Raj Kishore Prasad

Vs

State of Bihar and Another

Criminal Appeal No. 583 of 1996

(M. M. Punchhi, K. T. Thomas JJ)

01.05.1996

JUDGEMENT

PUNCHHI, J.:–

1. Special leave granted.

2. Can a Magistrate undertaking commitment under Section 209, Cr. P. C. of case triable by a Court of Session, associate another person as accused, in exercise of power under Section 319 of the Code of Criminal Procedure, or under any other provision, is the significant question which crops up for consideration in this appeal.

3. This first informant (the second respondent herein) Chandra Madho Singh, resident of Buxor, Bihar learnt on 6-3-1994 at about 7-30 p. m. that his brother Sudhir was under attack by means of an iron rod at the hands of Avadh Kishore alias Pagalwa in front of the latter's shop. When he came close to the place of occurrence, he found the accused abusing and saying to the victim that he would not let him remain alive. On seeing the first informant and his helpers having come, the assailant ran away from the spot. The first informant removed his injured brother to the Hospital and kept attending to him during night. Next morning on 7-3-1994, the injured expired. Thereafter at about 10 a. m. the first informant reported the matter to the police naming Avadh Kishore alias Pagalwa as the sole accused of the crime.

4. It appears that during investigation two witnesses namely Sudama Singh and Srikant Misra claimed to have seen and heard before hand the present appellant Raj Kishore Prasad (statedly about 18 years of age), the brother of Avadh Kishore alias Pagalwa, to have exhorted the accused to kill the deceased, whereafter the actual assailant is said to have assaulted the deceased.

5. The investigation was conducted by the local police officers, which was supervised by the Sub-Divisional Officer, Buxor and Superintendent of Police, Buxor, During the course of supervision, it transpired that there was not sufficient evidence or reasonable ground for suspicion that the appellant was involved in he crime and he was thus found to be innocent, more so when those two witnesses had not come forward to own their version before the supervising high officers. It is on that basis that the police filed report against the actual assailant only, on the basis that the appellant was not involved in the crime.

6. When the papers were laid before the Chief Judicial Magistrate, Buxor, the first informant made an application requiring the Magistrate to exercise his powers to summon the appellant so as to send him to stand trial along side the accused sent up by the police, before the Court of Session. The

Chief Judicial Magistrate dismissed the application of the first informant which led to a revision petition by the first informant before the Court of Session. The Court of Session allowed the revision petition and desired of the Chief Judicial Magistrate issuance of warrant of arrest of the appellant to face trial. It was then the appellant's turn to move the High Court under Section 482, Cr. P. C. praying for quashing of the orders of the Court of Session. Since the same was dismissed by the High Court, the appellant is here before us inter alia contending that at the stage set for employing Section 209, Cr. P. C., the Chief Judicial Magistrate has no power under Section 319 of the Code or otherwise, to add an accused in addition to the one facing commitment. Hence this appeal by special leave.

7. Section 209 and 319 of the Code of Criminal Procedure which play their part are set out below, one after the other :

> "209. COMMITMENT OF CASE TO COURT OF SESSION WHEN OFFENCE IS TRIABLE EXCLUSIVE Y BY IT – When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall –
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> (a) commit, after complying with the provisions of Section 207 or Section 208, as the case may, be the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;
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> (b) subject to the provisions of this Code relating to bail, remand the accused to custody during and until the conclusion of the trial;
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> (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;
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> (d) notify the Public Prosecutor of the commitment of the case to the Court of Session."
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> "319. POWER TO PROCEED AGAINST OTHER PERSONS APPEARING TO BE GUILTY OF OFFENCE–(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
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> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
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> (3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the enquiry into, or trial of, the offence which he appears to have committed.
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> (4) Where the Court proceeds against any person under sub-section (1), then–
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> (a) the proceedings in respect of such person shall be commenced afresh, and the

witnesses reheard;

(b) subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the inquiry or trial was commenced."

8. Sub-section (1) of Section 319 makes it clear that it operates in an on-going inquiry into, or trial of, an offence. In order to apply Section 319, it is thus essential that the need to proceed against the person other than the accused, appearing to be guilty of offence, arises only on evidence recorded in the course of any inquiry or trial. Proceedings before Magistrate under Section 209, Cr. P. C. are patently not trial proceedings and were never considered so at any point of time historically. There has never been any doubt on that account. Before the amendment of the Code of Criminal Procedure in the present form, commitment proceedings had the essential attributes of an inquiry and were termed as such. Now do they continue to be so is the core question, to determine and spell out the powers of the Magistrate under Section 209, Cr. P. C. If proceedings under Section 209, Cr. P. C. continue to be an inquiry, Section 319, Cr. P. C. would be obviously attracted, subject of course to deciding whether the material put-forth by the investigation could be termed as 'evidence', as otherwise no evidence is recordable by a Magistrate in such proceedings.

