Thakur Ram

Vs

The State of Bihar

Criminal Appeals Nos. 165-168 of 1962

(R. S. Bachawat, J. R. Mudholkar, R. Satyanarayan Raju JJ)

26.11.1965

JUDGMENT

MUDHOLKAR, J. -

This judgment will also govern Crl. As. No. 166 of 1962, 167 of 1962 and 168 of 1962. A common question arises in these appeals from a judgment of the Patna High Court dismissing four revision applications preferred before it by four sets of appellants in the appeals before us. Counsel on both the sides agree that since the relevant facts of all the proceedings are similar and the question of law arising from them is the same it will be sufficient to refer to the facts of Case No. TR 320/60.

Four informations were lodged at the police station, Ghora Saha on April 14, 1960 by different persons against the different appellants in these cases and a similar information was lodged against some of the appellants by one Mali Ram. In all these cases the allegations made by the informants were that each set of the accused persons armed with deadly weapons went to the shops of the various informants, demanded from them large sums of money and threatened them with death if they failed to pay the amounts demanded by them. The informations also stated that some of these persons paid part of the money and were given time to pay the balance while some agreed to pay the amounts demanded. Upon informations given by these persons offences under s. 392, Indian Penal Code, were registered by the station officer and after investigation five challans were lodged by him, in the court of Magistrate, First Class at Motihari. One of the cases ended in an acquittal but we have not been informed of the date of the judgment in that case. In the other four cases trial had come to a close in that all the prosecution witnesses and the defence witnesses had been examined and the cases had been closed for judgment.

In the case against the appellants in Crl. A. 165 of 1962 the challan was presented on October 27, 1960. The order sheet of that date reads as follows :

> #----------Date of order Order with the Office actionS.No. or signature of taken withproceeding the Court date----------1. 27-10-1960 All the 4 accused are present. Heard both sides. It is argued on behalf of the prosecution that it is a fit case for adopting procedure under Chapter XVIII Cr. P.C. and also that the entire occurrence relates to offences committed on 4 dates so that all of them cannot be dealt with in a single case. Discussed law point----------##
>
> "Charge u/s 302, I.P.C. framed against accused Thakur Ram and Jagarnath Pd. and

> explained to them. They plead not guilty. This case will constitute an independent case. As for the other parts of the alleged occurrence accused Jagarnath, Kamal Ram and Bansi Ram are charged separately u/s 384, I.P.C. and further accused Thakur Ram u/s 384/109, I.P.C. and explained to the respective accused. They plead not guilty. These charges relating to three incidents on 3 dates will constitute a separate single case.
>
> Start separate order sheet for both. Summons P.W. for 26-10-60 and 27-11-60.
>
> Accused as before.
>
> Sd./ O. Nath".

The trial dragged on for nearly 15 months and then the prosecution made an application to the court for framing a charge under s. 386 or s. 387, Indian Penal Code and for committing the case to a court of Sessions. This was disposed of by the learned Magistrate on January 25, 1962. The relevant portion of his order sheet of that date reads thus :

> "Accused absent. A petition for their representation u/s 540-A, Cr.P.C. is filed. Allowed. No reference book is produced. Persued the record. The prosecution has pressed to refer the case to the Court of Sessions u/s 386 or 387 I.P.C. On close scrutiny I find that the robbery defined inside 390 I.P.C. fully cover the ingredients pointed out and asked by the prosecution side. The case has entered in the defence stage. This point was not introduced ever before. The charge was framed u/s 392, I.P.C. after hearing the parties. Although it may be referred to the superior court at any stage, I find no reason to do so.
>
> Put up on 28-2-62. All accused to appear with D.Ws without fail. Accused as before."

