) 250.

7 BCR 71 (AD)—Kamar Ali Vs. The State—Principle of trial of counter-cases by the same court—Whether the same principle is applicable to the appellate court. Disposal of appeals by the same court for better appreciation of evidence preferable.

41 DLR 257—Jagodish Chandra Dutta Vs. M H. Azad—Order of sentence passed by the Labour Court under the provisions of Employment of Labour (Standing Orders) Act is not appealable to the appellate authority under the Code of Criminal procedure as there is no provision for such appeal under the Employment of Labour (Standing Orders) Act,

Labour Court was not constituted under Code of Criminal procedure—There in no provision for appeal or revision against any order passed under Sec. 26 of the Employment of Labour (Standing Orders) Act.

40 DLR 286 (AD)—Mafizuddin alias Mahi Vs. The State—Sections 236, 237, 238, 417 and 423. A Finding of acquittal can be converted into one of conviction only in an appeal under section 417 which being in accordance with section 423 Cr. P. C is the correct view taken in Bawa Singh's case. According to Mulla J. the process of altering a finding in an appeal from conviction must operate only within the limits prescribed under sections 236, 237 and 238 Cr. P. C and this process of alteration must stop whenever it comes up against a finding of acquittal and a finding of acquittal can be converted into one of conviction only in an appeal under section 417.

7 BLD 93 (AD)—Mohammad Siddiqur Rahman Vs. The State—Assessment of evidence—Delay in filing the case raises serious doubt about the place, time and manner of the incident much more so about the recognition of the miscreants—Identification of the skeletons by a reference to the two bunches of the keys along with the skeleton is itself doubtful in view of the late introduction of the story through the mouths of the witnesses for the first time in the court. The whole case has remained shrouded in mistery—It is for the prosecution to clear of all the mytries and suspicious failing which their case shall fail.

7 BLD 366—Jahangir Hossain Vs. The State—Alteration of conviction of the accused to a different offence by the appellate Court for which the accused was not charged—The appellate Court can make any amendment or any consequential or incidental order that may be just or proper—Where the accused is convicted for one offence but on appeal the appellate Court finds him guilty of another offence he may be convicted and sentenced for that offence—The conviction of the trial judge of the appellant is altered from section 468 to section 471 of the Penal Code maintaining the sentence passed on him.

40 DLR 244—Nasiruddin Meah Vs. The State—Section 423 Cr. P. C does not bar withdrawal of an appeal preferred by a convict and the Court of appeal should not refuse the prayer of the convict appellant for non prosecution of the appeal and should not insist that the appeal should be heard on merit inasmuch as the right of appeal is a privilege and the appellant has a right to elect not to pursue the appeal. But in case of an appeal from an order of acquittal, the Court may, refuse the prayer of withdrawal of the appeal as it may find on hearing the appeal on merit that the order appealed is illegal and calls for an order of conviction (Ref : 7 BCR 289, 8 BLD 503, 11 DLR 250 (SC)).

38 DLR 35 (AD)—Md. Jashimuddin Vs. The State—High Court's duty to examine the evidence in respect of all accused persons, even though only the question of sentence was passed before it. The High Court, which was the final Court of facts, again unfortunately did not examine the evidence at all in respect of a large number of the appellants before it purely on the ground that their appeals had been pressed only on the ground of sentence. In a criminal appeal; whether the appeal is pressed or not, it is the duty on the High Court to examine the evidence on the record. (Ref : 7 BCR 68 (AD), 6 BLD 198 (AD)).

6 BLD 161—Kalu Mirza Vs. The State—Alteration of the simple imprisonment into rigorous imprisonment whether amounts to enhancement of sentence. Whether permissible without giving an opportunity to the accused to be heard. In the absence of any opportunity given to the accused petitioners to show cause, the order of the learned Sessions Judge in so far as it relates to the alteration of the sentence of simple imprisonment to one of rigorous imprisonment cannot be sustained as it amounts to enhancement of sentence.

4 BLD 213 (AD)—Serajuddoula Vs. The State—Criminal appeal—Its dismissal without writing a full fledged judgment whether justified. There should have been some discussion of

the evidence before affirming the conviction of the appellants. There is no discussion about the nature of the offence or the part played by individual accused person. The impugned judgment cannot be sustained and it is set aside.

3 BCR 140—State Vs. Moktar—Inability of the prosecution to give the motive for the murder does not mean that the murder could not be committed by the accused.

3 BLD 108—zainul Abedin Vs. The State—Court can suo moto set aside conviction of the co accused who did not prefer appeal.

35 DLR 243—Mina Bibi Vs. The State—When a Court can not permit, on prosecutions prayer, remand of a case to the committing court so as to give opportunity to prosecution to fill gaps in the prosecution evidence. Re-trial of a case when conviction is set aside by appellate court cannot be ordered to enable the prosecution to bring in better evidence for the purpose of finding the accused guilty of the charge (Ref : 7 BLD 283).

34 DLR 16—Nabir Md. Vs. The State—Section 423 (1) (b) of the Cr. P. C provides that in an appeal from a conviction the appellate court "may alter the finding". the word 'finding' means the result of a judicial examination, specially into some matter of fact. Thus the expression "may alter the finding" clearly empowers the appellate court to consider the entire evidence against the accused appellant both as regards fact and law and so substitute its finding.

28 DLR 170 (SC)—Tozammel Hossain Chowdhury Vs. The State—Section 423 (1) (b) postulates the presence of sentence against an accused and in that sense it empowers the appellate court to reverse the finding of guilt and sentence and then to pass any appropriate order. Appellate court can alter the finding if it maintains the sentence or reduce it. Section 423 (1) (b) is confined to appeals against conviction and sentence. If a person is acquitted of one charged and convicted on another charge, the appellate court is not competent to reverse acquittal order when considering his appeal against

conviction on another court. Sessions court is not competent to alter an acquittal order. "After the finding" cannot mean reversing the finding of acquittal as in that case it would make section 423 (1) (b) redundant. Appeal against acquittal is provided in section 417 (Ref : 1 BSCD 113).

27 DLR 120 (SC)—Moyna Meah Vs. The State—In a case where the High Court Division in exercise of its appellate power under section 423 of the Code reduces a sentence of death to transportation for life or upon reference under section 374 of the Code does not confirm the sentence of death but passes any other sentence under section 376 and that sentence is a sentence of transportation for life. It is a case of reduction of sentence and not a case where the High Court Division has sentenced a person to transportation for life within the meaning of sub-clause (b) of clause (2) of Article 103 of the constitution and in such a case no appeal would lie to this division as of right (Ref : 1 BSCD 114, 21 DLR 297 (SC)).

27 DLR 106 (SC)—Ashraf Meah Vs. Bangladesh—High Court is competent to order retrial. Where order of re-trial is likely to prejudice the accused persons and evidence on record is sufficient to dispose of the case by the High Court, order of re-trial cannot be supported.

24 DLR 162—Jogomaya Kunda Vs. Sudhir Kumar Kundu—Restoration order is vacated by the appellate court on appeal Such order is upheld by the High Court under section 522 Cr. P. C.

22 DLR 263 (SC)—Sikander Hayat Vs. Ata and others—For disposal of criminal appeal, presence of appellant or his advocate or the Public Prosecutor is not essential. Withdrawl of complaint or appeal against acquittal is opposed to public policy. High Court's power is limited by section 423 and 439 Cr. P. C. Non of these limitation apply to Supreme Court (Ref : 12 DLR 571).

21 DLR 41 (SC)—Shamser Vs. The State—Enhancement of sentence by High Court while appeal against original conviction was pending before the Sessions Judge does not prejudice the accused.

14 DLR 263 (SC)—Abdur Rashid Vs. The State—Existence of circumstances which do not support prosecution case but lends support to defenoe. Prejudging the issues will interfere with the course of justice. When the trial court's conclusion are (judgment of acquittal) not supported by balanced statement of relevant facts or by truly reasoned arguments—Retrial order is a proper order.

6 DLR 65 (SC)—Imranullah Vs. The Crown—Right of the appellant is to be heard. Hearing of an appeal is not rehearing Latitude which an appellate court should allow to an advocate in arguing his case.

5 DLR 185 (FC)—Khairdl Khan Vs. The Crown—When the trial judge is blased the whole proceedings are vitiated and the affirmness of his judgment by the appellate court does not cure the defect. When retrial is directed the essential duty on the court is disposing of the case on retrial. When the judge on retrial fails to investigate the case in proper perspective the judgment stand vitiated.

4 DLR 305—Hurmat Ali Vs. The Crown—The appellate court set aside the order of conviction and sentence for want of valid sanction and directed a retrial after sanction. Held. The order passed was illegal.

6 BCR 243 (AD)—Moulana Hossain Ahmed Vs. The State—Summary dismissal of appeal against order of acquittal, Appellant's contention was that out of eleven prosecution witnesses—Six were teachers of the Madrasha and they corroborated the statement of the complainant P.W.I but the trial court acquitted the accused respondents—P.Ws 4, 6 & 8 did not see the complainant to write the letters resignation—Trial Court's order of acquittal on the ground of benefit of doubt cannot be perverse.

18 BLD (HC) 512—Mizanur Rahman Vs. Mst. Surma Khatun—In view of the provision of Section of Section 423 (1) (bb) of the Code in an appeal for enhancement of sentence, the appellate Court may enhance the sentence but such enhancement cannot be made unless the accused is given an opportunity of showing cause against such enhancement.

19 BLD (HC) 259—Moktar Ali Bepari Vs. The State and another— In an appeal from a conviction, sentence may be reduced by an appellate Court but sentence cannot be enhanced. From sub-section (1) (bb) of section 423 it is also clear that sentence can be enhanced only in an appeal for enhancement of sentence and that can be done after given the accused an opportunity of showing cause against such enhancement.

50 DLR (AD) 108—Major (Retd) Ashrment of sentence of the appeallants was illegal and without jurisdictiafuddin Sekander Vs. State—In view of the fact that the two foreigner appellants have made a clean breast of their offence and never tried to beat the law by any smart manoeuvre and they have begged mercy of the court from the very beginning the sentence of the two foreigner appellants be reduced from life imprisonment to rigorous imprisonment for 7 years.

51 DLR (AD) 18—Asiman Begum Vs. State, represented by the Deputy Commissioner— When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.

51 DLR (AD) 18—Asiman Bgum Vs. State, represented by the Deputy Commissioner— If it is found that the accused had suffered a substantial part of the sentence imposed upon him or her in the mis-trial, the Court may not for ends of justice direct a retrial.

51 DLR (AD) 497—Ismail Vs. State—Though a lawyer was appointed to defend the absconding accused, the appointment did not serve the purpose—The accused should be given an opportunity to defend himself properly by cross-examining the PWs and of that purpose the case is liable to be sent back to the trial Court.

51 DLR (HC) 488—Rafiqul Islam @ Rafiq and others Vs. State—In view of long detention of the appellants from the date of their arrest the prayer for commutation of sentence in respet of fine may be allowed.

50 DLR 559—Mizanur Rahman Vs. Surma Khatun—When sentence of fine is imposed in addition to sentence of imprisonment, this will amount to enhancement of sentence. The appellate Court may enhance the sentence but such enhancement cannot be made unless the accused is given an opportunity of showing cause against such enhancement.

52 DLR (AD) 54—Abdul Khaleque Master and others Vs. State—There has not been an elaborate discussion of the evidence on record. It is needless to say that a duty is cast upon the lower appellate Court to write out a proper judgment on facts while disposing of an appeal.

52 DLR (HC) 282—Ali Hossain (Md) and others Vs. State—The appellants had to undergo the rituals of a protracted trial and the agonies arising out of the order of conviction and sentence passed and by now much of their sins has been expiated by way of burning of the heart during this long period. Court in therefore, inclined to take a lenient view in awarding sentence to them.

7 BLT (AD) 133—Asiman Begum Vs. The State—If it is found that the accused had suffered a substantial part of the sentence imposed upon him or her in the mis-trial, the Court may not for ends of justice direct a retrial.

7 BLT (AD) 133—Asiman Begum Vs. The State— When it is found after a full trial that there was a mis-trial of trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.

If it is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be an useles exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial.

54 DLR (HC) 221—Mofizul Islam Vs. State (Criminal)—Since the prosecution has totally failed to prove its case against any of the accused persons, non-appealing co-accused is also acquitted of the charge under section 382 Penal Code.

5 BLC (AD) 122—Bhulu Rani Saha & anr Vs. Pran Ballav Podder & another—The High Court Division held rightly that the trial Magistrate had conveniently failed to consider the opinion of both the handwriting expert and the fingerprint expert to facilitate a judgment of acquittal and while setting aside the order of acquittal of the trial Court it has sent back the case on remand to the trial Court for a fresh decision and allowed both the complainant and the accused to examine further witnesses.

4 BLC 343—Abdul Hamid Vs. Habib Ahmed and another—The trial Court awarded the maximum sentence of fine of taka ten thousand but the Appellate Court reduced the same to Take one thousand without assigning any reason and such reduction of sentence was not proper and legal and hence the judgment and order of the Appellate Court so far it relates to reduction of sentence is set aside and the sentence imposed by the trial court shall be the sentence in this case.

424. Judgments of subordinate Appellate Courts.—The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than High Court Division :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

Scope and application—The object of this section is, firstly, to produce uniformity in procedure and to ensure that judgments of sub-ordinate criminal courts are written in such a way as to promote public confidence in their decision and secondly, to enable the High Court Division in revision to grasp the nature of the case without reference to the record. The appellate judgment should comply so far as may be practicable with the provisions of section 367 Cr. P.C.

53 DLR (HC) 99—While dispossing of a criminal appeal, the appeallate court considers at least the material evidence of the case and arrive at independent finding on all material points at issue. Mere saying that it concurred with finding to the trial court is not sufficient to meet the requirement of Law.

47 DLR 53—Ekram Ali Fakir Vs. Abdus Samad Biswas—The Additional Sessions Judge sitting on appeal did not apply his mind at all in order to come to an independent decision. He came to the conclusion "found nothing illegal in the impugned order" just after quoting in his judgment some portions of the judgment of the trial Court. In such a position, no rule need be issued-the case is sent back for delivering a proper judgment.

7 BCR 206—Abul Basher Vs. The State—Disposal of appeal points for determination are to be formulated and reasons for decision are to be given—By merely stating that appeal be dismissed without discussion and consideration of evidence at issue is no disposal of appeal in compliance with law—The Judgment in appeal must also record independently the finding as to the guilt of the accuseds (Ref : 3 BCR 239).

6 BLD 191 (AD)—Md. Hadiuzzaman Vs. The State—Judgment by appellate court. Question of independent finding on assessment of evidence—An Appellate Court must discuss the evidence in detail, make critical analysis of the evidence and consider the facts and circumstances of the case, independent of the decision of the trial Court and arrive at its own finding. The Sessions Judge's judgment shows that he considered the judgment on record but avoided detailed discussion and concurred in the trial court's finding. It cannot be held that this finding is not independent of that of the trial court. The doctor did not depose that there was any fracture of bone in the hand of Taifur. His deposition on oath is a substantive piece of evidence where as his medical certificate is a corroboration of his evidence on oath. The corroborative evidence cannot be considered without the substantive evidence.

32 DLR 51—Moksed Ali Vs. The State—It is well-settled that a final court of facts must formulate the point or points for determination in the case and give its decision on the basis of reasons. The law enjoins that the appellate court hearing an appeal on facts and law must arrive at independent conclusion on all the points at issue. The discussions of the

evidence must show that the appellate court has applied his mind independently to the points at issue. Finding of court of appeal on facts should at least give some indication in its judgment as to the application of its mind to the evidence on record from which the court of revision would be in a position to judge whether there had not been a proper appreciation of the evidence on all the points falling to be decided in the case (Ref : 10 DLR 346, 10 DLR 372).

9 DLR 133—Momtazuddin Vs. Abdur Rahman—Judgments, if show appreciation of the points form decision their consideration as well as reasons for finding, are proper judgments. Failure to follow prescribed form is curable under section 537.

425. Order by High Court Division on appeal to be certified to lower Court.—(1) Whenever a case is decided on appeal by the High Court Division under this Chapter, it shall certify its judgment or order to the Court by which the finding sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the Chief Metropolitan Magistrate, or the District Magistrate, the certificate shall be sent through the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate.

(2) The Court to which the High Court Division certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court Division; and, if necessary, the record shall be amended in accordance therewith.

Scope and application—A Magistrate while complying with an or order certified under this section does not act under that provision, but only performs a ministerial and not a Judicial or protected executive function. Hence, if, he negligently signs an arrest warrant against an acquitted person, he is not protested under judicial Officers' Protection Act (AIR 1971 All 162).

426. Suspension of sentence pending appeal. Release of appellant on bail.—(1) Pending any appeal by a convicted

person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court Division in the case of any appeal by a convicted person to a Court subordinate thereto.

(2A) When any person is sentenced to imprisonment for a term not exceeding one year by a Court, and an appeal lies from the sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal order that he be released on bail for a period, sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(2B) Where High Court Division is satisfied that a convicted person has been granted special leave to appeal to the Appellate Division of the Supreme Court against any sentence which it has imposed or maintained, it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person, is in confinement, that he be released on bail.

