Payare Lal

Vs

State of Punjab

Criminal Appeal No. 240 of 1960

(CJI B. P. Sinha, A. K. Sarkar, J. R. Mudholkar JJ)

30.08.1961

JUDGMENT

SARKAR, J. -

The appellant Payare Lal was the Tehsildar of Patiala. He and Bishan Chand, a Patwar clerk of the Tehsil Office, were prosecuted for offences under section 5(2) of the Prevention of Corruption Act, 1947. The Criminal Law Amendment Act, 1952 (Act XLVI of 1952), to which it will be convenient hereafter to refer as the Act, required the trial to be held by a special Judge appointed under it and in accordance with certain provisions of the code of Criminal Procedure mentioned in section 8 of the Act. The Principal question in this appeal turns on the construction of sub-section (1) of this section which we will later set out.

The trial commenced before S. Narinder Singh the special Judge, Patiala. He heard the evidence but before he could deliver a judgment he was transferred and was succeeded by S. Jagjit Singh. S. Jagjit Singh did not recall the witnesses and hear the evidence over again, but proceeded without any objection from either side, with the trial from the stage at which his predecessor had left it and having heard the arguments of the advocates for the parties, delivered his judgment convicting both the accused of the offences with which they had been charged and passed certain sentences on them.

The accused appealed against their conviction to the High Court of Punjab. The appeals came to be heard by Mehar Singh J., who, though no point had been taken by the accused, himself felt considerable difficulty as to whether S. Jagjit Singh had the power to decide the case on the evidence recorded by his predecessor and referred the matter to a larger bench taking the view that if the course followed was defective, the defect would be one of jurisdiction of the Court and could not be cured by the consent of parties.

The case was thereupon heard by a bench of that High Court constituted by Gurnam Singh and Mehar Singh JJ. who took different views. Gurnam Singh J. held that section 350 of the code applied to the trial before a special Judge in view of section 8(1) of the Act and under the terms of section 350, which we will later set out, S. Jagjit Singh was entitled to proceed on the evidence recorded by his predecessor S. Narinder Singh, while Mehar Singh J., was of the opinion that section 8(1) of the Act did not make section 350 of that Code applicable to such a trial. He also held that what S. Jagjit Singh had done was not a matter of mere irregularity curable under section 537 of the Code. The matter was then referred to Passey J., who agreed with Gurnam Singh J. On the question of section 537 of the Code, Gurnam Singh and Passey JJ. expressed no opinion in the view that they had taken of section 8(1) of the Act.

The appeals were thereafter heard on the merits by Tek Chand J. who upheld the conviction of the appellant but reduced the sentence passed on him. He, however, acquitted the other accused Bishan Chand, giving him the benefit of doubt. The appellant has now come up to this Court in further appeal with special leave. There is no appeal by the State against the acquittal of Bishan Chand.

There is no controversy that the general principle of law is that a judge or magistrate can decide a case only on evidence taken by him. Section 350 of the Code is a statutory departure from this principle. That section so far as material was at the date S. Jagjit Singh decided the case in these terms :

> Section 350. Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdictions, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself or he may resummon the witnesses and recommence the inquiry or trial.

It is only if this provision was available to S. Jagjit Singh that the course taken by him can be supported.

As we have said earlier, section 8 of the Act makes certain provisions of the Code applicable to the proceedings before a special Judge. The question is whether section 350 of the Code was one of such provisions. The answer to this question will depend on the construction of sub-sections (1) and (3) of section 8 of the Act, the material portions of which was now set out.

Section 8(1) - A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898... for the trial of warrant cases by magistrates.

(3) Save as provided in sub-section (1)..... the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special judge shall be deemed to be a Court of session trying cases without a jury or without the aid of assessors.....

