Chhadami Lal Jain and Others

Vs

The State of Uttar Pradesh and Another

Criminal Appeal No. 143 of 1957

(Syed Jafar Imam, J. L. Kapur, A.K. Sarkar, K. N. Wanchoo JJ)

14.09.1959

JUDGMENT

WANCHOO J. –

This is an appeal on a certificate granted by the Allahabad High Court in a criminal matter. The facts of the case may be set out in some detail to bring out the point raised in this appeal. A complaint was filed by Rajendra Kumar Jain against the four appellants and three others under ss. 409, 465, 467, 471 and 477A of the Indian Penal Code. It is not necessary for present purposes to set out the details of the complaint. Suffice it to say that after the statement of the complainant under s. 200 of the Code of Criminal Procedure hereinafter referred to as the Code) summonses were issued to the accused persons retiring them to answer a charge under s. 406 of the Penal Code. Prosecution witnesses were then examined and cross-examined and the statements of the accused persons recorded. The Magistrate then heard arguments on the question of framing of charges which were concluded on September 23, 1954. It was then ordered that the case should be put up on September 30, 1954, for orders. On that date the Magistrate framed charges against the four appellants under ss. 409 and 465 read with s. 471 and 477A of the Penal Code. On the same date the Magistrate ordered commitment of the four appellants to the Court of Session on these charges. The remaining three accused were discharged.

There was then a revision petition by Rajendra Kumar Jain against the discharge of one of the three accused, namely, Bhajan Lal. When the matter came up before the First Additional Sessions Judge Agra, he ordered suo motu on April 9, 1955, after a perusal of the commitment order that Bhajan Lal be committed to the Court of Session to stand his trial. In view of this order he dismissed the revision petition as infructuous. Thereupon Bhajan Lal went in revision to the High Court. That petition was heard by Roy, J., and he set aside the order of commitment of Bhajan Lal and one of the reasons given by him for doing so was that a Magistrate was not empowered to frame a charge and make an order of commitment until he had taken all such evidence as the accused might produce before him. As Bhajan Lal had not been called upon to produce evidence in defence the order of commitment made by the Sessions Judge was held to be not in accordance with law. This order was passed on October 6, 1955. Thereupon on January 7, 1956, the four appellants filed a revision petition before the Sessions Judge praying that the order of commitment passed against them be quashed and the main reason advanced in support of this petition was that the learned Magistrate had not observed the mandatory provisions of law laid down in ss. 208 to 213 of the Code which were essential for a valid commitment. This petition came up before the same First Additional Sessions Judge and he made a reference to the High Court that as the procedure followed by the Magistrate was irregular the order of commitment, dated September 30, 1954, was bad in law, and should be quashed.

This reference came up for hearing before another learned Judge of the High Court, namely, Chowdhry, J., and he took the view that the Magistrate had not failed to comply with the provisions of s. 208 and that non-compliance with the provisions of ss. 211 and 212 was curable under s. 537 of the Code. He, therefore, rejected the reference. There was then an application for a certificate to appeal to this Court which was allowed, particularly, as the view taken by Chowdhry, J., was in conflict with the view taken by Roy, J., already referred to.

The main contention of the appellants before us is that as the case began before the Magistrate as a warrant case under s. 406 of the Penal Code, it was incumbent upon the Magistrate, when he decided, in view of the provisions of s. 347(1) of the Code, that the case should be committed to the Court of Session, to follow the procedure provided in Ch. XVIII of the Code and inasmuch as he had failed to comply with ss. 208 to 213 of the Code the commitment was bad in law and should be quashed.