(3) When the appellant is ultimately sentenced to imprisonment, or imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Scope and application—This section provides for the suspension of sentences or execution of an order pending appeal and for release of the appellant on bail. The language in which sub-section (2A) of section 426 Cr. P. C has been couched, would show that the discretion of the orginal court convicting a person of a bailable offence is dependent on its satisfaction that the convict actually intends to present an appeal. Sub-section (2B) applies only where the accused has been granted special leave to appeal by Supreme Court. All

that the section lays down is that Court is authorised to release a convicted person if in confinement on bail during the pendency of the appeal. A power to grant bail to convicted person would, if exercised, interrupt the serving of the sentence. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence. The applicability of the section 426 (2A) are (1) there must be an appeal pending and (ii) the appeal must be by a convicted person. It is to be borns in mind that bail to a convicted person is not a matter of right irrespective of whether the offence he has found guilty of in a bailable or nonbailable one and that bail should be allowed only when after a perusal of the convicting courts judgment and the arguments of the Advocate, the appellate court considers the grant of bail justified (AIR 1956 All 633). Bail should be granted where the accused is not likely to abscond and the sentence is short. The gravity and seriousness of crime is undoubtedly a circumstance to be considered and if there is a chance of unexplained extraordinary delay in disposal of appeal, the accused should not be kept in jail for a long period without deciding the case.

Power of Convicting Court to Grant Interim Bail :

What Sub-section (2A) of this section enjoins is that where the court by which a convicted person is convicted if satisfied that he intends to present an appeal may enlarge the convicted person on bail for such period as will afford sufficient time to present the appeal and obtains the order of the appellate court for his release on bail. An order of bail can be passed only in cases in which the convicted person has got a right to prefer an appeal because only then it can be said that he has all intention to present an appeal to the appellate court. Such granting of ad-interim bail lies within the absolute discretion of the court convicting the person. This power is not restricted to whether the accused is convicted of offences either bailable or not bailable. It would indeed be a travesty of justice to keep a person in jail for a period of 4 or 5 years for an offence which is ultimately found not to have been committed by him. It is, therefore, absolutely essential

that the practice which all courts have been following in the past must be re-considered and so long as the appellate court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily unless there are cogent grounds for acting otherwise release the accused on bail.

46 DLR 143 (AD)—Mahbub Vs. State—In cases of short terms imprisonments, the Judge should better dispose of the appeal very expeditiously failing which he may consider the question of bail, (if raised again). (14 BLD-184 (AD). 43 DLR 119 (AD)).

44 DLR 354 (AD)—Sree Monju Kumar Saha Vs. State—Bail in a pending appeal—In a pending criminal appeal when an appellant files an application for bail, the Court should not ordinarily issue a Rule. The Court may grant or refuse bail or ask the petitioner to come up with a separate petition and may hear the State if necessary before disposing of an application for bail.

43 DLR 5 (AD)—Saimuddin Md. Vs. State—Sentence for one year—The Court ought to have exercised discretion in granting bail to the appellants in view of the short sentence of imprisonment.

43 DLR 120 (AD)—Baneazuddin Ahmed Vs. State—Direction for filing a separate application for bail while moving a revisional application whether proper—When the appellants were already on bail granted by the lower Appellate Court the direction that has been given after rejecting the prayer for bail is not proper and is not in keeping with the normal practice and procedure that is traditionally followed in the High Court Division in revision. In that view of the matter the appellants will remain on bail already granted till disposal of the revision case.

42 DLR 52 (AD)—Serajul Hoque Md. Vs. State—Appellant deposited the amount for which he was charged for misappropriation—Co-accused having been already released on bail the bail of the appellant should not have been refused—Appeal allowed and appellant allowed to remain on

ad-interim bail granted by the Appellate Division (10 BCR-154 (AD)).

43 DLR 321—Dulan Vs. State—Bail after conviction—The accused could obtain bail from the Appellate Court or from the High Court Division and not from the Trial Court which became functus officio after the filing and disposal of appeal against conviction.

13 BLD 445—Shaheb Ali Vs. State—The section, whether entitles a lower court to grant bail to a convict for a limited period—Bail under the section whether may be granted both by the trial court and by the appellate court. Whether under the section 462 (2B) the High Court Division may grant bail to the convict. Held : (1) section 426, (2A) is the section which entitles lower court to grant bail to a convict for a limited period after conviction in order to enable him to prefer an appeal. (ii) Bail under section 426 (2A) may be granted both by the trial court and by the appellate court. But the conviction in such a case must not carry beyond one year.

24 BLD (HC) 397—Dillodhar Mondol Vs. State—Section 426A of the Code relates to the power of the trial Court to grant bail to the convict to facilitate him to prefer appeal if the sentence be not exceeding one year. Section 426(2) deals with power of the High Court Division to grant bail during pendency of an appeal before Subordinate Courts. Section 426A of the Code has no application in the instant case. The convict appellant heard and disposed of.

15 BLD 144 (AD)—Abdul Hafiz Howlader Vs. The State—The appellants and six others were put on trial before an Additional Sessions Judge, Barisal to answer charges under sections 302/34 of the Penal Code and after a fullfledged trial the accused persons were acquitted. Against this order of acquittal the State filed an appeal before the High Court Division. The appellant's prayer for bail was refused by the High Court Division. The Appellate Division held that in normal circumstances bail is granted in such cases as because the accused have already satisfied the Competent Court that there are no reasonable grounds for believing that they have

committed the alleged offence. It is also the normal practice of the High court Division to grant bail in such circumstances. It has been further held that as a measure of punishment bail should not be refused in a case when an order of acquittal has been passed. Bill is granted to the appellants.

14 BLD 501—Md Ayub Ali Vs. State—Bail in a pending appeal involving murder charge—The accused petitioner and others were convicted under section 302/34 P. C and sentenced to imprisonment for life solely on the basis of the ex-culpatory confessional statements of the co-accused—The petr. has already suffered more than two and half years of his sentence—There is no chance of hearing of the appeal in the near future—In view of the above facts and circumstances the accused petitioner is enlarged on bail till disposal of the appeal.

12 BLD 405—Abul Kashem Vs. State—Section 426—Bail in pending appeal—Petitioner convicted and sentenced under section 395/397 respectively-not named in F.I.R. no recognition—Petitioners two full brothers-convicted on the basis of confession of co-accused-not corroborated in material particulars-no prospect of getting the appeal heard within reasonable time-bail for limited period allowed.

40 DLR 281 (AD)—Saidur Rahman alias Chan Mia Vs. The State—Bail—Suspension of sentence pending appeal—Release of appellants on bail—Sentence being in excess of one year. Sessions Judge was not competent to grant such bail, "fugitive from law". It is true that the Sessions Judge was not competent to grant such bail under Section 426 of the Code of Criminal Procedure since the sentence was in excess of one year. The order was therefore, illegal but the fact remains that the appellants submitted themselves to the sentence passed and obtained an interim order of bail in their favour albeit wrongly. In the facts of the case. It will be less than charitable to attribute to the appellants that the were "fugitive from law". There was nothing in their conduct to show that they were running away from the jurisdiction of the Court or avoiding its process. Since, however, the appellants were not covered by a legal order of interim bail, the proper order, the learned Judge

ought to have passed and which is always usually passed in such cases was to direct the appellants to surrender within a certain time before taking up the petition of appeal for hearing (Ref : 8 BLD 217 (AD), 7 DLR 105 (WP)).

9 BLD 3 (AD)—Md. Iqbal Vs. The State—Bail to appellant on condition of payment of fine whether sustainable—Payment of fine involving huge amount of money may not be possible and the purpose of granting bail may be defeated if payment of fine is made a condition for the bail—That is why the court has been given discretion to stay realisation of fine pending disposal of appeal—The impugned order for payment of fine as a condition for the bail is not supportable either in law or on the principle of reasonableness (Ref : 18 DLR 393 (SC), 25 DLR 126, PLD 1966 (SC) 1003).

8 BLD 208 (AD)—Nurul Islam alias Bablu Vs. The State—Bail—Prayer for bail in pending appeal—Whether the appellant's bail was properly refused upon a correct assessment of facts—It seems the High Court Division ignored facts stated in the petition-Having regard to the good academic background and future career of the appellant, there was enough justifiable reason to let him go on bail (Ref : 8 BCR 190 (AD)).

17 P. Cr. LJ 208J—Showkat Ali Vs. Abdul Hassan—Bail granted under section 426 cannot be cancelled for lack of legal provision.

27 DLR 16 (SC)—Solicitor, Government of Bangladesh Vs. Syed Anwar Ali—A person who has been convicted of a bailable offence can be granted bail. Provisions of section 426 and 427 are invocable regarding bail matter, only in case of conviction or acquittal after trial and to persons who have been convicted or acquitted after trial, section 496 to 498 have no application. The word "appear" does not mean voluntary appearance but means appearance in answer to process of court.

20 DLR 7 (WP)—Hata Vs. The State—Person convicted of bailable offence filing appeal against conviction is entitled to bail as a matter of right.

19 DLR 40 (SC)—Md. Ayub Vs. Md. Yakub—Chapter XXXIX Cr. P.C deals with cases of persons arrested or detained without warrant by police officer or who appear or are brought before a Court at any stage of any investigation, inquiry or trial. This Chapter does not deal with the cases of persons who are tried and convicted or acquitted, as their cases are specifically provided by section 426 and 427 of the Code.

5 DLR 127 (FC)—Nafajulla Vs. The Crown—Dismissal of an appeal on the ground that appellants did not surrender to their bail under section 426 (2A) Cr. P.C is not authorised by law. Bail allowed by trial court after conviction must fix a period for enabling the convict to obtain order of bail from appeallate Court.

19 BLD (AD) 202—Alal Uddin Vs. The State— In an appeal against a short sentence bail should be ordinarily granted in the exercise of proper discretion because usually it takes time to hear the appeal and with passage of the period of sentence the appeal becomes infructuous.

50 DLR 588—State Vs. Abdul Momin Sardar—Though the appellate Court including this court may enlarge a convict on bail for reasons to be recorded by it such a convict is not entitled to be released on bail if he is sentenced to suffer imprisonment for life.

8 BLT (AD) 5—Alal Uddin Vs. The State—Proper discretion in the matter of granting bail in a pending appeal filed against a short sentence.

Principle laid down in the case reported in 11 BLD (AD) 96—The learned Judge apparently failed to get the message from the case cited before him. It was observed in that case that in an appeal against a short sentence (2 years rigorous imprisonment as in the present case) bail should be ordinarily granted in the exercise of a proper discretion because ususlly it takes time to hear the appeal and with the passage of the period of sentence the appeal becomes infructuous. The learned Judge would be justified in refusing bail if he could ensure the disposal of the appeal within a reasonable time. i.

e., within 3-6 months, otherwise the refusal of bail will be manifestly unjust.

4 BLT (HC) 147—Paritosh Singha Vs. The State—Bail on Pending appeal-imprisonment for life-in F.I.R. mentioning the names of as many as 8 accused persons and the parts taken by them in the alleged occurrence leading to the death of Jobbed Ali—The name of the appellant petitioner does not appear in the F.I.R. when was lodged on the following day and he is the only earning member of the Hindu joint family-allow the prayer for bail of the petitioner.

4 BLT (HC)—Abdul Mannan Vs. The State—Learned Magistrate who held T.I. Parade was not examined in this case.

T.I. Parade proceeding held by a Magistrate—is not admissible in evidence under section 80 of the evidence Act and that it can not be presumed to be genuine and be proved to be so by evidence.

4 BLT (HC) 14— Bakul & Ors. Vs. The State—Admittedly the dead body of the victim was not found by any of the P. WS. except P.W. 7 the Doctor who held the Postmortem examination and it has been found that the dead body was unidentified and no name of the victim was recorded in the register. The Police who took the dead body of the victim to the morgue has not been examine on this case.

Held : There is nothing wrong in the identity the dead body of the victim Samatullah on the basis of his Photograph and recognition by his own near relations his son and the other material exibits on record proved by the Prosecution.

3 BLT (AD) 1— Abdul Hafiz Hawlader & Ors Vs. The State—The Appellants along with 6 others were tried under section 302/34 of the Penal Code and were acquitted. Against the said judgment and order of acquittal, the State filed Government Appeal before the High Court Division. In such circumstances it will not be fair and reasonable to put the appellants behind the Prison bar when they have already got

an order of acquittal from competent Court after a fullfiledged trial. It may also be mentioned that as a measure of Punishment bail should not be refused in case when an order of acquittal has been passed appellants are entitled to bail.

4 BLC 151—Abdul Hossain (Md) Vs. State—Considering the age suffering in service, facing trial and sarrendering before the trial Court soon after the delivery of judgment the convicted petitioner was enlarged on bail for one year in pending appeal against the judgment of sentence of 3 years.

427. Arrest of accused in appeal from acquittal.—When an appeal is presented under section 417. or section 417A, the High Court Division or any other Appellate Court, as the case may be, may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

26 DLR 1 (SC)—Superintendent and Remembrancer of Legal Affairs Bangladesh Vs. Jobed Ali—High Court acting under section 427 of the Code may order arrest of an acquitted person and subesquently may also under his release (Ref : 1 BSCD 115).

25 DLR 207—The State Vs. Md. Hossain—When appeal is admitted the acquitted man is to be treated as an accused.

19 DLR 445 (SC)—Md. Aslam Vs. The State—Section 427 is an independent section governing the grant of bail to an acquitted person against whose acquittal an appeal had been admitted for hearing.

428. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, 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 High Court Division by a Court of Session or a Magistrate.

(2) When the aditional 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.

(3) Unless the Appellate Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Scope and application—This section empowers the court to admit evidence at the appellate stage after recording reasons if it considers that such additional evidence is necessary to enable it to do justice to the case. As the section speaks of "additional evidence" it indicates cases where there being already some evidence, which is not considered satisfactory or where the evidence leaves the court in doubt, further evidence is considered necessary. The intention is to empower the appellate court to see that justice is done between the prosecutor and the prosecuted and if the appellate court finds that certain evidence is necessary for a correct finding it will take action. The object of this section is the prevention of a guilty man's escape through some careless or ignorant proceedings of a Magistrate, where the Magistrate through the some carelessness or ignorance has omitted to record the circumstances essential to find out the truth (28 Cr. LJ 1171). Reasons for taking additional evidence must be recorded.

47 DLR 486—Bakul Vs. State—The purpose of this section is to allow additional evidence at the appellate stage only and not to give an opportunity to the prosecution to fill up the lacuna in its case.

45 DLR 705—Rajab Ali Zulfiqar Vs. State—Additional evidence—Section 428 may be resorted to when such evidence either was not available at the trial or the party concerned was prevented from producing it, either by circumstances beyond its control or by reason of misunderstanding or mistake.

6 BLD 88 (AD)—Md. Shah Alam Vs. The State—Criminal trial. Remand for fresh trial. The trial court found evidence sufficient for establishing guilt of the accused. If the appellate Court did not consider this evidence sufficient, it was within jurisdiction to call for additional evidence. Fresh trial is likely to prolong the criminal proceeding against the accused appellants. The appellate court ought to have disposed of the appeal without directing a re-trial (Ref : 6 BCR 221).

5 BCR 279—Nazir Ahmed Vs The State—Case diary has not been found in spite of best efforts made by the prosecution. Statements of the witnesses recorded under section 161 Cr. P. C are also not available. The investigating officer having been not examined, no useful purpose will be served by betting the I. O. examined by the Court in exercise of its power under the section 428 Cr. P.C. Failure of justice has been occasioned by withholding the present set of eye witnesses which were cited in the F.I.R by the Informant P.W.I. The prosecution examined P.W. Nos. 2, 3, 5, 6 as eye witnesses though they were not at all named as witnesses in the F.I.R the informant P.W.I. The withholding of the material witnesses from the trial coupled with the deprivation of the right of cross-examining the eye witnesses as required under section 162 Cr. P. C has prejudiced the accused appellants who are as a result, entitled to ecquittal of the charge under section 304/34 of the Penal Code (Ref : 7 PLD 426).

21 DLR 177—Abdullah Hossain Vs. The State—New materials and incriminating facts as a result of further evidence taken under section 428 against the accused must be put to the accused so as to enable him to rebut the same.

7 DLR I (FC)—Khan Vs. the Crown—Provision of sections 375 and 428 Cr. P. C are meant to be used in such a manner as to secure even-handed justice to both parties, and that they should not be utilised to cure all the infirmities in the prosecution case in the appellate court. It does not make the slightest difference whether the additional evidence is required by the court or is produced by the parties (Ref : 4 DLR 551 FC).

5 DLR 280 (FC)—Md. Sarfaraz Khan Vs. The Crown—An acquitted prisoner may give evidence against a co-prisoner even in the appellate stage. The practice is not to be encouraged except in the interest of justice and when strictly necessary.

5 DLR 13 (WP)—Fazal Elahi Vs. The Crown—The powers to be exercised by an appellate court under section 428 are subject to two over-riding consideration : (1) that the additional evidence is considered to be necessary by the appellate court in the interest of justice, and (2) that the accused is not denied his right to a fair trial.

53 DLR 527—Shuinya @ Suruj Ali Vs. State (Criminal)—Sections 428 & 561A—As the present application is an application under section 561A, there is no scope of taking further evidence under section 428 of the Code of Criminal Procedure.

429. Procedure where Judges of Court of appeal are equally divided.—When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon shall be lied before another Judge, of the same Court, and such Judge after such hearing (if any) as he thinks fit, shall deliver his opinion, and the Judgment or order shall follow such opinion.