On February 28, 1962 the prosecution moved a petition for stay of proceedings on the ground that it wanted to prefer an application for revision of the order of January 25, 1962. Stay was refused and the case was proceeded with. On March 17, 1962 the defence case was closed and the case was fixed for March 29, 1962 for arguments. On that date a second application was made for committing the case to a court of Sessions. It would appear from the order sheet of March 29, 1962 that the Magistrate heard the parties and ordered the case to be put up on the next day, that is March 30, 1962. On this day the Magistrate passed an order to the following effect :

> "30-3-62 - All the 2 accused persons are present. Having carefully gone through the law points and section 236 Cr.P.C. I do not find that it is a case exclusively coming u/s 386 or 387 I.P.C. Hence the prosecution prayer is rejected."

Immediately thereafter a revision application was preferred, not by the prosecution, but by Sagarmal, an information in one of the other three cases. The Sessions Judge, Champaran, after briefly reciting the facts and reasons on which the order of the trying Magistrate was founded, disposed of the revision application in the following words :

> "The cases are of very serious nature and the framing of charges under sections 386 or 387, I.P.C. cannot be ruled out altogether. Consequently, I direct that each of these cases should be tried by a Court of Session. The learned Magistrate will commit the

accused persons for trial accordingly. The applications are thus allowed."

An application for revision was preferred by the appellants before the High Court and the main ground urged on their behalf was that the Sessions Judge had no jurisdiction to pass an order for commitment as there was no order of discharge by the Magistrate. There is conflict of authority on the question whether under s. 437, Cr.P.C. a Sessions Judge can, in the absence of an express order of discharge, direct commitment of a case to it while the trial is proceeding before a Magistrate in respect of offences not exclusively triable by a Court of Sessions. After referring to some decisions and relying upon two decisions of the Allahabad High Court the learned Judge who disposed of the revision application observed as follows :

> "As I have already indicated, in the instant cases, the trial Magistrate, after hearing to parties, refused to frame a charge for the major offence under section 386 or s. 387 of the Indian Penal Code. The refused by the Magistrate to frame a charge under section 386 or 387 of the Indian Penal Code was a final order and it amounted to an order of discharge of the accused of the offence under those sections. That being the position, the learned Sessions Judge had full jurisdiction to order for commitment."

The learned Judge further observed :

> "Without expressing any opinion on the merits of the four cases, I would state, that, on the material on record, the Sessions Judge was not unjustified in passing the impugned order for commitment of the accused in the four cases. The order of the Magistrate refusing to frame a charge under section 386 or s. 387 of the Indian Penal Code, Which amounted to an order of the implied discharge of the accused, was improper in all the four cases."

and dismissed the revision applications.

An application was made for a certificate of fitness to appeal to this Court. That was rejected and the appellants have come here by special leave.

The ambit of the powers of the Sessions Judge under s. 437, Cr. P.C. has been considered by a Full Bench of the Allahabad High Court in Nahar Singh v. State (I.L.R. [1952] 2 All. 152.). In that case it was held that the powers conferred by that section are exercisable only in a case where a Magistrate by an express order discharges an accused person in respect of an offence exclusively triable by a court of Session. The learned Judges constituting the Full Bench have taken the view that in the light of certain provisions of the Code to which they adverted, the failure of or refusal by a Magistrate to commit an accused person for trial by a court of Sessions does not amount to an implied discharge of the accused person so as to attract the power of the Sessions Judge under s. 437, Cr.P.C. to direct the Magistrate to commit the accused person for trial by a court of Sessions on the ground that the offence is exclusively triable by a Court of Sessions. The Full Bench decision has been followed in Sri Dulap Singh & ors. v. State through Sri Harnandan Singh (A.I.R. 1954 All. 163.). Before us reliance is also placed on behalf of the appellants on the decision in Yunus Shaikh v. The State (A.I.R. 1953 Cal. 567.). That decision, however, is of little assistance to them because the ground on which the High Court set aside the order of the Sessions Judge is not that he had no jurisdiction to make it under s. 437, Cr.P.C. but that the action of the Magistrate in not framing a charge under s. 366 of the Indian Penal Code but framing a charge only under s. 498, I.P.C. did not, in the light of the material before him, amount to an improper discharge of the accused in respect of