The first question that falls for consideration, therefore, is whether the Magistrate when he began this case, was proceeding in the manner provided for the trial of warrant cases. Section 347(1) of the Code comes into play when at any stage of the proceedings in any trial before a Magistrate, it appears to him that the case ought to be tried by the Court of Session; he has then to commit the accused under the provisions herein before contained. The Sessions Judge who made the reference held that the case before the Magistrate proceeded from the beginning as if it was a trial of a warrant case. It was on that basis that the Sessions Judge held that when the Magistrate made up his mind that the case ought to be committed to the Court of Sessions in view of the provisions of s. 347(1) of the Code it was his duty to observe the procedure laid down in Ch. XVIII, particularly, under ss. 208, 211 and 212 of the Code. The order of reference was sent to the Magistrate for explanation, if any, and the Magistrate replied that he had no explanation to submit. He did not say in his explanation that he was not proceeding as in a warrant case and that the proceedings before him throughout were proceedings in the nature of an inquiry under Ch. XVIII. When, however, the matter came up before the High Court, Chowdhry, J., was of opinion that though the Magistrate was competent to try the case as summonses has been issued under s. 406 I.P.C. only, it was open to him to hold an inquiry under Ch. XVIII from the very beginning in view of the provisions of s. 207 which empower a Magistrate to follow the procedure provided in Ch. XVIII in cases exclusively triable by a Court of Session and also in cases which are not exclusively triable by the Court of Session but which in the opinion of the Magistrate ought to be tried by such Court. The High Court was further of the view that the offence mentioned in the summons should be deemed to have given notice to the accused that it was optional with the Magistrate to hold an inquiry with a view to commit them to the Court of Session or to try them himself as in a warrant case because column 8 of Schedule II of the Code says that a case under s. 406 is triable by a Court of Session, Presidency Magistrate or Magistrate of the first or second class. Therefore, according to the High Court the matter was at large whether the Magistrate was going to adopt one procedure or the other despite the issue of summonses under s. 406 of the Penal Code and that nothing had happened to induce the belief in the accused that they would be tried as in a warrant case. The High Court, therefore, held that the case was proceeded with from the beginning as if it was an inquiry under Ch. XVIII and on that view it held that there was no non-compliance with s. 208 of the Code. As for non-compliance with ss. 211 and 213, the High Court was of the view that it was curable under s. 537 of the Code as no prejudice was caused.

We must say with respect that this view of the nature of the proceedings before the Magistrate is not correct. It is true that it is open to a Magistrate to hold an inquiry from the beginning under Chapter XVIII in a case not exclusively triable by the Court of Session. But the mere fact that the Magistrate

has such power does not necessarily indicate to the accused that he is holding an inquiry under Ch. XVIII rather than a trial before himself. Where the case is not exclusively triable by the Court of Session, the accused would naturally conclude that the proceedings before the Magistrate are in nature of a trial and not an inquiry under Ch. XVIII. If the Magistrate intends to use his powers under s. 207 and hold an inquiry from the beginning in a case not exclusively triable by the Court of Session, the only way in which the accused can know that he is holding an inquiry and not a trial is by the Magistrate informing the accused that he is holding an inquiry under Ch. XVIII and not trial. If he fails to do so, the accused can reasonable conclude that a trial is being held. In this case undoubtedly the Magistrate did not indicate to the accused from the beginning that his proceedings were in the nature of an inquiry under Ch. XVIII. Therefore the accused would naturally conclude that the proceedings before him were in the nature of a trial of a warrant case as the summonses that they had received were under s. 406 of the Penal Code only. The fact that in the complaint s. 467, which is exclusively triable by a Court of Session, was mentioned is of no consequence for the summonses to the accused were only for a trial under s. 406 of the Penal Code. It must, therefore, be held that the proceedings before the Magistrate began as in the trial of a warrant case and if the Magistrate at a subsequent stage of the proceedings was of the view that the case should be committed to the Court of Session, he would have to act under s. 347(1) of the Code. We have been at pains to refer to this aspect of the matter for considerations would be different if the case was exclusively triable by the Court of Session and began from the outset as an inquiry under Ch. XVIII. What we shall say hereafter must, therefore, be taken to apply only to a case which began as a proceeding in a warrant or summons case and in which the Magistrate at a later stage takes action under s. 347(1).

This brings us to a consideration of the duty of the Magistrate who takes action under s. 347(1) of the Code. That section reads as follows :-

> "If in any inquiry before a Magistrate or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he his empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained."

The first question that has to be decided is the meaning of the words "under the provisions hereinbefore contained". These words have been the subject of decision by a number of High Courts and the High Courts are unanimous that they mean that if the Magistrate decides at some stage of the trial to commit the accused, he has to follow the provisions contained in Ch. XVIII. It is not necessary to refer to those decisions for the words themselves are quite clear. They lay down that if the Magistrate comes to the conclusion that the accused ought to be committed for trial, he shall commit in accordance with the provisions contained in the earlier part of the Code, namely, in Ch. XVIII. This of course does not mean that the Magistrate must begin over again from the beginning. All that he has to do when he decides that the case ought to be committed is to inform the accused and see that the provisions of Ch. XVIII are complied with so far as they have not been complied with up to the stage at which he decides that there ought to be a commitment. Now the procedure under Ch. XVIII is laid down in ss. 208 to 213 of the Code. The Magistrate begins by hearing the complainant, if any, and takes all evidence that may be produced in support of the prosecution or on behalf of the accused or as the Magistrate may call himself. The Magistrate is also required to issue process to compel the attendance of any witness or the production of any document or other thing if the complainant or officer conducting the prosecution of the accused applies to him. After the evidence under s. 208 has been taken the Magistrate then examines the accused for the purpose of