Decisions

15 DLR 615—Mohim mandal Vs. The State—Upon difference of opinion the whole case is laid before the third judge and his judgment becomes the Judgment of the Court (Ref : 16 DLR 73 (WP)).

6 DLR 104 (FB)—Md. Shafi Vs. The Crown—Case on difference of opinion between two judges referred to third judges. Reference by third judge on question of law to Full Bench is competent.

430. Finality of orders on appeal.—Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 section 417A and Chapter XXXII.

431. Abatement of appeals.—Every appeal under section 417 or section 417A shall finally abate on the death of the accused and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Decisions

22 DLR 244—Anwar Hossain Khan Vs. The State—Criminal appeal against sentence of fine does not abate on the death of the accused appellant.

8 BCR 13—Profullah Kumar Nath Vs. The State—On the death of the accused during the pendency of revision, the revisional application will abate so far as the sentence is concerned but not the fine imposed on him which is recoverable from the estate of the deceased accused at the hands of the legal heirs. Principle followed in abatement of appeals followed.

CHAPTER—XXXII

OF REFERECE AND REVISION

432. [Omitted]

433. [Omitted]

434. [Omitted]

435. Power to call for records of inferior Courts.—(1) The High Court Division or any Session Judge, Chief Metropolitan Magistrate or District Magistrate, or any Sub-divisional Magistrate empowered by the Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situated within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence of order recorded or passed and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the reocord.

Explanation—All Magistrates, whether exercising orginal or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section.

(2) If any Sub-Divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(3) Repealed.

(4) If an application under this section has been made either to the Sessions Judge or to the Chief Metropolitan Magistrate or District Magistrate, no further application shall be entertained by the other of them.

Scope and application—The object of this revisional legislation is to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law,

irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order or, on the other hand, served hardship to individuals (29 Cr. LJ 446). The revisional jurisdiction of the Sessions Judge is concurrent with that of the High Court Divisions. No party can approach the High Court Division without moving the Sessions Judge at the first instance in revision. The words "finding, sentence or order" in this section are three separate matters and are separated by the disjunctive conjunction "or finding or sentence or order". There are, therefore three matters in regard to which the revision may be heard. One is the finding, another is the sentence and the third is an order (41 Cr. LJ 876). In this section, "finding" includes a conviction or an acquittal. The word "sentence", means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. "Order" covers commands or directions that something shall be done, discontinued or suffered. The word "proceeding" is wider than the expression "judicial proceeding" and covers everything done and recorded by an inferior criminal court acting as a court. The right of the private complainant to file a revision before the Sessions Judge against an order of acquittal passed by a Magistrate in a case instituted upon a private complaint, appears to be taken away by sub-section (5) of section 439 read with sub-section (2) of section 417. There is no bar, however, preventing a private complainant from filing a revision before the Sessions Judge under section 435/439A or before High Court Division for action under section 439 against an order of acquittal passed by a Magistrate in a case instituted upon a police report. But in a case instituted upon a private complaint, his right would be barred by the same provision. In police case so far as revisional jurisdiction is concerned to have orders of acquittal passed by Magistrate in cases instituted upon police report set aside, the private complainant has concurrent remedy in two forum, i, e. before the Sessions Judge and the High Court Division. If he moves the Sessions Judge or the High Court Division, both have powers to finally decide the

petition. In line with the principle, therefore when a power is co-extensive with two or more court in ordinary circumstances the litigant must first resort to the remedy in the court of the lowest jurisdiction which can finally decide his case. Where party seeks his remedy from the Sessions Judge, the entertainment of any further proceedings by the High Court Division in revision with regard to an order made by the Sessions Judge under section 439A Cr. P. C would be barred under sub-section (5) of section 439 Cr. P. C (1980 P. Cr. LJ 191). A revision always lies unless the jurisdiction to revise is taken away by express words or by necessary implication (13 Cr. LJ 31). A fresh application for revision on the same grounds as those on which a previous application was based is not maintainable (AIR 1935 All 466). An application for revision dismissed for default can be restored to the file and re-heard. When a matter comes up in revisional jurisdiction the petitioner has no right whatsoever beyond the right of bringing his case to the notice of the court. It is for the court to interfere in cases where it seems that some real and substantial injustice has been done. That is the main point which the court has to consider.

Section 435 empowers the courts specified to call for and examine the records of an inferior court for the purpose of satisfying themselves as to the legality and regularity of any proceedings or order made therein. It gives power to court to set right the error or illegality. When any illegality or irregularity which justifies rectification is found upon examination of record the machinery for the exercise of the power is provided under sections 436, 439 and 439A Cr. P. C. The object is to set right some patent defect or error. The revisional power of the Sessions Judge under sections 435, 439A and of the High Court Division under section 435, 439 does not create any right in the litigant but only reserves the power to see that justice is done and the sub-ordinate court do not exceed jurisdiction or abuse their powers. It is a discretionary power whose exercise must depend on the facts and circumstances of each case. The power to interfere is discretionary and unfettered by limitations (17 CWN 379). The

form of the order is to direct the court to do what it should have done or abstain from doing what it has done. Record may be called for on the application of party or of the Court's own accord. Court can act on any information contained in a newspaper, a placard on a wall, or an anonymous letter. The court can deal with interlocutory orders and set right when there is patent in-justice which calls for prompt redress. The Prime Minister or any executive authority has no power to call for the record of criminal cases and to hold up the trial. It is an interference with the course of justice. "Proceedings" cover everything done and recorded by an inferior criminal court acting as a court. "Inferior" means judicially inferior, that is a court, over which the court has appellate jurisdiction. Sessions Judge can revise orders of Assistant Sessions Judge. The subordination of all Magistrate to the Sessions Judge is governed by the express provisions of the Code (section 17 Cr. P. C).

56 DLR 208—Rezia Khaton Vs. State—Awcrions 439 & 561A—The High Court Division exercising power under section 561A of the Code is not supposed to embark upon an inquiry to ascertain sufficiency, reliability and admissibility of evidence—However, if a conviction order is passed absolutely without any legal evidence, it can be looked into in the present forum to secure ends of justice.

46 DLR 524—State Vs. Auranga—A Court is undoubtedly inferior to another Court when an appeal lies from the former to the latter.) ***

45 DLR 533—H.M. Ershad Vs. State—Revisional power, scope of-question whether the law laid down in section 5 (1) (3) of the Act, 1947 and section 4 of the Anti—Corruption Act, 1957 is discriminatory and violative of the provisions of the Constitution is not within the scope of the present rule to be determined,

45 DLR 722—Shariful Islam Vs. Billal Hossain—The Trial Court has a wide power to frame charges and this cannot be interfered with by the Revisional court by way of giving direction for altering a charge or framing a charge (Ref : 37 DLR 300).

43 DLR 60—Dr. Md. Abdul Baten Vs. State—Right of heirs of deceased complainant to proceed with the complainant's case—The complainant in the criminal case under section. 447 claimed ownership and possession of the land in question. On his death during the pendency of the revision case arising out of the matter his wife having stepped into his shoes so far as it relates to his properties, she is required to be brought on record to protect her interest in the land.

42 DLR 142—Satya Ranjan Sarda Vs. State—Sessions Judge called for records of the case triable under the provisions of the Special Powers Act from the court of the Magistrate in exercise of his Power under section 435 and Cr. P. C and took cognizance of the offence after converting himself into a Special Tribunal—This is not contemplated by law (10 BLD 54).

12 BLD 62—Khalilur Rahman Vs. State—The main question which the High court has to consider in revision is whether substantial justice has been done. Revisional Jurisdiction can be exercised by the High Court in cases where interest of public justice requires interference for correction of manifest illegality and prevention or gross miscarriage of justice. It is not only the province of High Court to interfere, but its duty to do so for the purpose of preventing abuse of the provision of law.

10 BLD 124 (AD)—Nizamuddin Vs. State—Interim Bail—Whether such bail granted in a revision case should run for indefinite time—While granting leave to appeal against refusal of bail by the High Court Division the accused were granted interim bail in expectation that the revisional application would be disposed of within a reasonable time—The interim bail should not continue for indefinite period—It will continue only for a further period of 4 months or till disposal of the revisional application, which ever is earlier.

10 BCR 19 (FB)—Nurul Huda Vs. Bahar Uddin—Sections 409, 410, 435, 436 and 439A Cr. P. C—Under section 409 the Sessions Judge can transfer appeals for hearing to the additional Sessions Judge and not to the Assistant Sessions Judge.

41 DLR 257—Jagodish Chandra Dutta Vs. M. H. Azad—High court Division in exercise of its power under section 345 Cr. P. C. has no jurisdiction to review any order of the Labour Court passed under section 26 of the Employment of Labour (Standing orders) Act. Power under section 439 and 561A is different in nature—Section 439 read with section 435 refer to inferior Court under High Court Division—Exercise of power under section 561A is not limited to the inferior Court only (Ref : 35 DLR 192).

38 DLR 246 (AD)—Md. Shahjahan Shaikh Vs. Sessions Judge Pirojpur—Anomaly created by retention of section 438 after passing of section 439A—Powers which High court Division and Sessions Judge can exercise under section 435. The legislative intent in conferring power under 439A does not mean conferment of power under section 561A as well (Ref : 6 BCR 81 (AD)).

6 BCR 368 (AD)—Tafazzal Hossain Shaikh Vs. Mir. Mohammed Akand—Under section 435 of the Code of Criminal Procedure the High Court Division may call for and examine the record of any proceeding before any Criminal court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by the inferior Court. Under section 439 Cr. P. C the Court even suo moto can call for the records and there is no legal bar in filing revisional application before the High Court Division by the complainant when the State does not prefer any appeal against the order of acquittal, even in cases initiated on police report.

5 BCR 173—Mahmudul Huq Vs. Golam Mowla—The Sessions Judge acting under sections 435 and 439 Cr. P. C cannot quash a proceeding pending before the Sub-Divisional Magistrate . The Sessions Judge can in exercise of his powers under section 438 Cr. P. C however, refer a matter which requires the quashing of a proceeding pending before a Subordinate Court for the order of High Court Division.

4 BLD 285—Mohar Ali Vs. Riazuddin—Assistant Sessions Judge—Whether an inferior Criminal Court to that of the Sessions Judge. Viewed from any stand point an Assisstant

Sessions Judge cannot but be an inferior Criminal Court in relation to the Court of Sessions Judge—A revision under section 435 Cr. P. C lies before the Sessions Judge against an order of Assisstant Sessions Judge either in original or appellate jurisdiction.

4 BLD 217 (AD)—Jasmat Ali Shaik Vs. Mosiran Bibi—Criminal trial. Interference by Sessions Judge with Magistrate's order of discharge before omission of sections 437 Cr. P. C. The offence being exclusively triable by the Court of Sessions and there being evidence in support of the prosecution case, the Magistrate was not competent to discharge the accused persons. He exceeded his jurisdiction in weighing and sifting the evidence as in a trial. The High Court Division erroneously held that the Sessions Judge was not competent to interfere with the finding of facts arrived at by the committing Magistrate.

3 BCR 111 (SC)—Shahadat Ali Vs. State—After application under section 439A was filed and it was admitted by the learned Sessions Judge, the proceedings under section 145 though terminated on 9.1.82 its finality was subject to the order passed by the Ld. Sessions Judge. After admitting the application for revision, the superior court is competent to stay the operation of the order impugned before it.

3 BLD 199—Mustafa Anwar Vs. The State—Unless a person is a complainant or informant he cannot be added as party in a criminal revision, A prosecution witness may be interested to see that the accused is prosecuted but that alone wiould not entitle him to be added as a party in a Criminal Proceeding. Deputy Attorney general should not appear for the private party when he is already appearing for the state in the same case.

1 BLD 119—Md. Shafiqullah Vs. The State—A criminal prosecution is not like a civil matter, where law of limitation applies. Limitation does not aply to criminal prosecution.

35 DLR 208—Mozaher Sikder Vs. Fariduddin Ahmed—The case having been dismissed for default when it was neither heard nor disposed of on merits. The petitioner in all fairness and for ends of justice should be afforded an opportunity of

being heard in the matter (Ref : 17 PLR 1231. AIR 1924 Lah 310).

35 DLR 127 (SC)—Shafiqur Rahman Vs. Nurul Islam Chy—Sections 345 to 438 prescribe the method by which the records of any criminal case comes to the High Court and the power of the High Court to deal with the record is provided in section 439. Revisional jurisdiction of the High Court cannot be invoked unless the party concerned beforehand moves the Sessions Judge or the District Magistrate (As the case may be) for relief (Ref : 3 BCR 172 (SC)).

34 DLR 332—Abul Khair Chowdhury Vs. State—An application under section 435 and 439 Cr. P. C. against on order passed by the District Judge under section 36 of the Legal practitioner Act is not maintainable in law.

34 DLR 142 (SC)—Haripada Biswas Vs. State—In order to enable the Sessions Judge to resort to the provision of section 435 it is fundamental that the particular case must be pending before an inferior court. When the Sessions Judge initiates a proceeding by himself section 435 has no application. (Ref : 2 BCR 80 (SC), 32 DLR 91, 23 DLR 133 (WP)).

33 DLR 399—Abdul Hamid Vs. The State—A court or public servant or any person who holds auction of any property has the power and jurisdiction to lay down the conditions of auction. A Court of law may only see that the condition or conditions are not unconscionable illegal or unreasonable. The Additional Sessions Judge had no jurisdiction in exercise of his power under section 435 or 438 of the Cr. P. C to order that the petitioner be given a chance by the Sub-Divisional Magistrate to make payment of the balance amount of bid money.

33 DLR 141 (SC)—S.Z.M. Nurul Huq Vs. The State—It may be mentioned that in the Criminal Procedure Code though there is power of revision, there is no provision of review Sessions Judge as a reviewing authority under the Martial Law Regulations (Regulation 4 of MLR I of 1975) acts as a person designata and not as a court and therefore his order is not revisable.

31 DLR 66—Ali Akbar Pandit Vs. Jadu Gopal Saha—An order passed under section 13 of the Police Act is not a judicial order and therefore not subject to revision by the High Court under section 435 Cr. P. C (Ref : 23 DLR 6 (WP)).

25 DLR 335—A. T. Mridha Vs. The State—High Court's superintending power of interferences in exercise of its revisional jurisdiction is in relation to cases before subordinate court. Section 435 and 439 Cr. P. C are not inconsistent with the provisions of P. O. 50/72.

19 DLR 38 (SC)—Md. Ayub Vs. Md. Yaqub—Bail to convicted persons is dealt with in section 426 and 435. Bail before conviction is dealt with in section 396 and 498.

14 DLR 21 (WP)—Wazir Vs. The State—Cancellation of a case by a Magistrate does not amount to discharge. Such a case is not open to revisional jurisdiction of the Session Judge.

12 DLR 681—Md. Nur Ali Vs. The State—Period of limitation to move sessions court by way of revision, is that provided in cases of appeals under Art. 154 of the Limitation Act. For the purpose of moving an application before the sessions Court, no period of limitation is fixed by any law or by any rule.

48 DLR 295—Anower Hossain and others Vs. Md Idrish Miah—A second revisional application by the self-same party is not barred to challenge an illegal order after dismissal of his earlier revisional application for default and not on merit.

Learned Advocate for the petitioners did not argue on the question of merit of the impugned order. So his contention as to limitation in the facts and circumstances of the case does not appeal to us. In the above facts and circumstances were are of the view that revisional application filed beyond the period of limitaition though should not be encouraged, cannot debar the Court from setting aside an illegal order of the subordinate Court in the interest of justice.

50 DLR (AD) 189—Shinepukur Holding Ltd & others Vs. Beximco Pharmaceuticals Ltd and others.—The law should not be stretched too far so that big companies against whom serious allegation of foul play concerning national economy is being made can themselves overtake the law by ingenious contentions.

It is true that in criminal matters the accused should get all protection under the law but it is also important that the law should not be stretched too far so that big companies against whom serious allegation of foul play concerning national economy is being made before the Court by a statutory authority can themselves overtake the law by resourceful enterprise in raising ingenious contentions in order to frustrate the prosecution on the threshold. The Court must strike a balance. We are of the view that the learned Sessions Judge failed to maintain that balance which has been restored by the High Court Division.

50 DLR (AD) 189—Shinepukur Holdings Ltd & others Vs. Beximco Pharmaceuticals Ltd and others—The Sessions Judge would have been well-advised to reject the revision petitions upon the view that the objection as to alleged lack of authority should be raised before the Court taking congnizance.

50 DLR (AD) 189—Shinepukur Holdings Ltd. & others Vs. Beximco Pharmaceuticals Ltd. and others—When the SEC was making a complaint of fraudulent acts against certain companies and their directors on the basis of an enquiry undertaken by an expert committee, a Court would be well-advised not to try to be more expert at the complaint stage because otherwise it will be an example of nipping the prosecution in the bud.

4 BLT (AD) 56—Md. Ferdaus Mondol & others Vs. The State & anr.—The proper course which the learned Adl. S. J. ought to have taken in criminal Revision case was to pass an order for further inquiry by the learned Magistrate, not an order of revival of the petition case as contended by the petitioners cousel.

