**ALLAHABAD HIGH COURT**

State

Vs.

Lakshmi Narain Singh

Criminal Ref. No.125 of 1959. made by S. J. of Jaunpur

(D.S. Mathur, J.)

02.03.1959. 22.06.1959

**ORDER**

**D.S. Mathur, J.**

This is a reference by the Sessions Judge of Jaunpur with a recommendation that the commitment of Lakshmi Narain Singh alias Raj Bahadur Singh and his father Srinath Singh to the court of session to stand their trial of an offence punishable under Section 302 Indian Penal Code or 302/109 Indian Penal Code, respectively, be quashed and the case sent back to the committing court for holding an inquiry in accordance with the provisions of Section 207-A(4) Criminal Procedure Code.

2. The case was investigated by the police when on 16-10-1958, at about 1.30 P. M., the dead body of one Sita Devi alias Sitawa, aged 20-21 years, was found floating in a culvert near the Duty Signal at Mehrawan Railway Station. There is no eyewitness to the murder and the case against the accused persons rests on circumstantial evidence. The committing magistrate committed the case to Session without recording any evidence.

3. The only point involved in the reference is whether the commitment of a case to the court of Session without recording evidence and on mere perusal of documents referred to in Section 173 Criminal Procedure Code is legal.

4. On this question, there is no previous pronouncement of this Court. In *State v. Yasin*[1], the committing Magistrate had after recording the evidence of a few eye-witnesses and not of all, committed the case to session. It was held that the committal order did not suffer from any infirmity or illegality, nor was the prosecution precluded from adducing in the sessions court witnesses other than those examined in the committing court. There is no observation in this case

which can suggest that in cases resting on circumstantial evidence, the committing magistrate must record the evidence of all the material witnesses before deciding whether to send up the case to the court of session or not. However, on consideration of the provisions of section 207-A, Criminal Procedure Code, I am of opinion that the same rule can be applied to

[1]1958 All LJ 413: ( AIR 1958 All 861)

cases based on circumstantial evidence, and where the magistrate decides not to record any evidence, and to commit the case on perusal of documents referred to in Section 173 Criminal Procedure Code, after examining the accused and hearing the parties, he cannot be said to have improperly exercised his discretion, except where from the committal order it appears that he did not take pains to himself peruse the documents and the statement of the accused.

5. When the Code of Criminal Procedure was amended under Act XXVI of 1955, the legislature laid down one procedure for committal proceedings instituted on a police report, and retained the old for proceedings instituted on private complaints, may be by a public servant or authority other than police. The old rules were to be followed in cases arising out of a private complaint, while in proceedings instituted on a police report, the procedure as laid down in Section 207-A Criminal Procedure Code was to be followed. The underlying object of the legislature was to save time of committing magistrates and to enable them to speedily commit cases to the court of Session. It will, therefore, be proper to give that interpretation to Section 207-A which would carry out the intention and object of the legislature. At the same time it shall have to be kept in mind that by the adoption of a speedy procedure, the accused are not handicapped and may not have to unnecessarily face a trial before the Sessions Judge.

6. Sub-section (1) of Section 207-A Criminal Procedure Code lays down that on receipt of a report forwarded under Section 173 Criminal Procedure Code, the magistrate shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than 14 days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date. Under sub-section (2), processes for the attendance of witnesses or for the production of any document or material exhibit are to be issued before such date if applied for by the prosecution. In other words, if the prosecution does not desire the attendance of any witness on the date the inquiry is to be conducted, it is not at all necessary for the Magistrate to summon witnesses and to himself record their evidence before committing the case to session. On the commencement of the inquiry, the Magistrate has, first of all, to satisfy himself that documents referred to in Section 173 have been furnished to the accused, and, if not already furnished, to take steps for copies of such documents to be supplied to the accused before the actual inquiry. In other words, the provision contained in sub-section (3) guarantees that before the inquiry is held, the accused has in his possession documents which will clearly indicate to him what witnesses, whether examined or not by the committing magistrate, would depose against him.

7. Sub-sees. (4) to (7) govern the recording of evidence by the committing Magistrate and also in what circumstances a charge is to be framed against the accused. Sub-Section (4) lays down that

the Magistrate shall proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged. In other words, if the prosecution decides not to examine any witness before the committing Magistrate, it will not be obligatory for the Magistrate to record the evidence of witnesses. The Magistrate has, however, been given the discretion under the second part of sub-section (4) to record the evidence of witnesses for the prosecution, if he is of opinion that such a step is necessary in the interest of justice. The words used in this sub-section are general, and would cover not only eye-witnesses to the incident but also evidence of circumstantial nature. In other words, it is for the Magistrate to decide whether it is necessary in the interest of justice to record any evidence during the inquiry. The discretion has to be exercised judicially, and not arbitrarily, and where it appears that the discretion was properly exercised, the Magistrate cannot be said to have committed any illegality.

8. Sub-sections (6) and (7) provide that where the evidence recorded under sub-section (4) and documents referred to in Section 173 do not disclose any ground for committing the accused person for trial, the Magistrate shall, after recording reasons, discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other magistrate, in which case he shall proceed accordingly; and where the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge declaring with what offence the accused is charged, and later on commit the case to Session. It is not laid down in sub-sections (6) and (7) that a discharge of the accused or commitment of the case to session without recording evidence under sub-section (4) would be illegal.

9. A consideration of the various sub-sections of Section 207-A will thus make it clear that the commitment of a case to the court of session for trial without recording any evidence under sub-section (4) is not illegal, unless, of course, the discretion not to record any evidence was exercised in an arbitrary manner.