enabling him to explain any circumstances appearing in evidence against him under s. 209. Thereafter if he is of opinion that there are not sufficient grounds for committing the accused for trial, he can discharge him unless it appears to him that such person should be tried before himself or some other Magistrate in which case he has to proceed accordingly. On the other hand, if the Magistrate is of opinion after taking the evidence and examining the accused that there are sufficient grounds for committing the accused for trial, he has to frame a charge under s. 210 declaring with what offence the accused is charged. The charge is then read over and explained to the accused and a copy thereof, if he so requires, is furnished to him free of cost. After the charge is framed the Magistrate calls upon the accused under s. 211 to furnish a list of persons orally or in writing whom he wishes to be summoned to give evidence on his trial. The Magistrate may also allow the accused to furnish a further list at a later stage in his discretion. Section 212 gives power to the Magistrate in his discretion to summon and examine any witness named in any list under s. 211. Then comes s. 213 which lays down that if the accused has refused to give a list as required by s. 211 or if he has given one and the witnesses, if any, included therein whom the Magistrate desires to examine, have been summoned and examined under s. 212 the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session and shall also briefly record the reasons for such commitment. On the other hand, if he is satisfied after hearing the witnesses for the defence that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

It will be seen from this analysis of the provisions relating to commitment that s. 208 gives a right to the accused to produce evidence in defence before the Magistrate examines him under s. 209 and proceeds to frame a charge under s. 210. Now when a Magistrate makes up his mind to commit a case not exclusively triable by the Court of Session under the power given to him under s. 347(1) of the Code, he has to follow this procedure. But as we have said earlier it is not necessary that the Magistrate should begin from the beginning again when he so makes up his mind. The Magistrate may make up his mind at any stage of the trial before him and generally speaking four contingencies may arise. Firstly, he may make up his mind after the trial is practically over and the witnesses for the prosecution have been examined and cross-examined after the charge, the accused has been examined both under ss. 253 and 342 of the Code and and all the defence evidence has been taken. In such a case ss. 208, 209 and 210 have been taken. In such a case ss. 208, 209 and 210 have been complied with and all that the Magistrate has to do is to intimate to the accused that he intends to commit him for trial and ask him to give the list of witnesses under s. 211 and proceed thereafter as provided in Ch. XVIII. Secondly, the Magistrate may make up his mind after all the witnesses for the prosecution have been examined and cross-examined and the charge has been framed but no defence has been taken. In such a case that part of s. 208 which lays down that all the evidence for the prosecution shall be taken, has been complied with and the Magistrate may then proceed to comply with the rest of section 208 and take the defence evidence and then proceed further under ss. 209 to 213 and amend the charge so as to make it conformable to a charge in an inquiry under Ch. XVIII or cancel it. Thirdly, the Magistrate may make up his mind after some of the prosecution witnesses have been examined and cross-examined and a charge has been framed. In such a case he has to examine the rest of the prosecution witnesses under s. 208 and take the defence evidence, if any, produced by the accused and then proceed under ss. 209 to 213 amending or cancelling the charge already framed as indicated earlier. Lastly, the Magistrate may have only just begun taking evidence for the prosecution and may not have framed a charge. In such a case he takes the rest of the prosecution evidence and complies with the provisions from ss. 208 to 213. But in each of these four contingencies it is the duty of the Magistrate to intimate to the accused that he has made up his mind to commit in view of the provisions of s. 347(1) and then proceed in the manner indicated

above. It is necessary that the accused should know when the Magistrate makes up his mind to commit so that their right under s. 208 to produce defence, if any, before commitment is made is safeguarded.

Now what happened in this case was this. The Magistrate had apparently taken all the prosecution evidence and the prosecution witnesses had been examined and cross-examined; the Magistrate had framed no charges upto September 30, 1954. He had heard arguments on the question whether any charges should be framed and had fixed September 30, 1954, for orders in this respect. When, therefore, he decided on September 30, 1954, that the case ought to be committed to the Court of Session, the proper course for him was to refrain from framing any charges and intimate to the accused that he intended to commit them for trial. He then should have called upon them to produce defence evidence, if any, under s. 208 and then proceeded further under Ch. XVIII. The Magistrate, however, failed to inform the accused that he had made up his mind to proceed under s. 347(1) and to commit them for trial. What he did on September 30, 1954, was to frame charges forthwith and record an order committing the accused to the Court of Session under s. 213 of the Code. He thus deprived them of their right to lead defence evidence, if any, under s. 208. It may be that if he had told them that he was going to proceed under s. 347(1) and commit them for trial and asked them if there was any defence evidence to be produced, they might have said that they did not wish to produce any defence before him at that stage. But what the accused would have said if the Magistrate had proceeded in this manner is irrelevant in considering the question whether the commitment in this case was bad in law inasmuch as it did not comply with s. 208 so far as giving the accused an opportunity to lead defence evidence, if any, was concerned. The fact remains, therefore, that in this case the Magistrate when he decided to act under s. 347(1) did not intimate that decision to the accused and proceeded forthwith to commit them for trial under s. 213, thus depriving them of the right to produce defence evidence, if any, under s. 208.