9. While enacting the Code of Criminal Procedure, 1973, the prefatory note before the Parliament containing 'Objects and Reasons' gave out the changes proposed to be made with a view to speed up the disposal of criminal cases. Item (a) specifically provided "the preliminary inquiry which precedes the trial by a Court of Session, otherwise known as committal proceedings, is being abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences."

10. The Law Commission beforehand in its 41st Report while recommending change on the subject opined as follows:–

"17. 11 –Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the Court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we propose in regard to such offences, the provision in this respect can take a simple form and can be placed in this chapter as forming part of the commencement of proceedings before Magistrate. It will be convenient to refer to this process as "commitment of the case of the Court of Session" although the procedure is redically different from the commitment proceedings at present provided in chapter 18.

(ii) Cl. 214 (S. 209)–"Preliminary inquires by Magistrate in cases exclusively triable by the Court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of inquiry provided for by the amendments made in 1955 and contained in Section 207-A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems. Preliminary inquires are, therefore, being dispensed with a case triable by a Court of Session. like granting copies, preparing the records, notifying the Public Prosecutor, etc. provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit it the case to the Court of Session. As regards private

> complaints in cases triable exclusively by a Court of Session the inquiry into the complaint by the Magistrate under the existing Section 202 will serve the purpose of a preliminary scrutiny." – S. O. R. Gaz. of Ind. 10-12-1970, Pt. II, S. R, Extra, p. 1309 (1320)."

(Empasasis supplied)

11. The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquires then know as "committal proceedings" have been abolished in case triable by a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the Public Prosecutor etc, are thus preliminary or ministerial in nature. It is of course true that the Magistrate at the juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of Session is in order, so that it can proceed straightaway with the trial and that nothing is lacking in content, as per requirement of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of "inquiry" as defined in Section 2 (g) of the Code of Criminal Procedure, which defines that "inquiry means every inquiry, other than a trial conducted under this Code by a Magistrate or a Court", because of the prelude of its being "subject to the context otherwise requrining". As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the state of Section 209, Cr. P. C. is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Session.

12. This Court in State of U. P. v. Lakshmi Brahman, AIR 1983 SC 439 (445), took a view which prima facie does not seem to be in accord with our views afore-expressed. It was held as follows:

> "The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry and the inquiry culminates in making the order of commitment. Thus from the time the accused appears or is produced before the Magistrate with the police report under Section 170 and the Magistrate proceeds to enquire under Section 207 has been complied with and then proceeds to commit the case to the Court of Session, the proceedings before the Magistrate would be an inquiry as contemplated by Section 2 (g) of the Code. We find it difficult to agree with the High Court that the functions discharged by the Magistrate under Section 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code.
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> From the text of the judgment it is clear that the statement of "Objects and Reasons" reflecting legislative policy as to the quality of 'inquiry' was not laid before this Court as well as the report of the 41 st Law Commission recommending abolishing of "inquiry" before the Magistrate, which was responsible for the change. Had the Bench been apprised of the historical perspective, we have no doubt in out mind that

the comprehension of the word "inquiry" as meant for Section 209, Cr. P. C. would have been the same as gathered by us on becoming cognizant of the legislative scheme for early disposal of cases triable by a Court of Session.

13. S/Shri K. B. Sinha and H. L. Aggarwal, learned counsel appearing on opposite sides, have heavily dwelt upon Kishum Singh v. State of Bihar, (1993) 2 SCC 16 : (1993 AIR SCW 771), to contend, that on plain reading of sub-section (1) of Section 319, there could be no doubt, that it must appear from the evidence tendered in the course of any inquiry of trial, that any person not being the accused, has committed any offence, for which he could be tried together with the accused, and that the said power could be exercised only if it so appears from the evidence adduced at the trial and not otherwise. Since that stage has not arrived in the instant case it is maintained that Section 319 is inapplicable. This is obviously correct. Nowhere has any evidence been recorded to invoke Section 319 of the Code. In the aforesaid case, this Court has ruled that sub-section (1) of Section 319 contemplates existence of some evidence appearing in the course of trial, wherefrom the Court can prima facie conclude, that the person not arraigned before it, is involved in the commission of the crime, for which he can be tried with those already named by the police. Even a person who had earlier been discharged was spelled out to fall within the sweep of the power conferred by Section 319 of the Code. Therefore, this Court's view as crystallized is that in strict sense, Section 319 of the Code cannot be involved in a case where no evidence had been led at a trial, wherefrom it can be said that the accused, other than the one facing trial, appears to have been involved in the commission of the crime.