an offence triable by a Court of Sessions. The view taken by the Allahabad High Court has been accepted as correct in Sambhu Charan Mandal v. The State (60 C.W.N. 708.). On the other hand a Full Bench of the Madras High Court has held in in re Nalla Baligadu (A.I.R. 1953 Mad. 801.) that where under s. 209(1) a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such person to be tried before himself or some other Magistrate, the revisional powers under s. 437, Cr.P.C. can be exercised before the conclusion of the trial before such Magistrate. The learned Judges expressly dissented from the view taken by the Full Bench of the Allahabad High Court. This decision has been followed in Rambalam Pd. Singh v. State of Bihar (A.I.R. 1960 Patna 507.). Other decisions which take the same view as the Madras High Court are : Krishnareddi v. Subbamma (I.L.R. 24 Mad. 136.); Shambhooram v. Emperor (A.I.R. 1935 Sind 221.); Sultan Ali v. Emperor (A.I.R. 1934 Lahore 164.); and in re Valluru Narayana Reddy & ors (A.I.R. 1955 Andhra 48.).

In order to decide the question which has been raised before us it would be desirable to bear in mind the relevant provisions of the Code of Criminal Procedure. Section 207 provides that in every inquiry before a Magistrate where the case is triable exclusively by a Court of Sessions or High Court, or, which in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate must in any proceeding instituted on a police report, follow the procedure specified in s. 207-A. Under s. 207-A the Magistrate, after perusing the police report forwarded under s. 173, has to fix a date for hearing and require the production of the accused on that date. He has also the power to compel the attendance of such witnesses or the production of any document or thing on that date if an application is made in that behalf by the officer conducting the prosecution. On the date of hearing the Magistrate, after satisfying himself that copies of the documents referred to in s. 173 have been furnished, has to proceed to take the evidence of such persons, if any, as are produced as witnesses to the actual commission of the offence. After the examination of those witnesses and after their cross-examination by the accused the Magistrate may, if he thinks it necessary so to do in the interest of justice, take the evidence of any one or more of the other witness for the prosecution. He has then to examine the accused for the purpose of enabling him to explain the circumstances appearing in the evidence against him and hear both the prosecution as well as the accused. If at that stage he is of opinion that no ground for committing the accused for trial exists, the Magistrate can, after recording his reasons, discharge the accused. If, however, it appears to the Magistrate that such person should be tried by himself or some other Magistrate he must proceed accordingly. This contingency will arise if the Magistrate forms an opinion that no case exclusively triable by a Court of Sessions is disclosed but a less serious offence which it is within the competence of the Magistrate to try is disclosed. In that case he has to proceed to try the accused himself or send him for trial before another Magistrate. Where the Magistrate is of opinion that the accused should be committed for trial he has to frame a charge and declare with what offence the accused should be charged. With the remaining provisions of s. 207-A we are not concerned. It will thus be seen that where the police report suggests the commission of an offence which is exclusively triable by a Court of Sessions, the Magistrate can nevertheless proceed to try the accused for an offence which is triable by him if he is of the view that no offence exclusively triable by a Court of Session is disclosed. Similarly, even in a case where an offence is triable both by a Magistrate and a Court of Sessions, the Magistrate is of the view that the circumstances do not warrant a trial by a Court of Sessions he can proceed with the trial of the accused for that offence himself. Section 347 which occurs in chapter XXIV headed "General provisions as to Inquiries and Trials" empowers a Magistrate to commit a person for trial by a Court of Sessions if in the course of the trial before him and before signing the judgment it appears to him at any stage of the proceeding that the case ought to be so tried. These provisions would thus indicate that an express order of discharge is