Section 435, 438 and 439A—52 DLR (HC) 379—The legislature has consciously kept section 438 alive although the Sessions Judge have been invested with the powers under section 439A to make final order enabling the litigants to choose the forum as to whether he would resort to the forum under section 438 or under section 439A with the risk of finality of the order that may be passed. Abdul Ahad @ Md Abdul Ahad Vs. State. (Ref : 20 BLD (HC) 372).

436. Power to order inquiry.—On examining any record under section 435 or otherwise, the High Court Division or the Sessions Judge may direct the Chief Metropolitan Magistrate or District Magistrates by himself or by any of the Magistrate sub-ordinate to him to make, and the Chief Metropolitan Magistrate or District Magistrate may himself make or direct any subordinate Magistrate to make further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any person accused of an offence who has been discharged :

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of showing cause why such direction should not be made.

Scope and application—This section empowers the Sessions Judge and the High Court Division to direct further inquiry by a Magistrate into any complaint which has been dismissed under section 203 and 204 (3) where the accused has been discharged. The mention of the two courts together, the High Court Division and the Sessions Judge shows that the legislature intended them to have same power with regard to the matter dealt with under this section. But though the powers of the courts are co-ordinate, still as a matter of procedure, the application should be made to the lower court. The High Court Division will interfere as a court of last resort. An order of Sessions Judge setting aside an order of discharge is liable to be reviewed by High Court Division. An order under this section can only be for a "further enquiry" (AIR 1940 Nag 128). This section does not confer any power on the Session Judge to direct that the accused persons should be summoned (1976 P. Cr. LJ 177). Generally speaking, further inquiry after dis-charge is improper unless the order is manifestly perverse or foolish or is based upon a record of evidence which is obvisously incomplete (38 Cr. LJ 1072). An order of further inquiry directed to a subordinate court means that the case should be taken up again and the question of dismissing the complaint or discharging the accused as the case may be should again be considered (32 Mad 22). Notice should be

given to the accused of the case and the same is mandatory in character. If the accused did not appear no notice is required to be given (32 Cr. LJ 44, 28 Cr. LJ 575, 27 Cr. LJ 302. PLD 1960 Lah 247).

9 MLR 224-227—Basiran Bewa (Mst.) Vs. The State—Session Judge cannot direct Magistrate to take cognizance of any offence against any accused—Quashment of proceedings on ground of abuse of the process of court—Sessions Judge can direct further inquiry but he can not direct Magistrate to take cognizance of an offence against any accused in exercise of powers under section 436, Cr.P.C. High Court Division can quash the proceedings under section 561A Cr.P.C. on ground of abuse of the process of court.

44 DLR 112—Mohibur Rahman Vs. State—The Magistrate seemed to have acted within his jurisdiction to decide, on assesment of evidence on record, whether all or some of the accused are to be sent for trial. The order of the Sessions Judge having the effect of directing the Magistrate to take congnizance of the 8 accused against whom the latter found no prima facie case is not within the scope of further enquiry contemplated under section 436 Cr. P. C.

43 DLR 519—Motaleb Vs. The State—Sessions Judge's power to order enquiry—The Sessions Judge commits no illegality in setting aside the order of discharge of the accused passed by the Magistrate and in directing the latter to send the case record to the Court of Sessions Judge along with statements recorded by the police. The order within the scope of section 436 Cr. P. C. But the Sessions Judge's further order giving direction to send the accused for trial being in excess of his jurisdiction cannot be sustained. The Magistrate is left with his absolute direction in the matter of taking congnizance of the offence and sending the accused-petrs. to the Court of Sessions for trial after holding further enquiry according to law (Ref : 8 BLD 180 (AD) 8 BCR 157 (AD), 41 DLR 246 (AD)).

42 DLR 240—Syed Ahmed Vs. Habibur Rahman—Sessions Judge re-assessed the evidence recorded by the Magistrate under section 202 (2A) of the Cr. P. C and apparently took

cognizance of the case himself against the petrs directing further enquiry into the matter by way of securing their attendance and ordering them to be sent up (under section 205 Cr. P. C) before his court to stand trial, **Held :** Order of the learned Sessions Judge is not contemplated in section 436 Cr. P. C and as such he acted illegally in interfering with the order of the LD. Magistrate as such (Ref : 8 BLD 276, 9 BLD 227).

10 BLD 54—Satya Narayan Sarda Vs. The State—Revisional power—Whether Special Tribunal can exercise such power—The procedure laid down in the Cr. P. C is to be followed in trying offences by such Tribunal but this does not empower it to act as revisional Court—The Code apply to exercising original jurisdiction in holding trial by the Tribunal and not revisional powers with which the Sessions Judge has been invested—Calling for records by the Sessions Judge and then converting himself into a Special Tribunal is not contemplated by law.

8 BLD 276—Yakub Ali Chowdhury Vs. Habibur Rahman—Taking congnizance of offence—Extent of Session Judge's Jurisdiction—Neither the Sessions Judge nor the High Court Division can direct the taking of congnizance (Ref : 9 BLD 227).

6 BLD 7 (AD)—Md. Wasefuddin Vs. Habibur Rahman—Discharge of accused—Question of fresh enquiry—Improper prosecution by private person for offences in connection with any institution should be guarded—Principal of a private College should not be prosecuted without concurrence of the Governing Body at the instance of private individual.

37 DLR 111—Nurul Islam Vs. The State—After examination of the record under section 435 the Session judge may direct further enquiry into any complaint case which has been dismissed by the Magistrate under section 203 Cr. P. C without going into the merit of the case.

35 DLR 143—Abdus Salam Master Vs. The State—A party aggrieved by an order of discharge passed by Magistrate can move the superior Court against such order in which case the superior court may direct further enquiry but can not direct the Magistrate to take cognizance of the offence (Ref : 5 DLR 5 (WP), 3 BLD 217, 3 BCR 212, 18 DLR 39 (WP)).

35 DLR 103—Abdur Razzaque Vs. The State—It is now settled that a Magistrate discharging an accused on the basis of police report passes a judicial order and in such a case the power under section 436 can be invoked.

25 DLR 152—Kanchan Ali Howladar Vs. Abdul Malek—Further inquiry under section 436 Cr. P.C does not necessarily mean the taking of additional evidence but it may also mean reconsideration of evidence already taken. What step will be taken in a particular case will depend upon the circumstances of that case (Ref : 23 DLR 121, 5 DLR 5 (WP)).

48 DLR 76—Sirajudullah and others Vs. State and others There is also no force in the contention that once the accused has been made party in the reivisional application he acquires a right to be heard.

As provision under section 436 only directs notice a case where a person has been discharged and not in the case of an accused to whom no process has been issued under section 204 and when the complaint has been dismissed without a notice to him.

DLR 76—Sirajudullah and others Vs. State and others 48 The order of dismisal of the complaint passed under sections 203 and 204 (3) Cr. P. C does not amount to discharge. So for a further enquiry in such a case no notice to the accused is necessary.

The principle, that an order prejudicial to an accused should not be made, without giving him an opportunity to be heard, has no application where the accused is not discharged. A revisional application before the learned Sessions Judge at the instance of an aggrieved complainant against an order of dismissal of a complaint by the Magistrate can be gone into without notice to the accused.

48 DLR (AD) 53—Yusuf A Hossain Vs. KM Rezaul Ferdous—Neither the Sessions Judge nor the High Court Division is invested with any power to directs any Magistrate to take cognizance of a case.

Their power is strictly limited to directing a further enquiry into the petition of complaint. It will be for the Magistrate concerned to take or not to take cognizance after the result of

further enquiry. After the dismissal of the pertition of complaint under section 203 Cr. P. C the informant-respondent's remedy was to approach the higher Court under section 436 Cr. P. C for further enquiry into his petition of complaint. The penultimate order of the High Court Division in directing the Chief Metropolitan Magistrate to take congnizance of the offence and to issue process in accordance with section 205 (1) Cr. P. C is not sustaninable.

50 DLR 551—Abdul Hai Vs. State—Question raised in this Rule could very well be raised before the Sessions Judge and the Sessions Judge could set aside the order of the Magistrate framing charge against the petitioner if there was merit in the contention raised by the petitioner and after such discharge there was no scope for directing further enquiry under section 436 of the Code. Since this question was not noticed at the time of issuance of the Rule discharge of the same without considering merit of the same may cause undue hardship and unnecessary harassment to the petitioner. So this Court decided merit of the Rule which is otherwise not maintainable.

52 DLR (HC) 598—Rasharaj Sarker Vs. State—When the order of discharge has been made without entering into the merit of the case, a fresh complaint or a fresh first information report against the same accused person can be maintainable, when fresh materials come forward which were not available at the time of previous investigation or enquiry.

8 BLC 459 (HC)—Abu Jafar Siddiqi and 7 others Vs. State—The requirement of section 436 of the Code of Criminal Procedure is the satisfaction of the Sessions Judge on examining any record under section 435 or otherwise that a further enquiry should be made into any complaint which has been dismissed or into the case of any person accused of any offence who has been discharged. Even when the Magistrate takes cognizance on the basis of Judicial enquiry, examination of the complainant on oath is not a condition-precedent.

437. Omitted.

438. Report to High Court Division.—(1) The Sessions Judge, Chief Metropolitan Magistrate or District Magistrate

may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the High Court Division the result of such examination, and when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Scope and application– In view of the present amendment of Cr. P. C by adding section 439A Cr. P. C giving power to Sessions Judge for revision, the provision of section 438 has lost importance. Formerly the Sessions Judge could not pass any final order but had to report to the High Court Division for order. Now the orders of the Sessions Judge are made final under section 439 Cr.P.C and no further proceeding by way of revision will be entertained by the High Court Division. So it is desirable that when important law and facts are involved the revisional application should be presented under section 438 read with section 435 Cr. P.C for reference to the Supreme Court, High Court Division (Ref : 40 DLR 196 (AD), 37 DLR 167).

Reference how to be made

The reference should be made in the form prescribed by the High Court Division for such reference by the General Rules and Circular Orders of the High Court Division. Criminal Appellate side Chapter 1 Rule 139 (26 Cr. LJ 1955). (a) The reasons for reference should accompany the record, (b) In making a reference it is the duty of the Sessions Judge to give a brief abstract of the case and the grounds upon which he recommends that the order of the lower court he considers to be incorrect and should be set aside by the High Court Division, (c) The Sessions Judge before he refers the case to the High Court Division may call upon the inferior court for an explanation of the order passed and should submit such explanation to the High Court Division together with the record (35 Cr. LJ 1020).

46 DLR 127—Farhad Hossain Vs. Mainuddin Hossain Chowdhury—Reference—Though the Sessions Judge has got power to make a reference to the High Court Division, it is not necessary now to make such a reference if the revisional application before him is to set aside any order of .the Magistrate as he his competent enough to set aside such order. Reference—Since the petr. could not make out a case of quashing of the proceedings and since no such power is vested in the Sessions Judge the impugned order refusing to make a reference to the High Court Division suffers from no illegality (Ref : 8 BLD 46; 8 BCR 1, 5 BCR 173, 28 DLR 111).

8 BCR 1—Mannan Vs. U.N.O. (State)—Offence under section 409 of the Penal Code exclusively triable by a special Judge under the provision of the Criminal law (Amendment) Act (XL of 1958)—Cognizance of the said offence by the Upazila Magistrate is not permissible under the Criminal law (Amendment) Act, 1958—the impugned order dated 17.1.1985 passed by the Upa-zila Magistrate, Kalmakanda, District Netrakona taking cognizance of the offence under section 409 Penal Code and issuing warrant of arrest against the petitioner is liable to be set aside by the Honble High Court Division in exercise of the power under section 439 Cr. P. C (Ref : 6 BCR 26).

6 BCR 121—Thazan Talukder Vs. The State—If a lower court does not receive stay order from a superior Court which has called for the case record and stay further proceeding then that court may proceed with the matter but an order passed by that court subsequent to the order of superior court calling for record is illegal. An Additional District Magistrate has got no jurisdiction to set aside an order of acquittal passed by a Magistrate, 1st Class. He is to refer the matter to the District Magistrate for a reference to the High Court under section 438 of the Cr. P. C.

1 BSCD 101—Ashab Meah Vs. Jalal Ahmed—No valid exception could be taken of the action of the Magistrate in bringing the respondent on record on the death of the original informant as a party to the proceeding.

1 BCR 423—Abdul Hakim Poddar Vs. Rahmat Ali—Since a final order was passed by the Additional Sessions Judge under

section 439A Cr. P. C as amended by Law Reforms Ordinance, High Court could not again sit in revision to examine the impugned order of Sub-divisional Magistrate.

35 DLR 129 (SC)—Shafiqur Rahman Vs. Nurul Islam Chy—Sections 435 to 438 provide the machinery and section 439 gives the powers to dispose of the record called for by the High Court.

26 DLR 170—Mrs. Maswood Vs. Md. Meah—In making a reference under section 438 Cr. P. C a court of sessions should not make an independent assessment on a question of fact.

22 DLR 511—The State Vs. Habibur Rahman Khan—Reference is to be made on law and not on facts, Reference under section 438 Cr. P. C on facts alone is not competent to invoke the revisional jurisdiction under section 439 of the Code (Ref : 7 PLD 10 Bal).

10 DLR 541—Shah Jillur Rahman Mutwalli Vs. The State— Revision petition under section 439 direct to the High Court without first moving the Sessions Judge (or the District Magistrate) under section 438 for reference to the High court is not entertainable, in exceptional circumstances.

9 DLR 153—The State Vs. Mantoo Dutta—Reference under section 438 can be made by the Judge suo motu (Ref : 2 DLR 404).

9 DLR 77—The State Vs. Fazar Ali—On the wording of Rule 150 of the General Circular, orders of the High Court. It does not appear that the explanation by the trying Magistrate must be with regard to the points on which a reference is actually made.

5 DLR 66—A.F.M. Abdul Jalil Vs. A. Sabur—Omission of the trial Magistrate to consider evidence of important witnesses involves a question of law. A letter of reference under section 438, in view of the illegalities cannot be termed as incompetent.

2 DLR 136—Majid Ullah Vs. Ataur Rahman Chowdhury—the provisions of sections 435 and 438 do not authorise an Additional Magistrate to set aside an order passed by a subordinate court but he is competent to make a reference to the High Court.

48 DLR 327—Nurul Hoque Vs. Bazal Ahmed and 3 others—When the Magistrate has only called for the case diary for the perusal upon allegations made in the naraji petition that the same will show a prima facie case against the accused, the reference prayed for against the step is premature.

52 DLR (HC) 379—Abdul Ahad @ Md Abdul Ahad Vs. State—Sessions Judges have been given revisional power to make final order but simultaneously thier powers to make recommendation to the High Court Division for order under section 438 have also been kept intact. (Ref. 20 BLD (HC) 372; 5 BLC 598).

439. High Court Division's powers of revision.—(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Courts Division may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless has an opportunity of being heard either personally or by advocate in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court the accused has committed than might have been inflicted for such offence by a Metropolitan Magistrate or a Magistrate of the first class.

(4) Nothing in this section shall be deemed to authorise the High Court Division to convert a finding of acquittal into one of the conviction, or to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439A.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Scope and application—The controlling and final power of revision in some cases rests with the High Court Division. Section 439 must be read along with and subject to the provisions of section 435. The object is to confer a kind of paternal and supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law irregularity of procedure, neglect of proper precautions and apparent harshness of treatment. The revisional Jurisdiction of High Court Division is very extensive (12 CWN 678). The Jurisdiction under section 435 and 439 which is very wide may be exercised to test the correctness, legality or even the propriety of the finding, sentence or order of the subordinate court of for satisfying itself as to the legality of their proceeding. The revisional powers are not limited to the powers mentioned in sub-section (1) which merely describes some of the reliefs which the High Court Division may grant. But it is not exhaustive (53 CWN 291). It has all the powers of an Appellate Court and more, it can enhance sentence. The revisional power though very wide is purely discretionary to be fairly exercised according to the exigencies of each case. It is an extra-ordinary power which must be exercised with due regard to the circumstances of each particular case. A private party who has no right of appeal, can come in revision where the Government fails to exercise the right of appeal.

56 DLR 213 (HC)—Abdur Rahman Kha (Md.) Vs. State—The order of The Additional Sessions Judge discharging the accused is not based on correct appre-ciation of the facts disclosed in the first information report and charge-sheet, and therefore, it suffers from illegality.

56 DLR 213 (HC)—Abdur Rahman Kha (Md.) Vs. State—An application under section 439 of the Code of Criminal Procedure by an information in a sessions case against order of discharging an accused is maintainable in spite of the position that the state has not filed such application.

53 DLR (HC) 226—A second revision does not lie u/s 439 of the code against the judgment and order of the Session Judge passed u/s 439A of the code as the same has been made an absolute for under sub-section 439 of the code.

47 DLR 341—Khondakar Md. Moniruzzaman Vs. State—This Court for rectification of injustice may also go into facts, if in the determination of any question of facts, onus is wrongly placed upon any party or an incorrect principle has been applied in determining the question of fact or any material piece of evidence has been ignored or due to misconception of law, a wrong view has been taken by the court below (Ref : 14 BLD 308).

46 DLR 127— Farhad Hossain Vs. Mainuddin Hossain Chowdhury—Reference—Though the Sessions Judge has got power to make a reference to the High Court Division, it is not necessary now to make such a reference if the Revisional Application before him is to set aside any order of the Magistrate as he is competent enough to set aside such order. Reference—Since the petr. could not make out a case of quashing of the proceedings and since no such power is vested in the Sessions Judge the impugned order refusing to make a reference to the High Court Division suffers from no illegality.