In substance these sub-sections provide that a special Judge shall follow the procedure prescribed by the Code for the trial of warrant cases by magistrates and save to this extent, the provisions of the Code applicable to a Court of sessions, shall govern him as if he were such a Court subject to certain qualifications which are not relevant for the present case. There is no controversy that section 350 of the Code is applicable only to magistrates and not a Court of session and cannot therefore be applied to a special Judge under sub-section (3) as it makes only those provisions of the Code applicable to him which would apply to a Court of session. The only controversy is whether that section is applicable to a special Judge under sub-section (1) of section 8 of the Act. If it is so applicable, it must be applied though under sub-section (3) it is not applicable, for this sub-section is to have effect "Save as provided in sub-section (1) ".

The real question is, what is meant by the words "the procedure prescribed by the Code..... for the trial of warrant cases by magistrates" in section 8(1) of the Act ? Does section 350 of the Code prescribe one of the rules of such procedure ? It is necessary however to point out that by an amendment made in the Act after judgment had been delivered in this case by S. Jagjit Singh, it has

been expressly provided that section 350 of the Code applies to the proceedings before a special Judge. On the amended Act, therefore, the question that has arisen in this case, would no longer arise. For reasons to be hereafter stated, this amendment clearly does not govern the proceedings before S. Jagjit Singh and this case has to be decided without reference to the amendment.

Is was once held by the Madras High Court in In re Vaidyanatha Iyer ((1954) 1 M. L. J. 15; A. I. R. (1954) Mad. 350) that section 350 of the Code prescribed a rule of procedure for the trial of warrant cases as mentioned in section 8(1) of the Act. This seems to be the only reported decision taking that view. All other decisions which have been brought to our notice take the contrary view. Even in Madras, in In re Fernandez ((1958) II M. L. J. 294), a Full Bench of the High Court has now held that section 350 of the Code was not applicable to a special Judge and has overruled In re Vaidyanatha Iyer ((1954) 1 M. L. J. 15; A. I. R. (1954) Mad. 350). That appears to be the position on the authorities.

It is true that section 350 of the Code is a provision applying to all magistrates and therefore, also to a magistrate trying a warrant case. That however does not in our opinion decide the question. We think it relevant to observe that it is a right of an accused person that his cases should be decided by a judge who has heard the whole of it and we agree with the view expressed in Fernandez's case ((1958) II M. L. J. 294) that very clear words would be necessary to take away such an important and well established right. We find no such clear words here.

We turn now to the word used. When sub-section (1) of section 8 of the Act talks of a procedure prescribed by the Code for the trial of warrant cases by magistrates, it is reasonable to think that it has the provisions and the language of the Code in view. When we look at the Code, we find that ch. XXI is headed "Of the Trial of Warrant Cases by Magistrates". This chapter consists of sections 251 to 259. Section 251 is in these terms :

> Section 251 In the trial of warrant cases by Magistrates, the Magistrate shall, -
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> (a) in any case instituted on a police report, follow the procedure specified in section 251A; and
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> (b) in any other case, follow the procedure specified in the other provisions of this Chapter.

The Code, therefore, expressly refers to sections 251-259 as containing the procedure specified for the trial of warrant cases by magistrates; this then, is the procedure it prescribes for the trial of such cases. It would be legitimate, therefore, to think that the Act in using the words "procedure prescribed by the Code..... for the trial of warrant cases by magistrates" also meant only these sections of the Code and did not contemplate section 350 of the Code as a procedure so prescribed, though that section is applicable to the proceedings before a magistrate trying a warrant case. It does not seem to us that the words "the procedure prescribed by the Code..... for the trial of warrant cases by magistrates" meant a procedure which may be followed by magistrates in all cases. Further more section 350 occurs in a chapter of the Code which deals with general provisions relating to inquiries and trials and is not a provision which has been specifically prescribed by the Code for application to the trial of warrant cases by magistrates, as are sections 251 to 259.