contemplated only in a case where a Magistrate comes to the conclusion that the act alleged against the accused does not amount to any offence at all and, therefore, no question of trying him either himself or by any other court arises. They also show that where an accused person is being tried before a Magistrate in respect of an offence triable by that Magistrate it appears to the Magistrate that the act of the accused amounts to an offence which is triable either exclusively or concurrently by a Court of Sessions he has the power to order his committal. This power, however, has to be exercised only before signing the judgment. It cannot obviously be exercised thereafter because of the provisions of s. 403(1) which bar the trial of the person again not only for the same offence but also for any other offence based on the same facts. It would follow from this that where on a certain state of facts the accused is alleged by the prosecution to have committed an offence exclusively triable by a Court of Sessions but the Magistrate is of the opinion that the offence disclosed is only an offence which he is himself competent to try and either acquits or convicts him there is an end of the matter in so far as the very set of facts are concerned. The facts may disclose really a very grave offence such as, say, one under s. 302, I.P.C. but the Magistrate thinks that the offence falls under s. 304-A which he can try and after trying the accused either convicts or acquits him. In either case the result would be that the appropriate court will be prevented from trying the accused for the grave offence which those very facts disclose. It is to obviate such a consequence and to prevent inferior courts from clutching at jurisdiction that the provisions of s. 437, Cr.P.C. have been enacted. To say that they can be availed of only where an express order of discharge is made by a Magistrate despite the wide language used in s. 437 would have the result of rendering those provisions inapplicable to the very class of cases for which they were intended. When a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Sessions what the Magistrate has to be satisfied about is whether the Material placed before him makes out an offence which can be tried only by the Court of Sessions or can be appropriately tried by that Court or whether it makes out an offence which he can try or whether it does not make out any offence at all. In Ramgopal Ganpatrai v. State of Bombay ([1958] S.C.R. 618.) this Court has pointed out :

> "In each case, therefore the Magistrate holding the preliminary inquiry, has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and unless he is so satisfied, he is not to commit."

It has, however, also to be borne in mind that the ultimate duty of weighing the evidence is cast on the court which has the jurisdiction to try an accused person. Thus, where two views are possible about the evidence in a case before the Magistrate, it would not be for him to evaluate the evidence and strike a balance before deciding whether or not to commit the case to a Court of Sessions. If, instead of committing the case to a Court of Sessions, he proceeds to try the accused upon the view that the evidence found acceptable by him only a minor offence is made out for which no commitment is required he would obviously be making an encroachment on the jurisdiction of the appropriate court. This may lead to miscarriage of justice and the only way to prevent it would be by a superior court stepping in and exercising its revisional jurisdiction under s. 437 Cr.P.C.

There is nothing in the language of s. 437 from which it could be said that this power is not exercisable during the pendency of a trial before a Magistrate or that this power can be exercised only where the Magistrate has made an express order of discharge. Express orders of discharge are not required to be passed by the Court in cases where, upon the same facts, it is possible to say that though no offence exclusively or appropriately triable by a Court of Sessions Judge is made out, an offence triable by a Magistrate is nevertheless made out. One of the reasons given by the Allahabad High Court in support of the view taken by it is that a Magistrate has power even during the course

of the trial to commit the accused to a Court of Sessions and that to imply a discharge from his omission to commit or refusal to commit would not be consistent with the existence of the Magistrate's power to order commitment at any time. That does not, however, seem to be a good enough ground for coming to this conclusion. The power to commit at any stage is exercisable by virtue of the express provisions of s. 347 or s. 236 and a previous discharge of an accused from a case triable by a Court of Sessions would not render the power unexercisable thereafter. Moreover, even if an express order of discharge is made by a Magistrate in respect of an offence exclusively triable by a Court of Sessions but a trial on the same facts for a minor offence is proceeded with the Magistrate has undoubtedly power to order his commitment in respect of the very offence regarding which he has passed an order of discharge provided of course the material before him justifies such a course. There is nothing in s. 347 which precludes him from doing this. It will, therefore, be not right to say that the power conferred by s. 437 is exercisable only in respect of express orders of discharge. In this context it will be relevant to quote the following passage from the judgment of the Full Bench of the Madras High Court in Krishna Reddy's case (I.L.R. 24 Mad. 136.) :