46 DLR 338—Abdul Ali Vs. State—The acquittal of co-accused whose case stands on the same footing as that of the appellants cannot be a ground for their acquittal when there is sufficient evidence on record justifying their conviction. A suo moto rule is issued against acquitted accused to show cause why the order of their acquittal shall not be set aside and be not convicted like the appellants as they too appear to be involved in the offences proved against the appellants.

46 DLR 67 (AD)—Sher Ali Vs. State—The Sessions Judge's decision is not final in relation to a person who has not filed the revisional application to the Sessions Judge but has been impleaded therein as opposite party. He is free to go to any appropriate forum to challenge the Sessions Judge's decision. But he cannot go to the High Court Division with another revisional application as such an application-better known as second revision-is expressly barred by section 439. The idea of

the High Court Division that both the courts-one under section 439 (4), the other under section 439A are equal in power and the judgment of one is the judgment of another, appears to be grotesque displaying perversity of thought (Ref : 14 BLD-84 (AD)).

45 DLR 533—H. M. Ershad Vs. State—Revisional Power, scope of—Question whether the law laid down in section 5 (1) (e) of the Act, 1947 and section 4 of the Anti-Corruption Act, 1957 is discriminatory and violative of the provisions of the Constitution is not within the scope of the present Rule to be determined.

44 DLR 223 (AD)—Abdul Hamid Mollah Vs. Ali Mollah—Revision against order of acquittal—When the appellate Court and the High Court Division upon evidence and circumstances which is not unreasonable or perverse refused to believe the prosecution case, this court merely because a different view is possible of the evidence does not interfere with an order of acquittal (Ref : 13 BLD-127 (AD), 7 DLR 211 FC, 7 DLR 1, 11 DLR 359).

43 DLR 60—Dr. Md. Abdul Baten Vs. The State—Right of heirs of deceased complainant to proceed with the complainant's case—The complainant in the criminal case under section 447 claimed ownership and possession of the land in question. On his death during the pendency of the revision case arising out of the matter his wife having stepped into his shoes so far as it relates to his properties, she is required to be brought on record to protect her interest in the land. Revisional power of the High Court Division— It is true that the party in a revision case under section 439A is debarred from agitating his point before the High Court Division under section 439 of the Code, but the power has not been restricted by any clause of section 439 or by any law if it is considered necessary to prevent the abuse of the process of the court. The order of the Sessions Judge being not in accordance with law requires interference and the aid of section 561A of the Code can be appropriately invoked there being no scope for second revision.

43 DLR 120 (AD)—Beneazuddin Ahmed Vs. State—Direction for filing a seperate application for bail while moving

a revisional application whether proper-when the appellants were already on bail granted by the lower Appellate Court, the direction that has been given after rejecting the prayer for bail is not proper and is not in keeping with the normal practice and procedure that is traditionally followed in the High Court Division in revision. In that view of the matter, the appellants will remain on bail already granted, till disposal of the revision case.

43 DLR 53 (AD)—Azima Begum Vs. Yusuf Khan—Refusal of prayer for ad-interim stay while issuing Rule in criminal revision. When appellant clearly stated before the High Court Division while obtaining the Rule that she gave birth to a child just five month ago and it would be injurious to her health as also to the baby if both were to be placed under any type of custody at that critical stage it was not a judicious and sound exercise of discretion to refuse the said stay (Ref : 12 BLD 183 (AD)).

43 DLR 44 (AD)—State Vs. Abdus Sattar—The High Court Division sitting in appeal was bound to give due weight to the opinion of the Trial Court with regard to the credibility and demeanour of the witnesses.

43 DLR 40—Fazal Vs. State—The remand order amounts to a double jeopardy for the petitioners and offers a chance to the prosecution to remedy its lacuna. Such a remand should not be made.

42 DLR 107—Jalaluddin Vs. Mrs. Bilkis Rahman—Petitioner acquitted of the charge of dacoity by the trial Judge—Government had not prefereed any appeal under section 417 Cr. P. C—Section 439 Cr. P. C does not authorise High Court Division to convert a finding of acquittal into one of conviction **Held**—The Rule issued suo moto by the High Court Division without jurisdiction (Ref : 1 BSCD 116).

42 DLR 90 (AD)—Ahsan Sarfun Nur Vs. Nurul Islam Sarder—The jurisdiction of a Single Judge to hear a revisional application against an order of acquittal passed in a case involving an offence punishable with sentence of imprisonment exceeding one year is barred.

11 BLD 142 (AD)—Bangladesh Vs. Mohammad Ali—Power of conversion of acquittal into conviction, whether can be

exercised though not specifically provided-exercise of jurisdiction by the Government in the absence of specific provision whether is void. **Held**—Unless the power of conversion of acquittal into conviction is specifically provided in a statute, such power can not be read into it and exercised. In the absence of any specific provision for converting acquttal into conviction the govt. exercised jurisdiction which was not vested in it and the impugned order of conviction is void.

10 BLD 70—Haji Abdul Ali Vs. Md. Mesbahuddin—Dispute concerning land-power to allow parties to be added at revisional stage—Inherent power to do justice by bringing on record all the parties that are required to be present for an effective disposal of the case is a power existing in all the Courts and not only in the High Court—Power of the Magistrate to add legal representative on the death of any of the parties during the enquiry stage would extent to a Criminal Revision pending before the Higher Court.

41 DLR 291—Abdus Samad Vs. The State—Interpretation of Statute—The expression if the accused is in confinement in section 439 Cr. P. C is used as a condition precedent to bail. To be released on bail a person must be in custody or in some sort of confinement. Vokalatnama was not executed by the petitioners from jail. They initially were not entitled to any protection of this Court when the Rule was issued and therefore not entitled to any hearing in this Revision Case. A fugitive from justice is not entitled to protection of the Court. A convicted person against whom there stands a judgement and order of conviction will have to comply with the order by surrendering before the Court.

41 DLR 257—Jagodish Chandra Dutta Vs. M. H. Azad—High Court Division in exercise of its power under section 435 Cr. P. C has no jurisdiction to review any order of the Labour Court passed under section 26 of the Employment Labour (Standing Orders) Act. There is no provision for appeal or revision against any order passed under section 26 of the Employment of Labour (Standing Orders) Act. Order of sentence passed by the Labour Court under the provisions of Employment of Labour (Standing Orders) Act is not appealable

to the appellate authority under the Code of Criminal Procedure as there is no provision for such appeal under the Employment of Labour (Standing Orders) Act.

40 DLR 294 (AD)– Kashem Ali Vs. The State– Administration of Criminal justice with the change of time and circumstances attending the same–High Court Division to be a little more scrutinizing even in a case of acquittal whether misappreciation of evidence is never a sufficient ground for interfering with an acquittal. Leave order, was granted to examine the powers under section 439 Cr. P. C as interpreted by High Court Division (Ref : 9 BLD 13 (AD)).

39 DLR 158– Ruhul Amin Vs. Director, Drug Administration and Licencing Authority– Director, Drug Administration and Licencing Authority has no power whereby to require Ayurvedic, Unani and others firms to register their firms with him. He has acted without jurisdiction and most high handedly.

9 BLD 85–Sultan Ahmad Vs. Golam Mostafa–Revisional jurisdiction–Extent of this to be exercised by the High Court Division to interfere with an order of discharge–Under Revisional jurisdiction the occasion to interfere with an order of discharge under section 119 Cr. P. C should be rare, particularly at the instance of a private party–But in the instant case bias has been so patent on the part of the concerned Magistrate that his court finds it proper to interfere and pass an order binding down the opposite parties to keep peace, without sending the case back to him on remand.

7 BLD 123–Ekramul Huq Vs. Mansur Ahmed–Penalty for failing to implement settlement–The petitioner having not been parties to the industrial Dispute Case and no direction having been made on them, there is no question of violating any decision or order and as such they cannot be prosecuted– The industrial Relations Ordinance (XXIII of 1969).

8 BLD 180 (AD)–Bangladesh Vs. Yakub Sarder–Revisional power–Whether power to order for trial of an accused against whom no process has been issued is included in such power– It has been argued that the complaint involving an offence under section 302/34 Penal Code and exclusively triable by

the court of Sessions having been dismissed by the Magistrate inspite of sufficient materials for trial, the Sessions Judge got implied power to call for the records of the case so as to try it himself—It is difficult to accept this view and to hold that revisional power whether of the Sessions Judge or of the High Court Division includes by implication the power to try an accused against whom no process has been issued is not included in the Revisional Power either of Sessions Judge or of the High Court Division—When the complaint was dismissed on an erroneous view of law the only course for the Sessions Judge was to direct further enquiry.

7 BLD 283—Jainal Abedin Vs. The State—Re-trial—When re-trial should be ordered—Whether exparte disposal of a criminal trial is justified—There appears some disputed question of fact and if there is no positive proof of certain facts the accused could not be convicted— On such vital question the defence ought to have been given an opportunity on the day without proceeding exparte—This is thus a fit case to be sent on remand for re-trial.

6 BLD 249—Md. Abul Bashar Vs. The State—Criminal motion cannot be disposed of ex-parte without serving any notice on the opposite party and without hearing him. 439 (2) provides for notifying the opposite party and giving him an opportunity to be heard. The powers exercised by the Sessions Judge are the powers which may be exercised by the High Court Division and therefore the Sessions Judge is not only bound by the terms of section 439 but is also bound by the procedure contained therein.

37 DLR 261—Mamud Ali Vs. The State—The court can under section 439 Cr. P. C suo moto take cognizance of the case of an accused who has not appealed and set aside his sentence if found illegal (Ref : 21 DLR 253, PLD 1949 Lah 179 PLD 1965 Karachi 637).

4 BLD 34 (SC)—Md. Torab Ali Biswas Vs. The State—Discharging the Rule in a Criminal Revision in the absence of the Petitioner—In such a case High Court Division ought not to have commented on the merit of the case.

36 DLR 63—Abul Kashem Sowdagar Vs. Abdur Razzaque—The revisional jurisdiction under section 439 Cr. P. C is not to

be lightly exercised and cannot be invoked as of right. Such power is to be exercised sparingly only in proper cases.

36 DLR 42 (SC)—Tafazzul Hossain Vs. Mir Md. Akand—Under section 439 Cr. P. C the Court even suo moto can call for the records and there is no legal bar in filing revisional application before preferring any appeal against the order of acquittal, even in cases initiated on police report. The jurisdiction of the High Court Division in exercising revisional jurisdiction under section 439 of the Code is wide enough to interfere with the finding of facts arrived at by the court of appeal below if any illegality is found in the impugned order (Ref : 8 DLR 112 FC, 6 BCR 368 (AD)).

33 DLR 77—Atikullah Vs. The State—No judicial record can be called for except by the superior court but certified copy of any paper can be obtained with the necessary permission of the court.

31 DLR 70 (SC)—Bangladesh Vs. Tan Kheng Hock—Police power of investigation cannot be interfered with under section 439 or 561A by any court.

28 DLR 253—Abdul Hafez Sardar Vs. The State—High Court suo moto can set aside a conviction even when the accused did not prefer an appeal (Ref : 1 PLD 179 Lah, 8 DLR 74).

27 DLR 680—Haji Md. Kudratullah Vs. The State—In the case of acquittal the revisional Court will have to see that the full facts and circumstances of the case were laid before the trial court and the trial court comprehended the entire case. There is no doubt that in setting aside the judgment in an acquittal case importance must be given as to the benefit of every doubt to the accused person which is the basic principle of the criminal jurisprudence of this country (Ref : 16 DLR 605 (SC), 9 DLR 586, 7 DLR 123).

23 DLR 12 (WP)—Rahman Gul Vs. The State—If jail appeal filed beyond time, High Court can suo moto condone the delay and admit the appeal to prevent miscarriage of justice under section 439.

22 DLR 692—Erfan Sheikh Vs. The State—High Court is competent to convert the appeal pending before it into revision

under section 439 (1) Cr. P. C on petitioner's prayer for such conversion (Ref : 9 DLR 424, 6 BLD 423).

20 DLR 540—Md. Shamsul Huq Vs. The State—Powers exerciseable by the High Court in appeal and in revision with two exceptions, are similar in all respects. The exceptions are that in an appeal a sentence may not be enhanced whereas this may be done in revision and secondly, that in revision an acquittal shall not be converted into a conviction, whereas this may be done in an appeal against an acquittal. Every other power, whether procedural or final, is equally exerciseable in appeal as it may be exercised in revision by the High Court (Ref : 7 DLR 78 FC).

20 DLR 55—Dr. Jamshed Bakht Vs. Ameenur Rashid Chowdhury—High Court's power under section 439 is very wide. It is true that under section 436 Cr. P. C the Sessions Judge has concurrent power with the High Court to direct further inquiry but the power of High Court under section 439 is very wide and it can revise the proceedings or orders passed by any inferior criminal court in exercise of its revisional jurisdiction in a proper case (Ref : 23 DLR 6 (WP)).

19 DLR 428 (SC)—Mrs. C. M. Samual Vs. Mr. C. M. Samual—The rule about concurrent findings of two courts on a question of fact does not apply to criminal cases and the Judges of the High Court are competent to examine in a particular case the whole evidence to come to their own finding on this point.

18 DLR 30—Basiruddin Meah Vs. Madhu Lal Somani—The appellate Court's omission to pass necessary orders regarding restoration of the disputed property under section 522 Cr. P. C is not appealable but as against this omission a revision under section 439, would lie to the High Court and the High Court in exercise of its revisional jurisdiction can set aside the order of the trial Magistrate passed under section 522 of the Code.

17 DLR 33 (SC)—Riaz Haider Zaidi Vs. The State—In revision the case was remanded by the High Court to the lower court for rehearing. Subsequently one Judge acting in administrative capacity, cancelled the remand order and

withdrew the case to the High Court and directed it to be heard by a judge who was a party to the earlier remand order. Procedure adopted disapproved, though the order as passed by the High Court in the interest of justice in this particular case was upheld.

17 DLR 396—Mrs. Nur Jahan Begum Vs. Authorised Officer Chittagong—The High Court is competent to exercise its revisional jurisdiction under section 439 of the Code even in respect of order from which no appeal would lie under section 408 of the Code.

15 DLR 498—Abdus Samad Vs. Haji Mominuddin Khan—Revisional powers only exerciseable for correcting injustice and not mere illegality (Ref : 9 DLR 77, 13 DLR 241).

10 DLR 205—Abdul Kader Vs. Chairman, Dhaka Municipality—A Magistrate's order under section 453 of the Bengal Municipal Act is an order passed by him acting as a criminal court and is open to the revisional jurisdiction under section 439 Cr. P. C.

9 DLR 252—Kalu Meah Vs. Jonag Ali—It is generally not the practice of the High Court to quash charge framed in the trial Court; but it is now well established that if the case is of an exceptional nature, the High Court has the power to do so in exercise of its revisional jurisdiction.

7 DLR 515—The Crown Vs. Md. Molla—Notice under section 439 (2) can be served straightway on the party's lawyer.

6 DLR 80 FC—Shera Vs. The Crown—It is illegal to alter the findings in exercise of the powers under section 423 of the Code and disregard the qualification attached to the words "alter the findings", and then to resort to section 439 (6) to enhance a sentence in such a manner as to convict a person of an offence of which he has been acquitted. The provisions of sections 423 and 439 of the Code cannot be availed of in such a manner as to reverse the finding of acquittal under the cloak of merely altering it (Ref : 6 DLR 439, 6 DLR 130 (WP)).

5 DLR 32 FC—A. Sattar Vs. The Crown—It appears to be an established practice of the High Court of Dhaka not to allow any grounds to be urged in support of a revision petition except the ground or grounds on the basis of which a rule had been issued in the first instance.

4 DLR 104—Fazlul Quader Chowdhury Vs. The Crown—The admission contained in the petition for revision in the High Court cannot be taken into consideration in order to fill up the gaps in the prosecution case or to support a conviction.

1 DLR 140—Rajab Ali Vs. Hasan Ali Fakir—The High Court has no power to interfere under section 435 and 439 Cr. P. C with an order passed by the SDO under Bengal Village Self Government Act.

2 PCR 125—While no limitation is laid down for the presentation of revision it has been a general rule of practice that such petitions should be submitted to the revisional court within 60 days of the passing of the order of the lower court unless there are unusual or exceptional circumstances.

17 BLD (AD) 123—Md. Reazuddin Ahmed Vs. The State and another—Under Section 439 of the Code, the High Court Division may suo motu call for the record of the Courts subordinate to it and set aside any order passed by such Courts in any legal proceeding which has caused miscarriage of justice.

17 BLD (HC) 11—Khondker Maniruzzaman Vs. The State—The High Court Division exercising supervisory jurisdiction over all Courts subordinate to it is competent to scrutinise necessary facts to examine to legality or propriety of any order passed by the trial Court under section 265C or 265D of the Code of Criminal procedure. Since the trial Court framed charges against the accused petitioner without any material on record the impugned order is set aside.

17 BLD (HC) 458—A.K.M. Muhituddin Vs. The State—Provision of the Act can be resorted to for enquire into or for investigation of pecuniary resources or property of any person either he is a public servant or any other else or in other words 'an ordinary citizen' and as such the provisions of the Act is not applicable in the case of petitioner, who is 'an ordinary citizen' is not correct.