14. Learned counsel differ however on the other question posed in Kishum Singh's case (1993 AIR SCW 771). It was whether a Court of Session, to which a case is committed for trial by a Magistrate, could, without itself recording evidence, summon a person not named in the police report presented under Section 173 of the Code of Criminal Procedure, 1973, to stand trial along with those named therein; if not in exercise of power conferred by Section 319 of the Code, then under any other provision? The answer given was in the affirmative, on the basis of Section 193 of the Code, as it presently stands, providing that once the case is committed to the Court of Session by a Magistrate, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of Original Jurisdiction gets lifted, thereby investing the Court of Session unfettered jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the crime can prima facie be gathered from the material available on the record. It is on this reasoning that this Court sustained the order of the Court of Session (though it ostensibly was under Section 319, Cr. P. C. terming material of investigation before it is 'evidence;) summoning the un-named accused to stand trial with the named accused. A stage has thus been discovered, before the reaching of the state of exercise of power under Section 319, Cr. P. C., on the supposition and premise that it is pre-trial when the question of charge was being examined. Such power of summoning the new accused has been culled out from the power exercisable by the Court of Session under Section 227 and 228 of the Code, enabling it to discharge under Section 227 or charge under Section 228 the accused persons before it and while so to summon another accused involved in the commission of the crime, prima facie appearing from the material available on record of the case. Thus at a stage posterior to the stage envisaged under Section 319, the Court of Session has been held empowered to summon an accused if a prima fice case is made out from the material available on the record.

15. We have respectfully to express, in the wake of the legislative policy, our reservations to such view even though that view, has been met with approval in Nisar v. State of U. P., (1995) 2 SCC 23 : (1995 AIR SCW 1493). he scheme and design of Chapter XVIII and the legislative policy

reflected therein seems to have been underestimated. It is designed to secure speedy trial for those who are facing it. Sections 225 to 237, Cr. O. C. (which includes Sections 227 and 228) are integrated provisions of a lot which govern in totality the trial proceedings under Chapter XVIII titled "Trial before a Court of Session". There seemingly is no intermediate stage envisaged between commitment and trial or the trial proceeding splitting into recharge trial and after charge trial. Trial being with Section 225 when the Public Prosecutor is present before the Court of Session to conduct the prosecution and opens its case disclosing the evidence by which he proposes to prove the guilt of the accused. It is for him to highlight the particulars of the evidence he would lead to prove the case against the accused facing trial. The stage of Section 227 and 228 comes as the next step after observance of such procedure, as part of trial. It is thus designed that proceedings to discharge or charge the accused are part of trial. Addition of an accused by summoning or resummoning a discharged accused, and that too without hearing the accused, has only been permitted in the manner provided by Section 319, Cr. P. C. on evidence adduced during the course of trial, and in no other way. Having thus expressed our doubts we do not, as at present advised, take the matter any further because the fact situation of the present case does not warrant its resolution to take care of the fact situation by giving appropriate relief to the appellant in the manner suggested later.

16. Thus we come to hold that the power under. Section 209, Cr. P. C. to summon a new offender was not vested with a Magistrate on the plain reading of its text as well as proceedings before him not being an 'inquiry' and material before him not being 'evidence'. When such power was not vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Session itself awaiting the case on commitment, merely on the specious ground that the Court of Session can, in any event, (sic) the accused to stand trial, along with the accused meant to be committed for trial before it. Presently it is plain that the stage for employment of Section 319, Cr. P. C. has not arrived. The Order of the Court of Session requiring the Magistrate to arrest and logically commit the appellant along with the accused proposed to be committed to stand trial before it, is patently illegal and beyond jurisdiction. Since the Magistrate has no such power to add a person as accused under Section 319, Cr. P. C. when handling a matter under Section 209, Cr. P. C., the Court of Session, in purported exercise of revisional powers cannot obligate it to do so. The question posed at the outset is answered accordingly in this light. When the case comes after commitment to the Court of Session and evidence is recorded, it may then in exercise of its powers under Section 319, Cr. P. C. on the basis of the evidence recorded by it, if circumstances warranting, proceed against the appellant, summon him for the purpose, to stand trial along with the accused committed, providing him the necessary safeguard envisaged under sub-section (4) of Section 319. Such course is all the more necessary in the instant case when expressions on merit have extensible been made in the orders of the Magistrate, the Court of Session and that of the High Court. Any other course would cause serious prejudice to the appellant. We order accordingly.

17. For reasons aforestated, we set aside the impugned order of the Court of Session as also that of the High Court, requiring the Magistrate to perform his functions under Section 209 of the Code of Criminal Procedure as explained above. The appeal thus stands allowed. Appeal allowed.