The next question which falls for consideration is the effect of this non-compliance with s. 208 of the Code and whether it is curable under s. 537 of the Code. The effect of non-compliance with various provisions of the Code and whether such non-compliance is curable under s. 537 have been the subject of a large number of cases before various High Courts and also before their Lordships of the Judicial Committee of the Privy Council. It is not necessary to refer to this mass of authorities. One of the earliest of these case decided by the Privy Council is Subramania Iyer v. King-Emperor [(1901) L.R. 28 I.A. 257], while one of the latest is Pulukuri Kotayya v. King-Emperor [(1948) L.R. 74 I.A. 65]. The law was summed up by their Lordships of the Judicial Committee in Pulukuri Kotayya's case [(1948) L.R. 74 I.A. 65] at p. 75 in these words :

> "When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subramania Iyer's case [(1901) L.R. 28 I.A. 257], the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the "course of such conduct, the irregularity can be cured under s. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in Abdul Rehman v. The King-Emperor [(1926) L.R. 54 I.A. 96] where failure to comply with ss. 360 of the Code of Criminal Procedure was held to be cured by s. 535 and 537."

These observations were quoted with approval by this Court in Narain Rao v. The State of Andhra Pradesh [[1958] S.C.R. 283]. It seems, therefore, fruitless to consider whether the non-compliance with s. 208 in this case is an illegality which cannot be cured under s. 537 or an irregularity which is curable thereunder. As the stage of trial has not been reached in this case, no question arises of considering whether the trial has been conducted in a manner different from that prescribed by the Code. What we have to see is whether the breach of s. 208 which has occurred in this case is such that the Court will presume prejudice to the accused by the mere fact of the breach. If such presumption can be made, the breach would obviously be not curable under s. 537 of the Code, even assuming that that section applies. The question, therefore, which eventually emerges is whether this breach of s. 208 is of such a character that the Court will presume that there has been prejudice to the accused by the mere fact of the breach. Now the accused has a right under s. 208 to produce evidence in defence, if any, before the Magistrate proceeds to decide whether a charge should be framed or not. The Magistrate's decision whether the charge should be framed or not is bound to be affected one way or the other if evidence is produced by the accused, for the Magistrate would then be bound to consider the effect of that evidence on the question of framing the charge. If the accused is denied the opportunity of leading that evidence which he has a right to do under s. 208, it seems to us that the denial of such right is sufficient to cause prejudice to the accused and s. 537 would have no application to a case of this kind. The possibility that the accused may not have produced defence if asked by the Magistrate whether he would do so, is of no consequence, so far as this conclusion is concerned. If this is the reply expected, it makes it all the more incumbent on the Magistrate to inform the accused that he was intending to commit the case and ask him if he wished to produce evidence. If the accused did not want to do so, the Magistrate would have done his duty and his way would be clear to proceed further with his intention to commit the accused. But when the Magistrate did not intimate to the appellants in this case that he was intending to commit them for trial and proceeded to frame charges and pass the order of commitment forthwith on September 30, he was denying to them their right to produce defence under s. 208 of the Code. The denial of that right is in our opinion in itself sufficient to cause prejudice to the accused and failure of justice inasmuch as the accused were prevented from leading evidence which might have induced the Magistrate not to frame a charge against them or cancel it. We are, therefore, of opinion that the breach of s. 208 which took place in this case was such as was bound to cause a failure of justice and there is, therefore, no question of the application of s. 537 in these circumstances. The commitment is, therefore, bad in law and must be quashed on this ground alone.

In the petition of appeal the appellants have referred also to breach of provisions of ss. 211, 212 and 213 of the Code. As we have come to the conclusion that the breach of s. 208 in this case is sufficient to invalidate the commitment it is not necessary to consider the effect of the further breach of ss. 211, 212 and 213. What we have said in this case with respect to the effect of the breach of s. 208 may not be taken as applying to the breach of ss. 211, 212 and 213 for the considerations arising out of those breaches may be different.

We, therefore, allow the appeal, quash the order of commitment as well as the charges framed and send the case back to the Magistrate to proceed in the manner indicated above according to law.

Appeal allowed.

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