48 DLR 427—Moslem Ali Mollah alias Moslem Molla and others Vs. State—In exercise of revisional jurisdiction High Court Division can in approprate cases disturb findings of fact.

50 DLR 111—Abdul Aziz Vs. Sekendar Ali—নিম্ন আদালত সাক্ষ্য প্রমাণ বিবেচনা করে যে সিদ্ধান্তে উপনীত হয়েছেন তার সাথে দ্বিমত পোষণ করলেই রিভিসন মামলার আসামীদের খালাসের আদেশ বাতিল করে দিয়ে মামলা পুনঃ বিচার পাঠান সঠিক নয়। শুধুমাত্র নিম্ন আদালতের সিদ্ধান্ত স্পষ্টতঃ ভ্রমাত্মক বা ন্যায়ভ্রষ্ট হলে বা নথি অস্পষ্ট হলে বা আদালতের এখতিয়ার ত্রুটিপূর্ণ হলেই খালাসের আদেশ বাতিল করে দিয়ে মামলা পুনঃবিচারে পাঠান উচিৎ।

49 DLR (AD) 64—Reazuddin Ahmed (Md) Vs. State and another—The High Court Division may also suo motu call for the record of the Courts subordinate to it and set aside any order passed by such courts in any lgal proceedings which has caused miscarrage of justice.

51 DLR 43—Syed Ahmed Vs. Abdul Khaleque and others—It is to be borne in mind that the High Court Division does not function as a Court of revision for permitting the guilty person to escape the just reward of their misdoing on the ground of an unsubstantial technicality. Whether or not the High Court Division will exercise its Revisional jurisdication in a given case must depend upon the facts and circumstances of that cans only.

51 DLR 268—Ali Akbar (Md) Vs. State and ors.—Merely because the court deciding a revision may arrive at a different conclusion would be justifiable in reversing the decision of the trial Court unless it is possible to demonstrate with certainty that none of the grounds upon which trial Court acqitted the accused is at all supportable.

51 DLR 33—Harun and others Vs. State—Since the petitioner did not get any opportunity to resist the application for cancellation of his bail and to present his case for maintaining the order granting him bail, the impugned order cancelling bail is set aside and the court in seison of the case is directed to consider the matter afresh. [Ref : 3 BLC 465]

49 DLR 37—Shamsul Huque Bhuiyan (Md) Vs. State.—The Additional Sessions Judge did not point out any illegality or irregularity in recording the evidence of witnesses examined by the prosecution or in the trial Court's refusal to examine any witness produced. In such circumstances there was no justification for the Judge to make order permitting to examine witnesses at the time of fresh trial on remand that was ordered.

48 DLR 295—Anower Hossain and others Vs. Md Idrish Miah—As there is nothing in the impugned order requiring to prevent abuse of the process of the Court or to secure the ends of justice, the revisional application is barred under the amended provision of section 439(4) of the CrPC.

51 DLR 268—Ali Akbar (Md) Vs. State and ors.—Scope of a revision against an order of acquittal is very limitted in view of the provision of sub-section (4) of section 439 of the Code and descisions of the higher courts.

If the informant could prefer an appeal on the failure of the state to do so then the result could have been otherwise. Moreover complainant has been given a limited right of appeal against an order of acquittal under the appeal amended sub-section (2) of section 417 of the Code only on the ground of error of law. In such circumstances informant should also be given right to prefer appeal like the complainant and both of them right of appeal on the grounds of error of fact as well.

3 MLR (HC) 135—Kamal alias Kamal Mia Vs. The State and Aleya Begum—A criminal appeal once admitted for hearing it must be disposed of on merit. It cannot be dismissed for default. There is no provision in the Code of Criminal Procedure requiring the appellant to put in requisites for service of notice to the respondent.

52 DLR (HC) 97—Jahiruddin Ahmed Vs. Yasinuddin and others—The Judgment of the trial Court lacks in certain essential findings in respect of the offence but this by itself cannot be a sufficient ground for acquittal of the accused persons on appeal of in the face of evidence on record proving their guilt.

BLT (AD) 140—Ayub Ali Miazi Vs. S. A. Molla & Ors.—It appears from the judgment of the High Court Division that the two injured witnesses namely Titu Mia and Jainal did not name the accused-respondents before the investigating officer in their statement, recorded under Section 161 Cr.P.C and respondent No. 3. Giasuddin was not even named in the F. I. R—**Held:** We do not find any illegality in the impugned judgment, which warrants interference by this Division.

52 DLR (HC) 281—Khadem Ali (Md) Vs. State—As a rule of practice Court regards 60 days as the period of limitation for

filing a criminal revision. In spite of this, nothing prevents the Court from entertaining a revisional application filed beyond 60 days when the applicant can satisfy the Court that he was prevented by any sufficient cause from filing the revision earlier.

6 MLR (HC) 39-40—Setting aside charge—Where the acts of a person constitute both civil and criminal offence, there is no legal bar to prosecute both civil and criminal proceedings against him. To stay the criminal proceedings till disposal of the civil suit will frustrate the purpose of the proceedings and defect the intention of the law. And as such the High Court Division declined to interfere with the framing of the charge u/s 406 and 420 of the Penal Code.

5 MLR (AD) 168—Nazrul Islam and others Vs. The State—When the trial has already began and some of the witnesses are already examined, the matter as to whether the charges are established or not the determination of which rests with the trial Court. The propriety of framing charge is now the matter of the past. At this belated stage the Revisional application does not lie.

7 BLC (AD) 51—Hazera Khatun Vs. State and others (Criminal)—Learned Advocate for respondent No. 2 having admitted that the impugned judgment and order of the High Court Division was not proper and legal as being passed without notice to Hazera Khatun, the appeal was allowed, setting aside the impugned judgment passed by the High Court Division directing to hear the criminal revision afresh after serving proper notice upon Hazera Khatun.

7 BLC (HC) 303—Abdul Mannan Sarker Vs. Abdul Khaleque and anr (Criminal)—Sections 439 and 561A—Judged by the touchstone of the principles of law and keeping in account the nature of the decisions rendered by the learned Additional Sessions Judge the High Court Division converted the revision petition filed under section 439, Cr.P.C into a Criminal Miscellaneous Case under section 561A of the Code treating the Revision case as Miscellaneous Case.

7 BLC (HC) 635—Sajedul Hossain Chowdhury alias Dipu Vs. State (Criminal)—Sections 439 and 561A—Learned

Metropolitan Additional Sessions Judge by order dated 20-4-02 set aside the order of the Metropolitan Magistrate on allowing the Criminal Revision adopting the correct view that Re-Investigation was impermissible in law and observing that "Further Investigation" and not "Re-Investigation" would be performed and found that Metropolitan Magistrate was not justified in ordering for holding "Re-Investigation" and rightly directed the Chief Metropolitan Magistrate to take further steps in the light of observation made by him.

53 DLR 416—Mainuddin Chowdhury & others Vs. State and another (Criminal)—A Court may cancel the bail granted either by itself or by a Court subordinate to it when allegations for cancellation are made by giving substantive proof of overt act on the part of the accused against the prosecution witness and but not merely on vague, wild and general allegations.

53 DLR 226—Mariam Begum Vs. State & another (Criminal)—Sections 439 & 439A—A second revision does not lie under section 439 of the Code against the judgment and order of the Sessions Judge passed under section 439A of the Code as the same has been made an absolute bar under sub-section (4) of section 439 of the Code.

22 BLD (HC) 290—Md. Abdur Rahman Kha Vs. The State—An application by an informant under section 439 of the Code is maintainable against order of discharge of an accused.

5 BLC 641—Asiruddin (Md) alias Asiruddin Sarker and others Vs. State and another—Although both the courts below made a concurrent finding on conviction of the petitioner on the facts alleged in the case, the same will not debar the revisional Court from interfering and examining the evidence on record for arriving at a proper decision of its own on this point as both the Court below have failed to discuss and consider the evidence of the case.

439A. Sessions Judge's powers of revision.—(1) In the case of any proceeding the record of which has been called for by himself or which otherwise comes to his knowledge, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court Division under section 439.

(2) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final.

(3) An Additional Sessions Judge shall have and may exercise all powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him under any general or special order of the Sessions Judge.

Scope and application—This section has been added to the Cr. P. C by the Law Reforms Ordinance, 1978 to give relief to the litigant public locally. It is an extra-ordinary power given to the Sessions Judge which must be exercised with due regard to the circumstances of each particular case. Revisional powers are only exerciseable to rectify and illegality, irregularity, impropriety or mistake appearing on the face of the record. But these powers are discretionery and are to be exercised with care. The Sessions Judge will not interfere unless there has been a miscarriage of justice. This section provides that the Sessions Judge may exercise all or any of the powers exerciseable by the High Court Division in revision under section 439. The order of the Sessions Judge has been made final and no further revision by the High Court Division is permissible under section 439 (4) Read with section 439A (2). This is really not a good proposition of law. Under section 436 if a Sessions Judge passes an order the order of the Sessions Judge can be revised or interfered with, by the High Court Division as a Court of Revision. But in this particular section that power of the High Court Division has been taken away and the litigant public has been deprived of a valuable right to bring the matter before the superior Judicial court of the country. This power should have been made concurrent as in the case under section 436 Cr. P. C. Since the Sessions Judge by virtue of section 439A has now full general powers of revision, like High Court Division in respect of courts inferior to Sessions Judge in the case of any proceeding, it follows that the sessions Judge in revision can exercise any of the powers conferred on High Court Division under section 439. The revisional jurisdiction of the Sessions Judge is very extensive

but there cannot be revision against revision which is completely barred (40 DLR 196AD, 4 BCR 87AD). It has all the powers of an appellate court and more. It is normally to be exercised when there is a glaring defect in the procedure or there is a manifest error on point of law and consequently there has been a flagrant miscarriage of justice. It is to be exercised only for correcting injustice and not mere illegality. Ordinarily the court deals with only the points raised in the revision petition. The court can exercise the power of revision suo moto when illegality has been committed. The court may interfere to rectify any question of law, jurisdiction, illegality or irregularity or a question of fact. Section 439A must be read along with and subject to the provisions of section 435. The right of the private complainant to file a revision before the Sessions Judge against on order of acquittal passed by a Magistrate in a case instituted upon a private complaint, has been taken away by sub section (5) of section 439 read with sub-section (2) of section 417 Cr. P. C. A private party, who has no right of appeal, can come in revision where the Government failed to exercise the right of appeal. The informant can file revision in GR. case against acquittal. In view of the provision of law the order of the Sessions Judge has been made final. The litigant public cannot take the matter before the Supreme Court in High Court Division in any way if the case is rejected by the Sessions Judge. It is desirable that where the important fact and law are involved the revisional application should be presented under section 438 read with section 435 Cr. P. C for reference of the case to the Supreme Court High Court Division for passing appropriate order (Ref : 37 DLR 167, 40 DLR 196 (AD)).

56 DLR 12—Abul Hossain and others Vs. State—The revisional court is competent to direct the trial court to write a fresh judgment in a case when the trial court has failed to discuss and assess the evidence and written its judgment without trying to determine the fact in issue.

56 DLR 59 (AD)—Shamsuddin alias Shamsuddin Vs. Mvi. Amjad Ali and others—The revisional jurisdiction at the instance of the second party respondents under section 561-A

of the Code of Criminal Procedure does not lie as it is a device of invoking a second revision under the garb of an application under section 561-A of the Code of Criminal Procedure which is not maintainable.

53 DLR (HC) 226—A second revision does not lie u/s 439 of the code against the judgment and order of the Session Judge passed u/s 439A of the code as the same has been made an absolute for under sub-section 439 of the code.

47 DLR 167—Abdul Jalil Vs. State—No court can claim inherent jurisdiction to exercise power expressly taken away by legislation.

46 DLR 67 (AD)—Sher Ali Vs. State—The idea of the High Court Division that both the courts—one under section 439 (4) the other under section 439A—are equal in power and the judgment of one is the judgment of another, appears to be grostesqua displaying perversity of thought. So far as the direction by the Sessions Judge to hold further investigation into the case is concerned, it is quite lawful; but his direction to submit chargesheet is clearly without jurisdiction (14 BLD 45, 45 DLR 9 (AD), 12 BLD 54 (AD)).

46 DLR 127—Farhad Hoissain Vs. Mainuddin Hossain Chowdhury—Reference—Though the Sessions Judge has got power to make a reference to the High Court Division, it is not necessary now to make such a reference if the revisional application before him is to set aside any order of the Magistrate as he is competent enough to set aside such order.

43 DLR 60—Dr. Md. Abdul Baten Vs. The State—Right of heirs of deceased complainant to proceed with the complainant's case—The complainant in the criminal case under section 447 claimed ownership and possession of the land in question. On his death during the pendency of the revision case arising out of the matter his wife having stepped into his shoes so far as it relates to his properties, she is required to be brought on record to protect her intereset in the land. Revisional power of the High Court Division—It is true that the party in a revision case under section 439A is debarred from agitating his point before the High Court Division under section 439 of the Code, but the power has not

been restricted by any clause of section 439 or by any law if it is considered necessary to prevent the abuse of the process of the Court. The order of the Sessions Judge being not in accordance with law requires interference and the aid of section 561A of the Code can be appropriately invoked there being no scope for a second revision.

42 DLR 286—Abdul Matin Vs. The State—Case sent to the Sessions Judge by Upazila Magistrate—Sessions Judge recorded some evidence—Prosecutor made an application for sending record to Upazila Court for taking cognizance against some persons allegedly implicated in the offence, by the witnesses in Sessions Court—Sessions Judge made an order accordingly— Magistrate complied with the order of the Sessions Judge. **Held :** Order of Sessions Jugde is illegal and consequently cognizance taken of by the Magistrate thereon is illegal—the Cout of Sessions or the High Court Division has no jurisdiction to interfere with the discretion of the Magistrate in the matter of taking cognizance of any offence irrespective of the fact whether the offence is triable by a Court of Sessions or not.

15 BLD 198—Md. Soleman Vs. A. Barek Khalifa—Remedy under section 561A Cr. P. C is available to a party in an apropriate case even after the Sessions Judge exercised his power under section 439A Cr. P. C.

15 BLD 196—Shamsuddin Vs. Amjad Ali—While deciding a revisional application a Sessions Judge or an Additional Sessions Judge can deal with questions of facts of a case as much as an Appellate Court and on consideration of the evidence on record he may reverse the judgment of the Ld. Magistrate. But in reversing such a judgment he is required to advert to the reasons assigned by the the findings arrived at by the Magistrate.

41 DLR 395 (FB)—Nurul Huda Vs. Bahar Uddin—Assistant Sessions Judge deemed to have been appointed as Additional Sessions Judge does not acquire the status of an Additional Sessions Judge. Under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge. We

further hold that under section 409 the Sessions Judge can transfer the hearing of an appeal only to an Additional Sessions Judge and not to an Assistant Sessions Judge deemed to have been appointed as an Additional Sessions Judge. Section 410 has also full force and any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court Division. This section has no reference to an Assistant Sessions Judge deemed to have been appointed as an Additional Sessions Judge. The same applies to sections 435, 436, 438, 439A, (Ref : 1980 P. Cr. LJ 191).

40 DLR 196 (AD)—Haji Golam Hossain Vs. Abdur Rahman Munshi—No Second revision lies in view of the law in sections 439 (4) & 439A (2) Cr. P. C. The obiter made in drawing the distinction with reference to the facts in 35 DLR (AD) 127 is unwarranted (Ref : 37 DLR 204, 4 BCR 159 (AD), 5 BCR 287, 4 BCR 87 (AD), 38 DLR 186, 37 DLR 164).

8 BCR 157 (AD)—Bangladesh Vs. Yakub Sarder—question arose whether the Sessions Judge has got power under section 439A of the Code of Criminal Procedure or under any other provision of the Code to direct a Magistrate to send the case to him for trial when the Magistrate dismissed the complaint under section 203 of the Code. Case and cross-case—Police has submitted Charge-sheet in the cross case arising out of the same occurrence— Magistrate took the view that when the Police has submitted the charge-sheet in the cross-case started on a First information Report, he has no power to issue process against the accused cited in the Complaint petition—The complaint was dismissed on an erroneous view of law—The only course for the Session Judge was to direct further enquiry under section 436 Cr. P. C—The Session Judge has got no power to direct the Magistrate to send the case to him for trial when the complaint was dismissed under section 203 Cr. P. C by the Magistrate—High Court's Division's order for quashing the proceeding is not tenable—Further enquiry in the interest of justice should be made into the complaint which has been improperly dismissed.

37 DLR 316—Alhaj Rahim Uddin Shah Vs. Serajul Islam—Moving the High Court Division direct without approaching the Sessions Judge from the order passed by the Magistrate not valid. The petitioners obtained the Rule from High Court without approaching District Magistrate or the Sessions Judge. Therefore, in view of the rule of practice followed in the matter as observed by the Appellate Division of the Supreme Court of Bangladesh the failure of the petitioner to approach the Sessions Judge was a bar to obtain Rule from this Court. On this score alone the Rule is liable to be discharged.

37 DLR 290—Mahmudul Haq Vs. Golam Moula—High Court can quash criminal proceeding pending before a special court by virtue of its power vested under section 561A. Sessions Judge not competent to quash proceeding before a subordinate court acting under section 435 and 439A (Ref : 6 BLD 1).