Again, section 350 of the Code cannot, without doing violence to the language used in it, be applied to the proceedings before a special Judge. Clearly it cannot be applied where its terms make such

application impossible. Now the section can be applied only when one magistrate succeeds another. It lays down what the succeeding magistrate can do. Now suppose one special Judge succeeds another. How can he exercise the powers conferred by the section ? The section applies only when the predecessor is a magistrate. The predecessor in the case assumed is however a special Judge. Such a Judge is not a magistrate for the purpose of the Act, nor does the Act require that he is to be deemed to be such. Section 8(1) of the Act which only requires a special Judge to follow the procedure for the trial of a warrant case, cannot justify the creation of fiction making the predecessor special Judge, a magistrate. It is of some interest to note here that the amendment to the Act which expressly makes section 350 of the Code applicable to proceedings before a special Judge also provides that for the purposes of so applying the section, "a special Judge shall be deemed to be a magistrate". Clearly, the legislature thought that unless such a fiction was created, the application of the section to the proceedings before a special Judge would create difficulties or anomalies. Therefore also, the Act could not in our view, have intended that section 350 of the Code would be available to a special Judge as a rule of procedure prescribed for the trial of warrant cases.

For all these reasons, we would prefer the opinion expressed by Mehar Singh J. We think that under the Act, as it stood before its amendment as aforesaid, section 350 of the Code was not available when one special Judge succeeded another. We hold that S. Jagjit Singh had on authority under the law to proceed with the trial of the case from the stage at which S. Narinder Singh left it. The conviction by S. Jagjit Singh of the appellant cannot be supported as he had not heard the evidence in the case himself. The proceedings before him were clearly incompetent.

It is then said that this defect was a mere irregularity and the conviction of the appellant can, if sustainable on the evidence, be upheld under section 537 of the Code. In regard to this section, it was said by the Privy Council in Pulukuri Kotayya v. King Emperor ((1947) L. R. 74 I. A. 65, 75),

> "When a trial is conducted in an 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 section 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".

It seems to us that the case falls within the first category mentioned by the Privy Council. This is not a case of irregularity but want of competency. Apart from section 350 which, as we have said, is not applicable to the present case, the Code does not conceive of such a trial. The trial offends the cardinal principle of law earlier stated, the acceptance of which by the Code is clearly manifest from the fact that the Code embodies an exception to that principle in section 350. Therefore, we think that section 537 of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one.

Then it is said on behalf of the appellant that we should not send the case back for a fresh trial but decide it ourselves on the evidence on the record. Coming from the appellant, it is a somewhat surprising contention. According to him, a point which we have accepted, there has really been no proper trial of the case. It would follow from this that there has to be one. In the absence of such a trial we cannot even look at the evidence on the record.

Lastly, we have to say a few words on the amendment of the Act expressly making section 350 of

the Code applicable to the proceedings before a special Judge. The amendment came long after the decision of the case by S. Jagjit Singh and had not expressly been made retrospective. It was said on behalf of the respondent, the prosecutor, that the amendment being in a procedural provision was necessarily retrospective, and, therefore, no exception can now be taken to the action taken by S. Jagjit Singh. Assuming that the rule contained in section 350 of the Code is only a rule of procedure, all that would follow would be that it would be presumed to apply to all actions pending as well as future : Kimbray v. Draper ([1968] 3 Q. B. 160). Such a retrospective operation does not assist the respondent's contention.

Nor do we think it an argument against sending the case back for retrial that the special Judge now hearing the case would be entitled to proceed on the evidence recorded by S. Narinder Singh in view of the amendment. Whether he would be entitled to do so or not would depend on whether the amended Act would apply to proceedings commenced before the amendment. It has to be noted that the impugned part of the proceedings was concluded before the amendment. On this question, we do not propose to express any opinion. In any event, under section 350 as it now stands a succeeding magistrate has power to resummon and examine a witness further. We cannot speculate what the special Judge who tries the case afresh will think fit to do if section 350 of the Code is now applicable to the proceedings before him. For all these considerations, we think it fit to send the case back for retrial.

We therefore, allow the appeal and set aside the conviction of the appellant and the sentence passed on him. The case will now go back for retrial according to law.

Appeal allowed.

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