

P. C. Gulati

Vs

Lajya Ram Kapur and Others

Criminal Appeals Nos. 86 and 88 of 1965

(A. K. Sarkar, V. Ramaswami – I, Raghuvar Dayal JJ)

19.08.1965

JUDGMENT

RAGHUBAR DAYAL J. –

The sole question which determines these appeals is whether the High Court can transfer a case pending in the Court of a Magistrate to the court of the Additional Sessions Judge.

It is urged for the appellant, who had actually moved for the transfer of the case, that the High Court has no such power. The respondents contend that the High Court has such power.

Chapter XLIV of the Code of Criminal Procedure, hereinafter called the Code, deals with transfer of criminal cases. Section 526, in that chapter, empowers the High Court to pass the following orders whenever it is made to appear to the High Court that the requirement of either of clauses [a] to [e] of sub-s. [1] thereof exists:

"[i] that any offence be inquired into or tried by any Court not empowered under ss. 177 to 184 [both inclusive], but in other respects competent to inquire into or try such offence.

[ii] that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction:

[iii] that any particular case or appeal be transferred to and tried before itself; or

[iv] that an accused person be committed for trial to itself or to a Court of Session."

The language of clause [ii] is wide enough to provide for an order transferring a case from the court of a Magistrate to a court of session as both the Courts are subordinate to the High Court and the Court of session is a court superior in jurisdiction to that of a Magistrate.

Reference may be made to s. 6 which reads:

"Besides the High Court and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in India, namely:-

I - Courts of Session. II - Presidency Magistrates; III - Magistrates of the First class;

IV - Magistrates of the Second Class; V - Magistrates of the Third class.

It is clear that the Court are mentioned in the order of their superiority in respect of jurisdiction. It is not urged for the appellant that the language of cl. [ii] if sub-s. [1] of s. 526 does not give power to the High Court to transfer the case from a Court of a Magistrate to that the provisions of sub cl. [ii] should be so construed as to limit its provisions to the transfer of cases from the court of a Magistrate to another court of a Magistrate as otherwise there would be difficulties in the trial of the case by the Sessions Court when it is transferred to it form the court of a Magistrate.

The first difficulty urged is that s. 193 of the Code inter alia provides that except as otherwise expressly provided by the Code or by other law for the time being in force, no Court of session shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf; that there is no express provision in the code which empowers the Court of session to take cognizance of the case as a court of original jurisdiction when it be transferred to it by a High Court and that therefore the Court of Session is incompetent to take cognizance of such a case and try it.

Another difficulty suggested is that neither s. 526 nor any other provision of the Code provides for the procedure to be followed by the Sessions Judges in the trail of the case transferred to it by a High Court and that the procedure laid down for the trial of a case by the Court of Session will not be suitable for the trial of the transferred case as s. 271 of the code requires the court of session to commence the trial by reading the charge, a charge which according to other provisions of the Code is to be framed by the Magistrate who commits the case.

We do not consider any of these contemplated difficulties in the trial of the transferred case by the court of session to be of any significance.

We may deal with the second contention first. The omission to provide specifically the procedure to be followed in the trial of a case transferred to the Court of Session by the High Court in the exercise of its powers under s. 526 of the Code will not make the transfer illegal, when the language of cl. [ii] of sub-s. [1] confers the power on the High Court of transferring a case from the court of a Magistrate to the court of superior jurisdiction, which a court of Session is. Support for this contention was sought, for the appellant, from sub-s [2] of s. 526 which provides that when the High Court withdraws for trial before itself any case from any court other than a court of a Presidency Magistrate, it shall, except as provided for in s. 267, observe in such trail the same procedure which that court would have observed if the case had not been so withdrawn. It the withdrawal of the case is equivalent to the transfer of a case in exercise of powers conferred by cl. [iii] which empowers the High Court to ord

There is no difficulty in our opinion in the Court of Session trying the case transferred to it in accordance with the provisions of Chapter XXIII which deals with the procedure of trails before High Court and courts of Session. The court of Session has to follow the procedure laid down in this Chapter so far as that be applicable to the cases to be tried by it. This is clear not only from the heading of the Chapter but also from the provisions of S. 268 which require all trials before a Court of Session to be either by jury or by the Judge himself, and of s. 270 which require the Public Prosecutor to conduct the prosecution in every trial before a court of Session. Of course, special procedure laid down for particular type of cases and proceedings will the followed in those cases as special provisions over ride general provision of Chapter XXIII. Such special provisions are to be found in ss. 198B [5], 481 and 485A of the Code.