6 BCR 81 (AD)—Md. Shahjahan Sheikh Vs. The Sessions Judge, Pirojpur—Section 439A (i) Cr. P. C inserted by the Ordinance No. XLIX of 1978 effective from 1.6.1979. The Sessions Judge may exercise all or any of the powers which may be exercised by the High Court Division under section 439. The legislative intent in conferring power under section 439A does not mean conferment of power under section 561A as well. The Sessions Judge could never exercise power under section 561A (Ref : 6 BLD 1).

6 BCR 145—Abdul Karim Vs. The State—The question in this Rule is whether High Court Division can entertain an application under section 561A of the Code of Criminal Procedure when the petitioner's application under section 439A of the Code of Criminal Procedure on the same subject matter was rejected by the Sessions Judge. In other words the question boils down to this. Whether the petitioner is precluded from moving even an application under section 561A Cr. P. C if his case was rejected earlier by the Sessions Judge on an application under section 439A. Decision in Professor Md. Shahabul Huda Vs. Md. Shafi reported in BCR 1984 (AD) 468 decided on 23.11.83 was discussed in support of the contention for exercise of jurisdiction under section

561A Cr. P. C. Question of impliedly filing second revision under section 561A Cr. P. C which is barred under section 439 (4) Cr. P. C after having moved the Sessions Judge under section 439A Cr. P. C. which is not allegedly competent was discussed.

6 BLD 158—Sultan Ahmed Matbar Vs. The State—Further enquiry after chargesheet—The learned Magistrate rightly rejected the application for further enquiry and the learned Additional Sessions Judge acted without jurisdiction in passing the impugned order which is not covered by any law and beyond the scope of the Code (Ref : 5 BCR 161).

5 BLD 28—Ali Hossain Vs. The State—Whether Sessions Judge competent to entertain a revisional application against order of acquittal. Sessions Judge had no jurisdiction to entertain any revision against the order of acquittal where there is provision for appeal (Ref : 4 BLD 221, 1 BLD 377).

4 BLD 248—Siddiqur Rahman Vs. The State—Quashing of a proceeding by setting aside the order of a criminal court initiating a proceeding is permissible where there is a patent injustice. Power to set aside such inititation or taking of cognizance of an offence by a Magistrate can be execrcised when it manifestly appears that there is a legal bar against the prosecution. The Sub-Divisional Magistrate after perusing the report of the enquiry, issued warrants of arrest against the accused. The allegation in the petition of complaint and the evidence taken in the inquiry constitute a prima facie case against accused under section 342/364 Penal Code. In view of the above quashing of the proceeding would lead to an abuse of the process of court.

4 BLD 169—Habibur Rahman Vs. Wasefuddin—Revisional Jurisdiction can only be invoked where there is an illegality in any impugned order. The order of the Sessions Judge directing fresh trial without finding any illegality in the order of the trying Magistrate cannot be sustained (Ref : 3 BCR 269).

3 BCR 111 (SC)—Shahadat Ali Vs. The State—After application under section 439A was filed and it was admitted by the Sessions Judge, the proceeding under section 145 though terminated on 9.1.82, its finality was subject to the

order passed by Sessions Judge. After admitting the application for revision the superior court is competent to stay the operation of the order impugned before it.

2 BCR 46– Shafiqur Rahman Vs. Nurul Islam Chowdhury–The Sessions Judge when trying a case under section 439A cannot be taken as an inferior court as contemplated under section 435 and 439 of the Cr. P. C.

4 BLD 16–Ayub Ali Vs. Suna Meah–An appeal would lie against the order of acquittal passed by the Magistrate under section 247 Cr. P. C in view of the amended provisions of section 417 (2) Cr. P. C and as such a revision against the order of acquittal is barred under section 439 (5) Cr. P. C.

32 DLR 241–Kafiluddin Mandal Vs. Dabir Mandal–Order of the Sessions Judge summarily rejecting the prayer for setting aside the final order passed by the Magistrate was final.

31 DLR 70 (SC)–Bangladesh Vs. Tan Kheng Hock–Police power of investigation cannot be interfered with by court.

22 DLR 192 (SC)–Alauddin Vs. Musammet Parvin Akhter–A revision is not a continuation of the original proceeding like an appeal.

12 DLR 631–Md. Noor Ali Vs. The State–Period of limitation to move the session court by way of revision is that provided in cases of appeals under Article 154 of the Limitation Act.

16 BLD (HC) 111–Amjad Hossain and others Vs. The State and another–Revision by the informant. When the state does not prefer any appeal against the order of acquittal passed by Magistrate in a police case the informant is competent to maintain a revision before the Sessions Judge.

Revision before the Sessions Judge against acquittal

18 BLD (HC) 14 –Abu Taher and others Vs. Hasna Begum and another–Where the State does not file any appeal against an order of acquittal passed by a Magistrate in a Police case the informant, who is vitally interested in the result of the case, is competent to file a revision before the Session Judge, who can look into the legality and propriety of the order of acquittal.

48 DLR 386– Zahurullah (Md) Vs. Nurul Islam and others–Sessions Judge acted illegally and without jurisdiction

in quashing the proceeding of the case pending in the Court of Sadar Upazila Magistrate in exercise of his power under section 439A of the Code of Criminal Procedure because the power of quashing a proceeding is available only under section 561A Cr. P. C.

50 DLR 551– Abdul Hai Vs. State– Jruisdication of the Sessions Judge under section 439A is co-extensive with the revisional jurisdicition on this Court in all matters except quashing a proceeding.

After the insertion of section 439A Sessions Judge in exercise of rvisional power can set aside any order of the subordinate Criminal Court in adition to directing further enquiry under section 436 of the Code but cannot quash a proceeding.

49 DLR 64–Amjad Hossain and others Vs. State and another–Where the State does not file any appeal against the order of acquittal in a police case the informant is competent to prefer revision before the Sessions Judge who can look into the legality or propriety of the order of acquittal. But the Court of revision cannot convert a finding of aquittal into a finding of conviction.

440. Optional with Court to hear parties.–No party has any right to be heard either personally or by advocate before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by advocate, and that nothing in this section shall be deemed to affect section 439 sub-section (2).

Scope and application–The accused is not entitled to be heard when an order under section 436 is made directing a further inquiry into a summary rejection of complaint (15 Cal. 608). The revisional power of the court is exercised at its own discretion and no petitioner has a right to be heard (29 Cr. LJ 88).

47 DLR 480–Sirajul Islam Vs. Fazlul Hoque–Under section 440 of the Code a party or his Advocate has no right to be heard by a court exercising revisional power and it is the discretion of the court to hear such a party or his advocate.

1 BSCD 117—Fazlur Rahman Vs. The State—No party has any right to be heard in a criminal revision case. Cases not to be remanded to the High Court Division for fresh hearing simply because of default of appearance of the lawyer at the hearing of the case before that Division.

441. Omitted.

442. High Court Division's order to be certified to lower Court or Magistrate.—When a case is revised under this Chapter by the High Court Division, it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision s. certified; and, if necessary, the record shall be amended in accordance therewith.

Scope and application—This section deals with every case which is revised under this Chapter by a High Court Division and also by a Sessions Judge; that means, it applies to all revisions whether under section 439 or 439A Cr. P. C and it provides that it shall certify its decision or order to the lower Court.

—O—

CHAPTER–XXXIIA

TIME FOR DISPOSAL OF APPEAL AND REVISION

442A. Time for disposal of Appeal and Revision.–(1) An appellate Court shall dispose of an appeal filed before it within ninety days from the date of service of notice upon respondents.

(2) A Court having power of revision shall dispose of a proceeding in revision within ninety days from the date of service of notice upon the parties :

(3) In this section in determining the time, only the working days shall be counted.

Scope and application–This section puts a time on the court to dispose of appeals and revisions. The provisions of time limit in the case of appeal and revision are directory and not mandatory because non-compliance of the provisions of this section has got no penal consequence and it may be the pious wish of the legislature.

–O–

PART VIII

SPECIAL PROCEEDINGS

CHAPTER—XXXIII

(SECTIONS 443 TO 463 OMITTED).

CHAPTER—XXIV

LUNATICS

464. Procedure in case of accused being lunatic.—(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Government directs and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

Scope and application—This section applies to Magistrate. The object of the inquiry under this section is to ascertain whether accused is capable of making a defence. The object of this section is whether accused is of unsound mind at the time of trial and not as in section 84 Penal Code whether he was or was not so at the time of the commission of the offence charged. The medical officer should be called as a witness and should be carefully examined. A mere certificate of the medical officer as to unsoundness of mind is not enough.

17 DLR 68—Mubarak Ali Vs. Md. Hachi Meah—Court is not bound to inquire into a plea of insanity unless it has reason to believe that the accused was of unsound mind.

465. Procedure in case of person being lunatic before Court of Sessions.—(1) If at the trial of any person before a Court of Sessions, it appears to the Court that such person is of unsound mind and consequentiy incapable of making his defence, the Court shall, In the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, It shall record a finding to that effect and shall postpone further proceedings in the case.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

Scope and application—The provisions of this section are mandatory and their non-compliance vitiates the trial. The question of unsoundness of mind must be ascertained in the first instance and this is the preliminary issue.

54 DLR 590 (HC)—State Vs. Abdus Samad @ Samad Ali—When in a trial before the court of sessions it is made to appear to the court that the accused facing the trial is of unsound mind and consequently incapable of making his defence, the court is required to enquire into the question of insanity, if necessary by taking evidence, to satisfy itself whe ther he is fit to make his defence.

24 DLR 69—State Vs. Shiraj Ali—Defence plea of insanity—When on questions of insanity evidence of local witnesses are divided it is incumbent upon the court to see if there were other materials in the case to resolve the difficulty. Medical insanity and legal insanity are not the same thing. The legal insanity must be established by direct evidence in a case as contemplated in Section 84 Penal Code.

466. Release of lunatic pending investigation, trial.—(1) Whenever an accused person is found to be of unsound mind and incapahle of making his defence, the Magistrate or Court, as the case may be. whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in his behalf.

(2) **Custody of lunatic.** If the case is one in which, in the opinion of the Magistrate or Court. bail should not be taken,

or if sufficient security is not given the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Government may have made under the Lunacy Act, 1912.

Scope and application—This section applies both to Magistrates and Court of Sessions. This section may be read with section 473 Cr. P. C.

Revision—Revision lies against the order of the Magistrate under section 439A Cr. P. C and against the order of Sessions Judge to the High Court Division (AIR 1933 Sind 267).

467. Resumption of inquiry or trial.—(1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

7 BLD 432—Abdul Latif Vs. The State—Plea of insanity by the accused— Procedure to be followed—Once the plea of insanity is validly taken by the accused and the same is prima facie found as such the court is under obligation to take recourse to the provisions as laid down in chapter XXXIV of the Code to deal with such matter as not expected to come to a definite finding whether such accused is suffering from mental insanlty or not (Ref : 19 Cr. LJ 125 SB).

468. Procedure on accused appearing before Magistrate or Court.—(1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be, and if the accused is found to

be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

469. When accused appears to have been insane.— When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate or, as the case may be, the Court is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate or, as the case may be, the Court shall proceed with the case.

470. Judgment of acquittal on ground of lunacy.— Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was worng or contrary to law, the finding shall state specifically whether he committed the act or not.

Scope and application—Before a verdict of acquittal under section 84 P.C can be pronunced, unsoundness of mind must be clearly and distinctly proved. Section 469 read with section 470 provides that the court shall acquit the accused where it is satisfied from the evidence that he was at the time of the commission of the offence incapable of knowing the nature of the act.

471. Person acquitted on such ground to be detained in safe custody.—(1) Whenever the finding states that the accused person committed the act alleged the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Government may have made under the Lunacy Act, 1912.

(2) **Power of Government to relieve Inspector General of certain functions.** The Government may empower the officer in-charge the jail in which a person is confined under the provisions of section 46 or this section, to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474.

Decisions

12 BLT (HC) 434—Ayar @ Ayaruddin & Ors. Vs. The State—The convict is legally entitled to a copy of the judgment free of cost if the desires to present an appeal and intimates to the jail authority in this regard.—We direct the trial Courts to intimate to all the convicts who are not defended by a lawyer or the convicts though defended by a lawyer intend to prefer jail appeal due of financial or any other cause, of their right of getting copies of the judgment free of cost in order to enable them to present proper appeal within limitation without being misled in the hands of undesiring persons. This direction is given for the interest of justice on consideration of over all socio-economic conditions of the country. [Para-9]

7 BLC (HC) 577—Enayet Hossain (Md) and others Vs. State (Criminal)—Sections 463/471/109—Considering the facts and circumstances of the case, the High Court Division accepted the unconditioned apology of the accused persons and accordingly disposed of the matter by giving warning not to commit the offence in future.

54 DLR (HC) 148—Nikhil Chandra Halder Vs. State (Criminal)—When the accused comes within the definition of a criminal lunatic' he is liable to be detained in any asylum.

54 DLR (HC) 197—Nikhil Chandra Halder Vs. The State (HC) 197—Section-471(1) Lunacy Act 1912 (IV of 1912) Sections-3(4) and 24—Although the accused was acquitted, he came within the definition of a 'criminal lunatic' and was liable to be detained in an asylum for treatment.

472. Repealed.

473. Procedure where lunatic prisoner is reported capable of making his defence.—If such person is detained under the provisions of section 466, and in the case of a person detained in a jail, the Inspector General of Prisons, or,

in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

Decisions

7 BLT (AD) 179—Md. Abul Hossain Vs. The State—There has not been an elaborate discussion of the evidence on record—In view of the fact that the High Court Division did not write out a proper judgment we took pains of going through both the judgments and we do not find that any miscarriage of justice has been caused. After a careful consideration we feel that no useful purpose will be served in sending the case back to the High Court the ground that his name was included in the charge sheet on the recommendation of the public prosecutor.

7 BLT (AD) 215— Bhulu Rani Saha Vs. Sri Pran Ballav Podder & Anr.—Remand to the trial court for a fresh decision and allowed both the complainant and the accused to examine further witnesses on the point whether the alleged executant, Renu Bala died on 5.7.82, as alleged by the complainant or on 5.8.82 as alleged by the accused persons—**Held** : The learned Judges of the evidence of PW2 and his report Ext. 2 found and indication of commission of forgery on the deed in question, and held rightly that the trial Magistrate had conveniently failed to consider the opinion of both the hand writting expert and the fingerprint expert to facilitate a judgment of acquittal.

474. Procedure where lunatic detained under section 466 or 471 is declared fit to be released.—(1) If such person is detained under the provisions of section 466 or section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the Government may thereupon order him to be released or to be detained in custody, or to be transferred to a public lunatic

asylum if he has not been already sent to such an asylum, and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Government, which may order his release or detention as it thinks fit.

475. Delivery of lunatic of care of relative or friend.— (1) Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the Government may, upon the application of such relative or friend and on his giving security to the satisfaction of the Government that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself, or any other person, and

(b) be produced for the inspection of such officer, and at such times and places, as the Government may direct, and

(c) in the case of a person detained under section 466, be produced when required before such Magistrate or Court, order such person to be delivered to such relative or friend.

(2) It the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer, referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court, and upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.

—O—

CHAPTER—XXXV

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE (AD)MINISTRATION OF JUSTICE

476. Procedure in cases mentioned in section 195.—(1) When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

Provided that, where the Court making the complaint is High Court Division, the complaint may be signed by such officer of the Court as the Court may appiont.

For the purposes of this sub-section, a Metropolitan Magistrate shall be deemed to be a Magistrate of the first class.

(2) A Magistrate to whom a complaint is made under sub-section (1) or section 476A or section 476B shall, not withstanding anything contained in Chapter XVI, proceed, as far as may be, to deal with the case as if it were instituted on a police report.

(3) Where it is brought to the notice of such Magistrate or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

Scope and application—Sections 195 and 476 are closely connected and they should be read together. Section 195 forbids the cognizance by any court of the offences against

public justice mentioned in clause (b) and (c) except upon a regular complaint by the court concerned and section 476 lays down the procedure as to how the bar imposed by section 195 is to be removed and such complaint is to be made. It has no application of offences mentioned in section 195 (1) (a), if any offence referred to section 195 (1) (b) or (c) appears to have been committed in or in relation to any proceeding in a civil, revenue or criminal court, the court concerned may proceed suo moto or on being moved by person, if it is of opinion that in the interest of justice the offence should be inquired into and these are the essential conditions, Ordinarily proceedings under this section should not be taken until after the close of the case in which the offence is committed (21 CWN 753, 13 CWN 398). A preliminary inquiry before making a complaint is not compulsory or essential. The court may itself inquire and make complaint in the interest of justice. The court may under this section make the complaint on application made to it or otherwise (38 Cr. LJ 871). When the Code has made provision for circumstances under which a court can file a complaint it must be considered to be exhustive in respect of it and to limit the powers of the court in making such complaints (AIR 1945 Mad. 458).

56 DLR 543—Naogaon Rice Mills Ltd Vs. Pubali Bank Ltd(Civil)—The Court has enough power to lodge complaint without holding any enquiry when from the proved facts he is prima facie satisfied that an offence has been committed before him in a proceedding or in relation thereto even without hearing the party complained against.

