

# ALLAHABAD HIGH COURT

State

Vs.

Yasin

Criminal Ref. No. 274 of 1957

(B.R. James and J.N. Takru, JJ.)

08.04.1958

## JUDGMENT

**J. N. Takru, J.**

1. These two references by the learned Sessions Judge of Gyanpur arise out of cross-cases and raise two common questions of law, namely (1) whether under Section 207 A (4), Criminal Procedure Code, a committal order which is based upon an examination of some and not all of witnesses to the actual commission of the offence alleged is illegal? and (2) whether the prosecution in such a case are precluded from examining in the Court of Sessions a witness who was not examined in the committing Court?

2. Both the references first came up for hearing before our brother Sahai, who referred them to a Division Bench in view of the importance of the questions of law involved therein.

3. The facts giving rise to the said references are as follows :

At about 7-30 o'clock in the morning of 14-11-1956 a lathi fight took place between two factions in the village of Ahimanpur police station Aurai, district Varanasi. Both the parties to the fight lodged reports with the police, which investigated the cross cases and submitted charge sheets in both of them. In the Magistrate's court they were numbered as criminal cases Nos. 654 and 642 of 1956. In the former case, there were 16 eye-witnesses but the prosecution examined only three and in the latter case, out of the 17 eye-witnesses the prosecution examined only four. The learned Magistrate after perusing those statements and all the relevant documents for the prosecution and giving the accused an opportunity of being heard committed both the cases to the court of Sessions where they were numbered as Sessions Trial Nos. 5 and 6 of 1957 respectively. At the outset of the hearing before the learned Sessions Judge, the prosecution were asked to state whether they proposed to examine all the eye-witnesses mentioned in the calendar of witnesses or only those who had been examined before the Magistrate. It was then stated on

their behalf that the prosecution intended to examine all the witnesses to the actual occurrence.

4. The learned Sessions Judge was, however, of the opinion that under section 207-A (4), the prosecution were bound to examine all the eye-witnesses of the occurrence in the committing court particularly eye-witnesses on whose testimony they proposed to rely in the Court of Sessions, and that a committal order which was based upon an examination of some and not all of such eye-witnesses was illegal and liable to be set aside. Hence the aforesaid references.

5. In order to appreciate the correct legal position, a reference to the relevant provisions of the amended Code of Criminal Procedure may be made forthwith. Section 207A lays down the procedure which is to be followed in proceedings instituted on police reports and sub-sections (3) and (4) thereof state thus :

"3. At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

4. The Magistrate shall then proceed to take the evidence of such persons, if any, and as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution he may take such evidence also." The interpretation of this sub-section, like that of any other section in a statute, will depend primarily upon the language employed in it. It is only when that language is ambiguous that reference to other recognised canons of interpretation is permissible. Judged in this light the aforesaid sub-section is divisible in two parts. The first part deals with the evidence of persons who are witnesses to the actual commission of the offence, that is to say are eyewitnesses.

In their case, a Magistrate is enjoined to examine such persons if any as may be produced by the prosecution. The initiative under the first part is entirely with the prosecution. In my opinion, the words "if any and as may be produced by the prosecution", put that matter beyond the pale of controversy. It follows, therefore, that if the prosecution do not examine any eye-witness or examine only some of them, the Magistrate cannot compel the examination of the remaining eye-witnesses under the first part of that sub-section. The second part of the sub-section is however of wider amplitude and with the exception of formal witnesses whose examination is specifically provided for in section 510A, embraces all the other kinds of witnesses including even the eye-witnesses whom the prosecution did not examine under the first part thereof. The word "other" used in connection with the expression witnesses for the prosecution means all those witnesses direct or otherwise on whose testimony, the prosecution propose to base their case. But so that the accused may not be prejudiced in his defence, by the prosecution withholding material witnesses whether direct or circumstantial, the legislature has vested the Magistrate with the

discretion to examine any one or more of them suo motu or at the instance of the accused if he considers their examination necessary in the interests of justice.

It is hardly necessary to say that that discretion has to be exercised judicially and not in a capricious and arbitrary manner. In my opinion once this fundamental principle underlying sub-section (4) of section 207A is understood no anomaly in the procedure or prejudice or hardship to the accused will be found to exist.

6. The interpretation which I have attempted to place above has the further advantage that it also helps to subserve the real object underlying the amendments made in the Criminal Procedure Code in 1955. That object avowedly was to simplify and speed up the trial of criminal cases. Obviously this object cannot be achieved to any appreciable extent if the Magistrate has to record the evidence of all the eye-witnesses in cases of direct evidence. It is to obviate this contingency that a substantial amendment has been made in section 173 of the Code, and the officer in charge of the police station has been enjoined to furnish or cause to be furnished to the accused free of costs a copy of the report forwarded under sub-section (1) and of the first information report recorded under section 154 and of all other documents or relevant extract thereof on which the prosecution proposes to rely including the statements and confessions, if any, recorded under section 154 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses. The idea underlying this amendment is not only to inform the accused of the case against him but also of the evidence on which it is proposed to base it. That being so, the re-recording of the evidence for the prosecution in the court of inquiry would appear futile unless the interests of justice demanded it. In this view of the matter, sub-section (4) would be found to contain all the necessary safeguards for the accused while at the same time simplifying and speeding up the trial itself.