Section 271 provides that when the court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried. It does not say that the charge to be read must be the charge framed by the Magistrate who commits the case. It is the Session Judge who is to read out the charge on which the accused is to be tried by him. It may be that in the cases committed to the court of Session the Sessions Judge mostly reads the same charge which has been framed by the Magistrate. It is however open to him to re frame the charge and read out the charge as framed by him. In practice the Session Court does amend and add to the charge before proceeding with such cases and it is the charge as amended by him which is read out to the accused, the whole object of the charge being that the accused should know what offences he has to meet at the trial. The Sessions Judge

The other procedure for the trial of the accused is what is to be normally followed in the trial of warrant cases, and is laid down in ss. 286 to 292 and ss. 309 to 311. In certain cases the provision of s. 287 and 288 cannot however be complied with in the trial of cases transferred to the court of Session by the High Court if the accused has not been examined by the Committing Magistrate and if no evidence is recorded by him. Such a contingency can arise in the trial of cases committed by a Magistrate in pursuance of the provisions of s. 207A as it is not incumbent on him to examine any witness or the accused before committing him to the court of Session *Shri Ram v. State of Maharashtra*.

The provisions of s. 291 which refer to the summoning of witnesses for the accused may create a difficulty inasmuch as the accused is not given the right to have any witness summoned except as provided in ss. 207A, 211 and 231. The difficulty would be more theoretical than practical, as no Court will think of not affording an opportunity to the accused to summon defence evidence when in view of the transfer of the case by the High Court the accused could not comply with such provisions which require him in commitment proceeding to give a list of witnesses in the court of the Committing Magistrate.

We therefore do not consider that there arises any difficulty in the trial of the accused by the Court of Session in a case transferred to it by the High Court from the Court of a Magistrate.

We may now deal with the first objection which is really the main objection of the appellant about the trial of the case by a Session Judge on its being transferred to him by the High Court. Section 193 of the code prohibits the Court of Session to take cognizance of any offence as a court of original jurisdiction unless the accused is committed to it by a Magistrate or there is any other express provision in the Act. Such express provisions, according to the appellant, are to be found in a few sections of the Code. Section 198B empowers the court of Session to take cognizance of an offence under s. 500 I. P. C. on a complaint of the Public prosecutor without the case being committed to it for trial.

Section 480 empowers any Civil, Criminal or Revenue Court to take cognizance of the offences mentioned in that section and s. 485A empowers a Criminal Court to take cognizance of the offence committed by a witness on account of his non attendance in obedience to a summons. It is to be noticed that ss. 408 and 485A do not specifically mention the Court of Session, but these provisions can be availed of by that Court in view of the expression criminal court being wide enough to include a Court of Session.

Reference was also made to ss. 437 and 478, but they speak of commitment of the accused to the

Court of Session in certain circumstances.

Section 193 and the other section of the Code refer to the taking of cognizance of an offence by the Court of Session. The question is what amounts to the taking of cognizance of an offence by a court and whether the Court of Session's proceeding with a case transferred to it by the High Court, amounts to its taking cognizance of the offence under trial in the case.

Chapter XV of the code deals with jurisdiction of Criminal Courts in inquiries and trials. Part A consisting of ss. 177 to 189 deals with the place of inquiry or trial. These sections deal with the territorial jurisdiction of various Courts to enquire into or try offence. Part B deals with the conditions requisite for initiation of proceedings and therefore with the conditions governing the power of a court to commence, for the first time, proceedings in connection with offences about which the party aggrieved or the State desires to take action. Part B of Chapter XV consists of ss. 190 to 199B.

In *R. R. Chari v. The State of Uttar Pradesh* this court approved of the following observations of Das Gupta J. in *Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Bannerjee*:

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190 [1] [a], Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156 [3], or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.

When the Session Court receives a case on transfer by the High Court it is not to consider whether it should proceed or not with the case. It has to proceed with the case as it has been transferred to it by the High Court. There is therefore no occasion for the Court of Session to take cognizance of the offence in the sense that it has to determine whether the proceeding should be initiated in connection with the offence or not. The proceedings have been already initiated by the Magistrate and have been simply transferred to it. It has simply to proceed with the inquiry or trial as the case may be as the case has been made over to it by the High Court.