45 DLR 101 (AD)—Serajuddowla Vs. Abdul Kader—Proceeding in Court—In view of the decision that a Magistrate acts in his judicial capacity while discharging an accused on the basis of a final report by the Police and the reasonings in the majority judgment in AIR 1979 (SC) 777, the offence under section 211 Penal Code was committed in relation to a proceeding in Court and as such the bar under section 195 (1) (b) is attracted. Complaint of Court—Requirement—When the Magistrate considered the prayer of the Investigating Officer that the appellant be prosecuted for making a false charge and the prosecution report upon which cognnizance was taken shows that the same was filed as directed by the Magistrate, it

is clear that the prosecution of the appellant was sanctioned by the Magistrate himself and as such it could not be said that the cognizance was taken in violation of section 195 (1) (b) Ref: 8 BLD 224, 16 DLR 145 (WP), 37 DLR 207, 20 DLR 132 (WP), 20 DLR 66).

42 DLR 8—Sona Meah Vs. The State—No court can take cognizance of any offence under section 467 of the Penal Code without a complaint in writing by the court in which the document was given in evidence or by a court to which the said court is subordinate. Complaint not having been made by a competent court, the criminal proceeding under section 467 and 471 of the Penal Code has to be quashed.

14 BLD 190 (AD)—Md. Shamsul Hoque Bhuiyan Vs. The Institution of Engineers, Bangladesh—When a revisional application arises out of a proceeding in any subordinate court, (Civil, Criminal or Revenue) under section 476 Cr. P. C it is a Division Court (bench) which has been authorised under Rule 8 of the Supreme Court (High Court Division) Rules, 1973 to hear such matters. Under Rule 7 it is only the Division Court which can hear an appeal under section 476B Cr. P. C.

40 DLR 226 (AD)—Abdul Hai Khan Vs. The State—Jurisdiction of a Criminal Court when barred. Which Court is empowered to take cognizance of offences in the section 195 (1) (c). There is specified procedure and method for filing complaint by a Court in respect of offences described in clauses (a) and (b) but there is no such specified procedure for offences in clause (c) of section 195 Cr. P. C. Ambit of sub-section (4) of section 195 Cr. P. C. It is therefore, clear that the offences referred to in cl. (c) when committed in pursuance of a conspiracy or in the course of the same transaction, will fall within the ambit of sub-section (4) of section 195 including their abetments or attempts independent of the dates of their commissions, Section 476 is not independent of section 195 of the Code—Section 476 does not abridge or extend the scope of section 195 (b) or (c). Restricted application of clause (c) to be discarded, The clause will be applicable even when the offence alleged is committed by the party to proceeding in any Court before becoming such party if it is produced or given in evidence in such proceeding (Ref : 8 BCR 162 (AD); 8 BLD 195 (AD)).

8 BCR 155 (AD)—Abdul Gafur Vs. The State—Court can suo moto take cognizance of any offence of forgery alleged to have been committed by a party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding before that court under section 476 of the code of Criminal Procedure—The impugned judgement and order was passed by the High Court Division, Sylhet Sessions, directing the Deputy Registrar to lodge a petition of complaint before the competent Magistrate against the present appellants for alleged commission of forgery and practicing fraud upon the court by filing a false petition of compromise—The appellants preferred an appeal before the appellate Division against that order—The appellate division dismissed the appeal finding that the impugned order of the High Court Division does not suffer any infirmity and hence need not require any enquiry into the merit of the case at this stage (Ref : 8 BLD 195 (AD) reported in section 95 Cr.P.C).

7 BLD 93—Ali Hossain Vs. the State—Whether a person can be ordered to be prosecuted by a court for producing a fabricated document before a police officer and not before any court—Admittedly the document was not produced by one of the accused persons in any court but it was produced before a police officer—The exhibit although admitted by both the parties as fabricated document, was not produced in any court or griven in evidence in any court—The Sessions Judge has committed an error in passing the impugned order for lodging a complaint against the appellant.

5 BLD 73 (AD)—Mir Mahiruddin Meah Vs. Rokeya Hossain—Whether criminal prosecution can be initiated by a party to a civil suit against the other party when alleged offences have been committed, in relation to a proceeding in the Civil Court. No court is competent to take cognizance of such an offence except on a written complaint by the court concerned. Moreover so long the decree passed by the Civil Court remains in force it is a good defence for the appellants in criminal prosecution. Such proceeding should not be allowed to be continued and should be quashed (Ref : 2 PCR 97, 7 BCR 94 (AD)).

5 BLD 193—Mosammat Saleha Khatun Vs. the State—Whether a private individual can prosecute a person for offence committed in relation to a proceeding in a Court. Such

prosecution is barred under the provision of Clause (c) of sub-section (1) of Section 195 of the Cr. P. C. When the offence is committed by the parties "as such" in a proceeding before any Court. The expression "party to a proceeding" need be interpreted strictly and in its ordinary meaning. Section 195 and 476 of the Cr. P. C are to be read together in as much as the former section lays down the bar while the latter section lays down the method for removing the bar, Section 476 enjoins the Civil Court to make an enquiry when it is of opinion and when it appears that the offence has been committed in or in relation to a proceeding "in that Court." Section 195 (c) applies only to cases where an offence is committed in respect of a document which has been produced or given in evidence in such proceeding. When the offence is committed before the accused became party to the proceeding provision of section 195 (c) is not applicable (Ref : 5 BCR 150, 39 DLR 109, 16 DLR 145 (WP)).

5 BLD 285 (AD)—Syed Ebadat Ali Vs. The State—Cognizance in respect of a document produced or given in evidence in court. What is required is that the court must come to conclusion that an offence has been committed. If that is the case the court can launch prosecution. In the absence of such conclusion by the Civil Court prosecution and conviction for forgery of a document produced in Civil Court is illegal (Ref : 5 BCR 216 (SC), 2 PCR 127).

25 DLR 472—Golam Sarwar Vs. The State—For a complaint under section 476 (1) (b) it is not always necessary to examine any witness. A fresh preliminary inquiry is not always incumbent (Ref : 1 BSCD 118, 15 DLR 108, 7 DLR 299, 20 DLR 66).

14 DLR 39—Alhaj Aley Muhammad Akhand Vs. The State—The question whether a preliminary inquiry under section 476, should be held or not is one depending entirely upon the facts and circumstance of each case and the discretion vested under the expression "after such preliminary inquiry, if any, as it thinks necessary," occurring in section 476 has to be exercised on a proper application of the judicial mind and not arbitrarily or capriciously (Ref : 9 DLR 269).

3 BCR 26—Q.M. Nasimul Huq Advocate Vs. The State—The Revenue Court can only make upon an application a formal

complaint under section 195 Cr. P.C in a proceeding under section 476 Cr. P. C in respect of alleged forgery of a document filed before it. Such procedure having been not followed proceeding taken against accused persons without following the provisions of section 195 and 476 Cr. P. C is illegal (Ref : 7 DLR 299).

Revision—It is the Sessions Court which alone has the power under section 435 and 439A to interfere with an order under section 476.

17 BLD (HC) 547—Abdul Hamid Advocate Vs. Bangladesh Bar Council and others—A suo motu Rule was issued by the High Court Division under section 476 of the Code upon delinquent Abdul Majid to show cause as to why an inquiry should not be made to ascertain as to whether he gave false evidence as PW 2 before a Bar Council Tribunal in a complaint case and thereby committed an offence punishable under section 193 of the Penal Code.

18 BLD (HC) 288—Md. Idris Miah Vs. The State—In view of the provissions of section 476 Cr. P. C. a Court cannot proceed directly against any person for giving false evidence or fabricating evidence. The Court cannot also impose any fine upon any witness or direct him to pay any compensation to the accused. A Tribunal consituted under section 26 of the Special Powers Act is required to follow the provisions of section 476 Cr. P. C. if it wants to proceed against any witness for commission of an offence under section 193 of the Penal Code.

50 DLR 629—Idris Miah (Md) Vs. State—A Tribunal constituted under section 26 of the Special Powers Act is also required to follow the provisions of section 476 of the Code of Criminal Procedure if it likes to proceed against any witness of a case for commission of offence under section 193 of the Penal Code.

2 MLR (AD) 119—Shamsuddin Ahmed Chowdhury Vs. The State & another— The court can make a complaint only when a fraudulent document is produced before it in a procedings. When not produced before the Court in any proceeding private complaint is not barred in law. (Ref. 4 BLT (AD) 169).

5 BLT (AD) 169—Shamsuddin Ahmed Chowdhury Vs. The State & Anr.—Both sections 195 and 476 of the Code of Criminal Procedure clearly speak of production of a document

in a proceeding before a Court, Section 195 (2) speaks of civil, revenue or Criminal Court and Section 476 of the Code speaks of an enquiry into any offence referred to section 195 sub section (1) clauses (b) and (c) when the offence appears to have been committed on relation to a proceeding in that Court, thus it is absolutely clear that unless the document is filed in Court, the Court cannot make a complaint

4 BLC (AD) 100—Khizir Hayat Khan Eusuf Zia Vs. Major (Retd) Md Muqtadir Ali and others—Section 476 and 476B –All that the appellate Court, as expressed by section 476B of the Code, can do is to direct the withdrawal of the complaint if made by the trial Court or itself make the complaint which might have been made by the subordinate Court following the provision of section 476. Sending a case on remand by the appellate Court amounts to acting beyond jurisdiction.

5 BLC 286—Masuder Rahman (Md) Vs. State—Section 476(1) & 561A–The learned Special Judge considering the depositions of the petitioner and the concerned Magistrate given in the Special case in question and exercising its jurisdiction under section 476(1), Cr.P.C recorded its finding and rightly made a complaint to the District Magistrate, Jhalokati wherefrom the magistrate concerned rightly started a complaint case and took cognizance of the offence under sections 193/212 of the Peanl Code and hance the petition under section 561A, Cr.P.C is a misconceived one.

5 BLC 145—Masudur Rahman and another Vs. State—Section 476(1) and 561A –When the learned Special Judge considering the depositions of the petitioners as PW 6 and PW 10 and the concerned Magistrate as PW 9 given in the Special case exercised his jurisdiction under section 476(1) Cr.P.C and recorded his finding and rightly made a complaint to the District Magistrate whereupon the concerned Magistrate rightly took cognizance of the offence under sections 193/212 of the Penal Code and such offence is not dependent upon the acquittal or conviction of the original accused persons for whom the false evidence was given or sought to be screened from punishment and the learned Special Judge need not wait for forwarding a petition of complaint till conclusion of the trial to observe the effect of such deposition and hence the application for quashing the proceeding is misconceived.

476A. Superior court may complain where subordinate Court has omitted to do so.—The power conferred on Civil, Revenue and Criminal Courts by Section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.

Scope and application—The power to direct prosecution is conferred on the court and not on the particular officer who fills the judicial offence at a particular time. An appellate court can make a complaint only when the case in which the offence is committed is before it in appeal or when the original court has omitted to make a complaint or when the original court has refused to make complaint and the order of refusal is appealable to the appellate court.

476B. Appeals.—Any person on whose application any Civil. Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made may, appeal to the Court to which such former court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the sub-ordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.

Scope and application—An appeal cannot be filed until a complaint has actually been made (36 Cr. LJ 1371). The appeal will lie to the court to which the trial court is subordinate. Limitation for filing appeal is under Article 145 and 155. The Limitation must be held to run from the date of the complaint.

6 BCR 193—Amjad Howlader Vs. Mr. Habibullah Bhuiyan, Additional Sessions Judge, 1st Court, Patuakhali—The provision for a preliminary enquiry under section 476 of the Code of Criminal Procedure is not a mandatory one. Provisions

for holding enquiry into a complaint made by a private person or by a complaining Court to be complied with. When a statutory remedy by way of an appeal is available against a complaint filed under section 476 Cr. P. C, it will not be ordinarily proper for the High court to quash the proceeding instituted by that complaint.

16 DLR 276—Munshi Abdus Samad Meah Vs. Keshab Lal Gope—Appellate court has no jurisdiction to remand back a case for sanction to the trial court. It can itself make the complaint or direct the withdrawal such complaint.

8 DLR 675— Mizanur Rahman Vs. The State—A complaint under section 476 is appealable under section 476B. The complaint, if not challenged by filing an appeal, cannot later on be questioned on the plea that the complaint made was not legally valid.

20 BLD (AD) 46—Khizir Hayat Khan Eusuf Zai Vs. Major (Rtd) Md. Muqtadir Ali— Section 476B of the Code provides that any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made may, appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.

The authority of the appellate Court is clearly pronounced and it can not go beyond it. Sending a case on remand by the appellate court amounts to acting beyond jurisdiction.

7 BLT (AD) 252— Khizir Hayat Khan Eusuf Zai Vs. Major (Rtd.) Md. Muqtadir Ali & Ors.—Whether in appeal, the appellate court has jurisdication to order remand of the case under section 476 to the trial Court.

In case of making complaint the appellate court is to follow the provision of section 476. The authority of the Appellate Court is thus clearly pronounced and it can not go beyond it. Sending a case on remand by the appellate court amounts to acting beyond jurisdiction.

477—479. Repealed.

480. Procedure in certain cases of contempt.—(1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the sama day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred taka, and, in default of payment, to simple imprisonment for a term which may extend to one month unless such fine be sooner paid.

42 DLR 201—Md. Rowshan Ali Vs. Bangladesh Bar Council & others. The Tribunal shall have the same powers as vested in a Civil Court for the purpose of enquiry and every enquiry as such shall be deemed to be judicial proceding within the meaning of section 193 and 228 of the Penal Code—A tribunal shall be deemed to be a civil court for the purposes of section 480 and 482 Cr. P. C.

17 DLR 477 (SC)—The State Vs. Abu Syed Md. Idris Ali Sikder—A Revenue Officer not authorised to pass a sentence of fine (of imprisonment) for contempt of court under section 480 Cr. P. C he not being designated as a court within the meaning of "any Civil Criminal, or Revenue Court". His remedy for contempt lies in making of a complaint under section 228 Penal Code. This section does not empower an Industrial Court to impose punishment for insult or interruption to itself.

Appeal—Appeal lies against the order to the superior court under section 486 (1) Cr. P. C.

481. Record in such cases.—(1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender as well as the finding and sentence.

(2) If the offence is under section 228 of the Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

Decisions

19 DLR 354—Aziza Khatun Vs. The State—Court trying an offence must follow the procedure laid down in section 481. If

a fine over two hundred taka is called for complaint has to be made and the same referred to an appropriate court.

482. Procedure where Court considers that case should not be dealt with under section 480.—(1) If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred taka should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

483. When Registrar or Sub-Registrar to be deemed a Civil Court within section 480 and 482.—When the Government so directs, any Registrar or any Sub Registrar appointed under the Registration Act, 1908 shall be deemed to be a Civil Court within the meaning of section 480 and 482.

484. Discharge of offender on submission or apology.—When any Court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

485. Imprisonment or committal of person refusing to answer or produce document.—If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for

reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482 and, in the case of High Court Division shall be deemed guilty of a contempt.

485A. Summary procedure for punishment for non-attendance by a witness in obedience to summons.—(1) If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time. In obedience to the summons and without just excuse neglects or refuses to attend at the place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the court, may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding taka two hundred and fifty.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

Scope and application—This section does not dispense with mens rea as an ingredient for the offence. The Courts should find if the summons has been served and the accused had knowledge of it and did disobey the summons thereafter. Court should not be too sensitive for punishing contempts and this power should be used sparingly i. e. in serious cases only (AIR 1943 PC 202). This section authorises the criminal Court, and not any civil or revenue court, to try witnesses summarily for disobedience of its summons. A complainant is not a witness and therefore not punishable under this section.

10 DLR 12 (WP)—Bashir Ahmed Vs. The State—A Judge may take action under section 485, if a witness refuses to answer such questions as are put to him, but if the questions are themselves meaningless, then the witness has no other

alternative but, keeping in mind the dignity of the Court, to keep quiet and respectfully refuse to answer them.

Appeal—Appeal lies against the order under section 486 Cr. P. C.

486. Appeals from convictions in contempt cases.—(1) Any person sentenced by any Court under section 480 or section 485 or section 485A may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable. apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes shall lie to the Court of Session for the Sessions Division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would under the preceding portion of this section, be made if such conviction where a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge.

Scope and application—The provision of this section shows that the right of appeal conferred by sub section (1) is not controlled by any other provision of the Code (AIR 1960 All 214). Hence, an appeal against conviction and sentence under sections 480, 485 or 485A of the Code lies under sub-section (1) of this section even when the fine imposed does not exceed the limit prescribed by sections 413, 414 and 415 (AIR 1965 Cal 622 FB).

487. Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves.—(1) Except as provided in sections 480, 485 and 485A, no Judge of a Criminal Court or Magistrate, other than a Judge of the Supreme Court, shall try any person for any offence referred to in section 195 when such offence is committed before himself or in contempt of his authority, or is

brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Omitted.

Scope and application—The prohibiton in this section is limited to the trial of an offence referred to in section 195 and to the abetment of such offences. The words "in contempt of his authority" are general and are not to be construed as limited to cases where the alleged offence is in the nature of a contempt of Court. Therefore, Magistrate who makes an order under section 144 or section 133 is not competent to try a person for an alleged offence under section 188 of the penal Code for disobedience of such an order (AIR 1916 Cal. 69). It extends to all contempts of court. This section is wide enough to include a Metropolitan Magistrate.

54 CWN 71—There is no prohibition contained in section 487 such as have the effect of preventing cognizance of an offence so long as the Magistrate did not actually try the case himself.

—O—