10. While investigating a crime, police officials maintain a case diary in which they record the statements of witnesses examined by them, and who may later on be produced to give evidence in the case. Copies of such statements are furnished to the accused before the inquiry. Consequently, the accused knows from the very beginning what evidence witnesses would give against him. If the Magistrate peruses these statements, he will also know what evidence exists against the accused, and whether such evidence, if accepted on its face value, makes out a prima facie case or not.
In case witnesses are examined before the committing Magistrate, they will ordinarily make a statement similar to what they had made before the investigating officer. It is in only a few cases that witnesses may not support the statements which they are alleged to have made before the police. Consequently, it can be presumed that in majority of the cases on. perusal of the statements recorded under Section 161 Criminal Procedure Code the Magistrate would know without doubt what evidence may during the trial be adduced to prove the charge against the

accused.

11. When the Magistrate can ascertain what allegations are being made against the accused and the evidence which would later on be adduced by the prosecution, he can form an opinion on perusal thereof whether the case is a fit one for commitment for trial to the court of session. If he is of opinion that there is no ground for committing the accused for trial, he can easily discharge him under sub-section (6), otherwise the case can be committed to session. By adopting the above procedure, that is, committing the case to session for trial without recording evidence, the party to be prejudiced can be the prosecution, and not the accused. If the accused knows that a particular person will not corroborate the statement recorded under Section 161 Criminal Procedure Code, he can make a request before the committing Magistrate for examining that witness so that his statement recorded under Section 161 Criminal Procedure Code may be excluded when the Magistrate forms an opinion whether to commit the case to session or not. To presume that the police did not hold the investigation properly or that statements under Section 161 Criminal Procedure Code were not correctly recorded, would be wrong. In fact, it shall have to be presumed that whatever acts were done by a public servant, were done in accordance with the law. Consequently, if the accused does not make any request for the examination of persons to be named by him during the inquiry, courts of law can easily start with the presumption that witnesses if examined would make the statement as recorded under Section 161 Criminal Procedure Code. There will, therefore, be no likelihood of any prejudice being caused to the accused by evidence not being recorded by the committing Magistrate.

12. If witnesses are not examined before the committing Magistrate, and they are won ever before the trial, the prosecution would not be in a position to rely upon the earlier statement made by those witnesses. The previous statement of a witness cannot ordinarily be used as substantive evidence. One of the exceptions to this rule is contained in Section 288 Criminal Procedure Code. It is that if the statement made by a witness in the committing court is true and the one made during the trial is false, the deposition made in the committing court can be used as substantive evidence against the accused undergoing the trial. In other words, therefore, if no evidence is recorded during the inquiry, the prosecution would not be able to avail of the provisions of Section 288 Criminal Procedure Code and in certain cases the trial may result in acquittal for want of evidence. Apparently it was for this reason that discretion was given to the prosecution to determine beforehand which witnesses should be examined before the committing magistrate. An intelligent investigating officer can know beforehand which witness may later on turn hostile, and if he is acting diligently he should take steps for the appearance of such witnesses and to have them examined during the inquiry. But if the prosecution finds that it would rot be necessary for them to take advantage of Section 288 Criminal Procedure Code they need not take steps for the examination of witnesses in the committing court.

13. From the above it will be clear that in majority of the cases it will not be necessary, in the interest of justice, for the Magistrate to himself record evidence of witnesses; and that

commitment of a case to the court of session without recording evidence will not in any way prejudice the accused and if prejudice is caused, it would be to the prosecution. Such a procedure will save the time of the committing magistrate, who shall not have to unnecessarily record evidence to be adduced during the trial by the prosecution. It will thus be possible for the Magistrate to send the case to the court of session within a few weeks of the receipt of charge-sheet from the police. Such a procedure will naturally facilitate the early decision of the criminal case.

14. The Rajasthan High Court has taken a contrary view in *State v. Birda*[2], The Hon'ble Judges who decided that case were under the impression that it was difficult for a magistrate to perform the duties laid down in sub-sections (6) and (7) of Section 207-A, Criminal Procedure Code, unless he himself recorded some evidence during

[2] AIR 1957 Raj 318

the inquiry. It was also observed that where a case rested on evidence other than the evidence of persons who witnessed the actual commission of crime, a proper exercise of the Magistrate's powers under Section 207-A would be ensured only if he recorded the evidence of a few witnesses for the prosecution. With due respect I beg to differ from these observations. As already mentioned above, while holding the inquiry under Section 207-A. the Magistrate has before him the statements of witnesses as recorded under Section 161 Criminal Procedure Code by the investigating officer. This evidence is sufficient to enable the Magistrate to decide whether the case is a fit one for committal for trial or not. It will be in exceptional circumstances only that it may become necessary to record evidence. This can be where the statements under Section 161 Criminal Procedure Code had not been clearly taken down, or there exists some confusion or contradiction in such statements. In such cases it will be necessary for the Magistrate to record evidence for the due performance of his duties and for the proper exercise of discretion vested in him. If the question is looked into in this light, Courts cannot place sessions cases based on direct evidence of eye-witnesses in one category and those which rest on circumstantial evidence in another.

15. To sum up, the commitment of a case to the court of session for trial without recording any evidence is not illegal, unless from, the commitment order it appears that the Magistrate had not perused the documents referred to in Section 173 Criminal Procedure Code and like a post office forwarded the case to session for trial. The commitment may also be held to be illegal if on perusal of such documents, it appears that for the proper exercise of discretion it was necessary for the Magistrate, in the interest of justice, to examine witnesses.

16. Coming to the present case, the committing magistrate had in the order of commitment indicated the evidence which would be adduced before the Sessions Judge. It cannot, therefore, be said that the Magistrate had not perused the documents referred to in Section 173 Criminal Procedure Code. He had also taken into consideration the statements of the accused persons. In other words, the order of commitment is not one which can be quashed.

17. The reference is hereby rejected.
Reference rejected.