A consideration of the provisions of the various section in Part B of Chapter XV of the Code dealing with initiation of proceedings also makes out the difference between the taking of cognizance of a case and the subsequent inquiry and trial of the offence of which cognizance has been taken. Section 190 provides that Magistrate can take cognizance of a case in either of the three ways mentioned in sub-s. [1]. Section 191 provided for the transfer or commitment of the case in which the Magistrate has taken cognizance of the offence under sub-s. [1] [c] of s. 190 i.e. on information received from any person other than a police officer or upon his own knowledge or suspicion that an offence has been committed, if the accused objects to being tried by that Magistrate. The provisions of this section made a distinction between the taking of cognizance of an offence and its subsequent trial by that Magistrate or by another Court. Similarly, s. 192 provides

for the transfer of a case, of which the Magistrate mentione

When a case is committed to the court of session, the court of session has first to determine whether the commitment of the case is proper. If it be of opinion that the commitment is bad on a point of law, it has to refer the case to the High Court which is competent to quash the proceeding under s. 215 of the Code. It is only when the Session Court consider the commitment to be good in law that it proceeds with the trial of the case. It is in this context that the Session Court has to take cognizance of the offence as a court of original jurisdiction and it is such a cognizance which is referred to in s. 193.

We are therefore of opinion that the further proceedings by the Court of Session in a case transferred to it by the High Court are not barred by s. 193 of the Code.

Further it would be incongruous if the High Court be competent to transfer a case from the Court of a Magistrate to itself and try it but it be not competent to transfer a case to the Court of Session. There does not appear to be any reason which would have induced the legislature to contemplate the application of cl. [ii] of sub-s [1] of s. 526 to the transfer of cases from the court of a Magistrate to the court of any other magistrate of equal or superior jurisdiction and not to the Court of Session. Clause [iv] expressly mentions the power of the High Court to order commitment of an accused person for trial to itself or to a court of Session. Such an order can however be passed only when the proceedings in the Court of the Magistrate have reached that stage when it be possible for the High Court to direct the committal of the accused to the court of Session or to itself. An order for the commitment of the accused cannot be passed at any earlier stage while the transfer of a case can be made at any s

Lastly, reference maybe made to s. 527 of the Code which empowers the Supreme Court to direct that any particular case or appeal be transferred from one High Court to another High Court or from a criminal court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. The language of the section empowers this court to transfer a case from the court of a Magistrate of equal or superior jurisdiction, or to a court of Session, subordinate to another High Court. This Court actually transferred one case from the Court of a Magistrate to the Court of an Additional Sessions Judge as is clear from the judgment of this Court in Harbhajan Singh v. State. It may also be mentioned that there is nothing in s. 527 about the procedure which the transferee court has to adopt for the further progress of the case. Sub-s. [3] of s. 527 simply gives an option to the transferee court to act on the evidence already recorded or partly so recorded and partly recorde

We are therefore of opinion that the High Court is competent under s. 526 [1] [ii] of the Code to transfer a case from the Court of a Magistrate to the Court of the Session Judge.

The order under appeal in Cr. A 88 of 1965 dated March 13, 1964, transferring the case to the court of the Additional Session Judge is therefore correct. We therefore dismiss this appeal. Cr. A. 86 of 1965 is also against the order of the High Court dated March 13, 1964 allowing the revision against the order of the Session Judge refusing to transfer the case from the Court of the Magistrate. That order being correct, we dismiss Cr. A. 86 of 1965.

Cr. A. 87 of 1965 is against the order of the High Court refusing to review its order of transfer dated March 13, 1964. That appeal is therefore dismissed as infructuous.

RAMASWAMI, J. –

I regret that I do not agree to the judgment pronounced by my learned brother Dayal, J.

The appellant, P. C. Gulati filed a criminal complaint under s. 500, Indian Penal Code against the respondents-Lajya Ram Kapur and Diwan Chand Kapur in the Court of the Sub Divisional Magistrate, New Delhi. Later on, the appellant made an application under s. 528, Criminal Procedure Code to the Session Judge praying for the transfer of the case from the court of the sub Divisional Magistrate to another court of competent jurisdiction, but the application was dismissed. The appellant thereafter filed a Revision Petition, Criminal Revision no 30-D/64 in the Circuit Bench of the Punjab High Court against the order of the Sessions Judges refusing transfer of the case. The appellant also filed as application, Criminal Miscellaneous 63-D of 1964 under s. 526 of the Criminal Procedure Code in the Circuit Bench of the Punjab High Court for transfer of the cases. On March 13, 1964 the learned Chief Justice of the High Court allowed the Revision Petition and also the application under s. 526 of the Criminal Procedure h 13, 1964 in Criminal Revision no. 30-D/64 and Criminal Miscellaneous 63-D of 1964 transferring the complaint to the court of the Additional sessions Judge Delhi for disposal. Criminal appeal no. 87 of 1965 is brought, by special leave, against the order of the learned Chief Justice, Punjab High Court dated March 12, 1965 refusing to review his previous order dated March 13, 1964.