7. The learned Sessions Judge has referred to the Full Bench case of *Emperor v. Asghar<sup>1</sup>*, in support of the view which he has taken. The facts of that case are, however, different. There the prosecution had produced 17 eye-witnesses whose evidence they wanted the Magistrate to record. But the Magistrate after examining only four out of them committed the case to the court of Sessions. The learned Judge took the view that having regard to the language of section 208 (which then corresponded to the present section 207-A (4) the Magistrate had no option but to record the evidence of all the witnesses who had been produced by the prosecution and that the committal order which was based upon an examination of some and not all of the eye-witnesses for the prosecution was illegal and liable to be set aside.

That case has, however, nowhere laid down that under section 208, the Magistrate was bound to record the evidence of even those eye-witnesses who had not been produced by the prosecution and that if he did not do so, the committal order passed by him was illegal.

8. I shall now proceed to the examination of the decisions which have been given by some of our High Courts on the interpretation of section 207-A (4), Criminal Procedure Code.

9. The earliest case on that point is the *State v. Ramratan Bhudhan*<sup>2</sup>, In that case the learned Judge relying upon the rule of

<sup>1</sup> AIR 1936 All 134 (FB)

<sup>2</sup> AIR 1957 Mad Bha 7

interpretation which states that where a statute directs the doing of a thing for the sake of justice or public good, the word "may" has the same force as the word "shall", held, that the word may in the first part of sub-section (4) of Section 207-A must be interpreted as "shall" and so construed the first part of sub-section (4) meant that in the event of there being persons who have witnessed the actual commission of the alleged offence, the prosecution shall produce all of them and the Magistrate shall record their evidence. With all respect to the learned Judge deciding that case, I feel myself unable to subscribe to that view. In the first place I see no justification for interpreting the word "may" as "shall". If the legislature had intended it to be used in that sense I have no doubt it would have expressed its intention in more apposite terms, particularly when the same word in the second part of that sub-section has been clearly used in a permissive sense. The discretion which is vested in the Magistrate under the second part of that sub-section is a discretion which, as I have already stated, he has to exercise judicially and so exercised, there should, in my opinion, be no apprehension of any prejudice being caused to the accused whatever the nature of the evidence against him might be.

10. The next two decisions are of the Mysore High Court viz. *Krishna v. State of Mysore*<sup>3</sup>, and *M. Pavalappa v. The State of Mysore*<sup>4</sup>, The facts of the former case are somewhat different as there was no question of the recording of evidence of any eyewitness in it. That case was concerned with interpretation of the second part of section 207-A (4) and it lays down that,

"If there are no witnesses to speak to the actual commission of the offence, the Magistrate is not bound to examine any other witness or witnesses." That case, therefore, is no authority for the interpretation of the first part of section 207-A (4) and to the extent to which it purports to do so, it must be regarded as obiter. In the latter case, the interpretation of the first part of section 207-A (4) was directly involved and the view taken was that it was obligatory for the Magistrate under that subsection to examine eye-witnesses. For the reasons already indicated I feel myself unable, with the greatest respect, to endorse that view.

11. The fourth case is of *State v. Govindan Thampi Bhaskaran Thampi*<sup>5</sup>, in which the interpretation of the first part of section 207-A (4) was also directly involved. The learned Judges were of the view that,

"..... What it enacts is that when the proceeding before the committal court has passed the stages mentioned in sub-ss. 1 to 3 and reached the stage envisaged in sub-section 4, that court shall take the evidence of the witnesses to the actual commission of the offence alleged, while it is discretionary whether any other witnesses should be examined or not.

The words "if any" in the sub-section really present difficulties. A close reading of the sub-section will however show that those words relate to the offence alleged. The

<sup>3</sup> AIR 1957 Mys 5    <sup>5</sup> AIR 1957 Tran Coc 29

<sup>4</sup> AIR 1957 Mys 61

prosecution is bound to produce witnesses to the actual commission of the offence alleged and court has no discretion to refuse to examine them. Its discretion is confined to the examination of any other witnesses". In taking this view the learned judges were also of the opinion that the word "may" occurring in the first part of the sub-section must be construed as "shall". For the reasons which I have already expressed in connection with the case of *State v. Ramratan Bhudhan*, (*ubi supra*) I find myself unable with the greatest respect to accept the view which has been taken in this case.

12. The fifth case is *In re; Kunjan Raghavan*, AIR 1957 Kerala 32. The facts of this case are similar to those of the Full Bench case of *Emperor v. Asghar*, (*ubi supra*). In this case also the committing Magistrate passed the committal order after examining only a few of the eye-witnesses tendered by the prosecution. The learned Judges were of the view that the committal order based upon the examination of some and not of all of the eye-witnesses whom the prosecution had produced for that purpose is illegal. This decision is consequently of no help for the purpose of deciding the question which has arisen in the present case.

