ALLAHABAD HIGH COURT

State of U.P

Vs.

Satyavir

Criminal Ref. No. 247 of 1958, made by S.J. Bulandshahr

(M.C. Desai, J.)

20.05.1958. 02.12.1958

JUDGMENT

M.C. Desai, J.

1. A commitment can be quashed on at Question of law and law only. No question of law is involved in the commitment of the applicant to stand trial for an offence under Section 302, Indian Penal Code. There is no direct evidence and, therefore, there are no eye-witnesses, i.e. witnesses to the actual commission of the offence and Section 207A(4) is inapplicable. When there are no eye-witnesses there cannot possibly arise any question of the Magistrate's failure to examine them. Even when there are eye-witnesses the Magistrate is not bound to record the evidence of all of them; he is only required to record the evidence of only such of them as are produced by the prosecution. So it is for the prosecution to decide how many of the eye-witnesses should be examined; the Magistrate cannot compel to examine any particular witness or refuse to examine any eye-witness. The Magistrate has the power of examining other witnesses, but is not bound to examine them and no Magistrate failing to exercise that power can ever be said to commit an illegality. The prosecution did not produce any eye-witness before the Magistrate and the Magistrate did not commit any illegality or irregularity by not examining any eye-witness. Witnesses of circumstantial evidence are not witnesses of the actual occurrence and are not required to be examined by the Magistrate; he may, if he wishes, examine them but is not hound1 to do so and his failure to examine any of them is no infringement of law. I was referred to the *State v. Ramratan Bhudhan*[1], in which Khan, J. observed that the word "may" in Sub-Section (4) has the force of "shall"; I respectfully disagree. The prosecution is never bound to examine all witnesses to the actual commission of the offence and once this is conceded the word "shall", cannot be substituted for the word 'may' in the first part of the sub-section. The language of the sub-section is quite inconsistent with any idea of compulsion on the prosecution to examine any witness. There cannot be any compulsion unless the act to be done is specified

exactly; unless it is laid down that all the eye-witnesses shall be examined or unless the number of eye-witnesses to be examined is prescribed, it cannot be said that the prosecution is bound to examine eye-witnesses. If all the eye-witnesses are not required to be

[1]1957 Cri LJ 64 AIR 1957 Mad Bha7

examined some minimum number must be prescribed and in the absence of any prescribed minimum number "may" means the absence of compulsion. The word "may" in the last part of the sub-section may have the force of "shall" but it does not follow that the word occurring in the first part has the same force. It was also observed by Khan, J., that some evidence must be recorded by the Magistrate in every case and reliance for this proposition was placed on the absence of the words like "if any" in the beginning of Sub-Section (6). With great respect I venture to think that the addition of the word "it any" would render the opening words of the sub-section meaningless. The evidence referred to in Sub-Section (4) is the evidence that is actually recorded by the Magistrate, and, therefore, there does not arise the question of adding the words "if any." In *State v. Govindan Thampi, Bhaskaran Thampi*[2]*,*, a Bench of the Travencore-Cochin High Court was of the same view as Khan, J. and observed that the prosecution has no discretion to exercise in the matter of examination of eye-witnesses. I, however, agree with the observations of the learned Judges that "witnesses to the actual commission of the offence" do not include witnesses who give circumstantial evidence and that the prosecution has discretion not to examine any of them. I respectfully agree with the observation of Padmanabhia and Hombe Gowda, JJ., in *Krishna v. State of Mysore*[3]*,* to the effect that the non-examination of witnesses who are not eye-witnesses does not vitiate the order of commitment, that the Magistrate is not bound to examine a witness who is not an eye-witness, that the object of enacting Section 207A was to simplify the procedure and secure expeditious termination of the proceedings and that the words "such evidence" appearing in Sub-Section (7) mean the evidence contemplated by Sub-Section (4).

2. There is nothing in Sub-Section (6) of Section 207A to suggest that the Magistrate must record some evidence and that commitment of the accused without recording any evidence is illegal. The Sub-Section is to the effect that

> "when the evidence referred to in Sub-Section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him ..... such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused.....discharge him". Sub-Section (7) is to the effect that
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> "when, upon such evidence if taken such documents If considered, such examination (if necessary) being made ..... the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge".

These two Sub-Sections make a clear distinction between the evidence to be recorded under Sub-

Section (4) and the documents to be considered; the documents that are to be considered are not treated as evidence. The accused has to be examined only for the purpose of enabling him to explain adverse circumstances appearing in the evidence against him; he is not required to be examined for the purpose of enabling him to explain adverse circumstances appearing in the document that have to be considered.

[2]1957 Cri LJ 245: AIR 1957 Tran Coc29

[3]1957 Co LJ 76: (AIR 1957. Mys 5)

If no evidence has been recorded under Sub-Section (4) the accused is not required to be examined at all because there is nothing that he can explain. As no evidence has been recorded there are no adverse circumstances appearing against him. If there are adverse circumstances appearing in the documents, the accused is not required to be examined to explain them; all that he is entitled to in every; case is that he should be heard before the Magistrate frames a charge against him. The word "if necessary" in Sub-Section (6) and "if any" in Sub-Section (4) make it clear that his examination is not obligatory in every case. It is obligatory if any evidence has been recorded but Sub-Sections (6) and (7) do not compel the Magistrate to record some evidence in order that something to be explained by him may appear in the evidence and he may have the privilege of making a statement in examination. He has not an absolute right of being examined; it is conditional upon some evidence having been recorded by the Magistrate. The learned Sessions Judge is in error in observing that some evidence should be recorded by the Magistrate in every case in order that the accused may have to be examined. It is erroneous to contend that he is prejudiced, or deprived of a valuable right by being not examined. It has to be noted that the Magistrate does not convict him; he only commits him for trial and it is the Sessions Judge, who before convicting him, will give him full opportunity for explaining all adverse circumstances appearing against him in the case. The Magistrate has only to decide whether he should be committed for trial or not and no person has a right to be heard before he is ordered to be tried. The principle of natural justice is that nobody can be punished without being heard and not that nobody can be prosecuted or tried without being heard.

3. The reference is rejected.

Reference rejected.