The first question arising for determination in this case is whether the Additional Sessions Judge, Delhi has jurisdiction to try the Criminal case filed by the appellant without any order of commitment of the respondents by a competent Magistrate, Section 193 [1] of the Criminal Procedure Code states.

"193. [1] Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

Section 526 of the Criminal Procedure Code states:

"526. [1] Whenever it is made to appear to the High Court:-

[a] that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

.....

[1] that such an order is expedient for the ends of justice, or is required by any provision of this code: it may order -

[i].....

[ii] that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction:

..... .

On behalf of the respondents it was submitted by Mr. Anand that the Additional Session Judge has jurisdiction to proceed with the trial of the Criminal case in view of the order of transfer made by the High Court and procedure to be followed should be that of a warrant case as contemplated by s. 526 [2] of the Criminal Procedure Code which states:

"526. [2] When the High Court withdraws for trial before itself any case from any Court other than the court of a Presidency Magistrate, it shall, except as provided in Section 267, observe in such trial the same procedure which that court would have observed if the case had not been so withdrawn."

It was conceded by the learned Counsel that the provision of s. 526 [2] applies only to a case which has been withdrawn by the High Court for trial before itself from any other Criminal Court subordinate to it but it was contended that the principle of that sub section should apply also to criminal case transferred by the High Court to the Additional Sessions Judge from the Court of a Magistrate. In my opinion there is no warrant fro this argument. It is manifest that s. 526 of the Criminal procedure Code does not expressly provide for the procedure to be followed by the Additional Sessions Judge in a case of this description. It follows, therefore, that for the trial of a case of this description the legislature has not enacted any express provisions to the contrary within the meaning of s. 193 [1], Criminal Procedure, Code. This view is supported by reference to s. 526 [2], Criminal Procedure Code which is an express provision with regard to the trial of a case transferred by the High Court to itself from

"198 B. [1] Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code [Act XLV of 1860]. [Other than the offence of defamation by spoken words]. Is alleged to have been committed against the President, or the Vice- President, or the Governor or Rajpramukh of a State, or a Minister, or any other public servant employed in connection with the affairs of the Union or of a state, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the public prosecutor.

[2] Every such complaint shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

[3].....

[4] No Court of Session shall take cognizance of an offence under sub- section [1], unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

[5] When the Court of Session takes cognizance of an offence under sub- section [1], then notwithstanding anything contained in this Code, the court of session shall try the case without a jury and in trying the case, shall follow the procedure prescribed for the trial by Magistrate of warrant cases instituted otherwise than on a police report and the person again whom the offence is alleged to have been committed shall, unless the court of session, for reasons to be recorded otherwise directs, be

examined as a witness for the prosecution.

There is no provision in the Criminal Procedure Code similar to s. 198B or s. 526 [2] with respect to the mode of trial of the Criminal cases which are transferred direct from the court of the Magistrate to the Court of Additional Session Judge without an order of commitment being made. In the absence of any express provisions Judge has no jurisdiction to proceed with the trial of a Criminal case which has been transferred to it by the High Court.

If this view is right it follows that the High Court is not competent to transfer the Criminal case from the file of the Sub Divisional Magistrate court to the of the Additional Session Judge, Delhi under the provisions of s. 526 [1] [ii] of the Criminal Procedure Code. The argument was stressed by Mr. Anand on behalf of the respondents that the language of s. 526, Criminal Procedure Code contained no limitation and that it was open to High Court to transfer any particular case from a Criminal Court subordinate to its authority to any other Criminal Court of equal or superior jurisdiction. I do not consider that there is any justification for this argument. The language of s. 526 [1] [ii] cannot be read in isolation and cannot be given effect to without regard to the mandatory provisions of s. 193 of the Criminal Procedure Code. On the contrary, the power of transfer given to the High Court under s. 526 [1] [ii] must be so interpreted as not to conflict with the language of s. 193, Criminal Procedure Code. I

For the reasons expressed I set aside the order of the learned Chief Justice of the Punjab High Court dated March 13, 1964 and in its place I direct that the Criminal case filed by the appellant should be transferred to the Court of any other 1st Class Magistrate stationed at Delhi to be selected by the learned Chief Justice of the Punjab High Court under s. 526 [1] [iv] of the Criminal procedure Code. Criminal appeals Nos. 86 and 88 of 1965 are accordingly allowed.

In view of this order Criminal Appeal No. 87 of 1965 has become infructuous and is accordingly dismissed.

ORDER

In accordance with the majority judgment the appeals are dismissed.

</html