13. The sixth and the last case is *State v. Birda*<sup>6</sup>, That case is similar on facts to the case of *Krishna v. State of Mysore*, (*ubi supra*) inasmuch as in this case also the interpretation of the second part of sub-section (4) of section 207-A of the Code only was involved and the view the learned Judges took was that,

".....the only proper way in which the Magistrate in a case of this character could exercise his discretion judicially would be to hold that the interests of justice require that the evidence other than that of eye-witnesses must be recorded to establish the connection of the accused with the crime, and that being so, he must proceed to record such evidence and thereafter exercise the powers vested in him under sub-sections (6) and (7) of Section 207-A, Criminal Procedure Code"

It is true that towards the end of the judgment, the learned Judges hold that,

".....we think (though we do not wish to express a firm opinion in this matter as the point is not directly raised by the present reference) that the prosecution should not hold back eye-witnesses to the actual commission of the offence alleged at their sweet will and pleasure and in any case they would be running a grave risk if they later produced such witnesses at the trial whom they have not produced before the committing Magistrate. We

are inclined to the view that the prosecution should produce all such witnesses as it intends to produce at the trial."

The question as regards the interpretation of the first part of section 207-A (4) did not strictly arise in that case and the observations on that point are therefore, merely obiter.

<sup>6</sup> AIR 1957 Raj 318

14. Having regard to the discussion attempted above, I am of opinion that under section 207-A (4) of the Criminal Procedure Code, the Magistrate is only bound to record the evidence of such witnesses to the actual commission of the offence alleged as may be produced by the prosecution and a committal order based upon an examination of only some of such witnesses provided they are the only witnesses tendered by the prosecution for that purpose- does not suffer from any infirmity or illegality, nor are the prosecution precluded from adducing in the Sessions court witnesses other than those examined before the committing Court. In this view of the matter, the committal order passed in the present case is correct and the reference and the recommendation made by the learned Sessions Judge must consequently be rejected.

**B.R. James, J.**

15. I have perused the well-considered judgment of my brother Takru and find myself in agreement with the views expressed therein. The key to the answer to these References lies in the wording of the newly introduced section 207-A (4) of the Code of Criminal Procedure. To construe it properly we have to bear in mind both the object of commitment proceedings and the object of the amendment to chapter XVIII of the Code made in 1955. The object of the law in requiring an enquiry before a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. This provision of law, while it saves the accused person from the prolonged anxiety of undergoing trials for offences not brought home to him, also saves the time of the Court of Sessions from being wasted over cases in which the charge is obviously not supported by such evidence as could support a conviction. Besides a preliminary enquiry affords the accused persons an opportunity of becoming acquainted with the evidence of offences imputed to him and enables him to prepare his defence. The object of the amendment to Chapter XVIII of the Code introduced in 1955 was to simplify commitment proceedings and make them more speedy. It is well settled that the true meaning of any passage is that which best harmonises with the object. Consequently only that interpretation must be placed on Section 207-A (4) which best harmonises with the object aforesaid.

16. It is these principles which must apply when we endeavour to interpret the words "the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged" occurring in section 207A (4). The interpretation which would best harmonise with the object of commitment proceedings and of the amendment of 1955 is that the Magistrate is required to examine only those witnesses direct evidence of the crime whom the prosecution may choose to produce before him. In this connection the use of "if

any" and "may" is highly significant. Notwithstanding the availability of the alternative "shall" the legislature insist on employing the word "may" showing thereby that they leave the matter entirely at the discretion of the prosecution and it is because of this that with great respect to the High Courts which have declared otherwise, I am unable to agree that in this sub-section "may" is to be read as "shall". Indeed, on a plain reading of the first part of the sub-section I am of opinion that the discretion of producing eye-witnesses rests entirely with the prosecution and that if in a particular case they do not choose to produce a single such witness they cannot be compelled to do so, though I should like to add that it would be desirable for at least some of the eye-witnesses to be produced for examination.

17. The second part of the sub-section is equally significant for it confers on the Magistrate the power to examine any one or more of the other witnesses for the prosecution if he is of opinion that this is necessary in the interest of justice. This is a discretionary power vested in him and there should be no reason to suppose that he would not use it according to well settled judicial principles.

18. Nor should it be thought that there can be any apprehension of the defence case being prejudiced by the non-production of the eye-witnesses. By virtue of section 173 (4), the accused must, before the commencement of the commitment proceedings, be furnished with documents which contain all the evidence the prosecution propose to produce against him, while sub-section (3) of section 207A enjoins the Magistrate to satisfy himself that these documents have been duly furnished. Thus prior to the commencement of the commitment proceedings the accused has been put to notice of all the evidence that the prosecution desire to lead against him. Clearly, ample provision has been made for safeguarding his interest, so that no question of prejudice can arise. Besides, there is always available to the Magistrate his power to examine necessary witnesses under the second part of section 207A (4).

19. For these reasons I concur in the answers proposed by my brother Takru to the questions at issue in these references.

20. BY THE COURT : For the reasons given in the above judgments both the references fail and are hereby dismissed

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References dismissed.