> "I do not think that the order of the Sessions Judge was one which he had no jurisdiction to make. In my view the decision of the Magistrate must be taken to be not only one of acquittal of an offence punishable under section 379, Indian Penal Code, but one of discharge so far as the alleged offence under section 477, Indian Penal Code is concerned. The complaint against the accused was that he committed an offence punishable under section 477, Indian Penal Code. Such offence is triable exclusively by the Court of Sessions. The Magistrate could neither acquit nor convict him of such offence. He was bound either to commit him to the Sessions Court or to discharge him. He did not commit him. The only alternative was to discharge him, and that, I take it, is what the Magistrate really did do. It is not suggested that the charge under section 477 is still pending before the Magistrate. It has been disposed of, and the only question is as to what the disposal has been. It seems to me that the accused has been discharged so far as the charge under section 477 is concerned. The Magistrate's order, if stated fully, should have been 'I discharge him as regards the offence punishable under section 477, and I acquit him as regards the offence punishable under section 379."

We agree and are, therefore, of the view that the High Court was right in holding that the Sessions Judge had jurisdiction to make an order directing the Magistrate to commit the case for trial by a Court of Sessions.

The provisions of s. 437, however, do not make it obligatory upon a Sessions Judge or a District Magistrate to order commitment in every case where an offence is exclusively triable by a Court of Sessions. The law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which has to be considered in this case is whether the intervention of the revising authority was sought by the prosecution at an early stage. It would be seen that an attempt to have the case committed failed right in the beginning and was repeated not earlier than 15 months from that date. The second attempt also failed. Instead of filing an application for revision against the order of the Magistrate refusing to pass an order of commitment the prosecution chose to make a second application upon the same facts. It may be that successive applications for such a purpose are not barred but where a later application is based on the same facts as the earlier one the Magistrate would be justified in refusing it. Where the Magistrate has acted in this way the revisional court ought not to with propriety interfere unless there are strong grounds to justify interference. While rejecting the application on January 25, 1962 the ground given by the learned

Judge was that the case had already entered the defence stage and the attempt to have the committal was very belated. Matters had advanced still further when a third attempt failed on March 30, 1962. By that date not only had the defence been closed and arguments heard, but the case was actually closed for judgment. It would be a terrible harassment to the appellants now to be called upon to face a fresh trial right from the beginning which would certainly be the result if the Magistrate were to commit the appellants for trial by a Court of Sessions now. It is further noteworthy that after the last attempt failed it was not the prosecution which went up in revision before the Sessions Judge but the informants and, as pointed out earlier, in the matter concerning the appellants before us it was not even the informant Shyam Lall but one Sagarmal, the informant in another case who preferred a revision application. In a case which has proceeded on a police report a private party has really no locus standi. No doubt, the terms of s. 435 under which the jurisdiction of the learned Sessions Judge was invoked are very wide and he could even have taken up the matter suo motu. It would, however, not be irrelevant to bear in mind the fact that the court's jurisdiction was invoked by a private party. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few except one, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book. In our opinion it was injudicious for the learned Sessions Judge to order the commitment of the appellants particularly so without giving any thought to the aspects of the matter to which we have adverted. Even the High Court has come to no positive conclusion about the propriety of the direction made by the Sessions Judge and has merely said that the Sessions Judge was not unjustified in making the order which he made in each of the applications. For all these reasons we allow the appeals, quash the orders of the Sessions Judge as affirmed by the High Court and direct that the trials of each of the appellants shall proceed before the Magistrate according to law from the stages at which they were on the date on which the stay order became operative.

Appeals allowed.

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