

## ANDHRA PRADESH HIGH COURT

R. Govindaswamy

Vs

The State

(Krishna Rao. J.)

04.08.1959

### ORDER

#### **Krishna Rao, J.**

1. The petitioner was the accused in C. C. No. 264 of 1958 on the file of the Additional District Munsif Magistrate, Tirupati. His revision petition is directed against the order made on 13-12-1958 by the Sessions Judge, Chittoor, in C.R.P. No. 13 of 1958 filed under Sections 435 and 436 Criminal Procedure Code by which the case was remanded for further inquiry in the light of the observations in the order and was transferred to the Principal District Munsif-cum-first Class Magistrate, Tirupati for disposal according to law.

2. The case was instituted on a charge sheet filed by the Inspector of Police, Madanapalli. It appears that the petitioner was the Examiner of Copies in the Court of the District Munsif, Madanapalli and that he entered the Chambers of the Dist. Munsif at about 1 p.m., on 18-1-1958 for some official work. The District Munsif objected to his having entered the room without prior permission, sent him away from the room and a little later found fault with him again for his conduct. Subsequently, while the District Munsiff was going home from the court house at about 3 p.m., the petitioner is alleged to have hit him on the back of his neck with a sandal. The charge sheet stated that the petitioner committed the offence as a consequence of the chiding given to him by the District Munsif in the discharge-of his official duty and was punishable under Sections 332 and 355 Indian Penal Code. The Magistrate, however, framed a charge on 6-10-1958 against the petitioner only under Section 355. Indian Penal Code. The Assistant Public Prosecutor applied to the Magistrate on 15-10-1958 to add a charge under Section 822, Indian Penal Code, but the Magistrate dismissed the application. Thereupon the Circle Inspector filed C.R.P. No. 13 of 1958 under Sections 435 and 436 Criminal Procedure Code before the Sessions Judge, Chittoor for setting aside the order of Implied discharge made on 6-10-1958 and for directing that an additional charge under Section 332. Indian Penal Code be framed. On that

petition, the learned Sessions Judge made the order mentioned above.

3. The learned counsel for the petitioner did not dispute the position that the Magistrate's action on 6-10-1958 amounted to an implied discharge in respect of the alleged offence under Section 322, Indian Penal Code. Some of their criticisms against the proceedings of the learned Sessions Judge were based on a misconception of the facts. It was urged that the entries in the docket of C.R.P. 13 of 1958 did not mention that the records were called for from the Magistrate and that the question arises whether a Sessions Judge has jurisdiction to make an order under Section 436, Cr. P. C. without calling for the records. But the Sessions Judge has since reported that the records were called for from the Magistrate before the order was passed. It follows that the question posed does not arise for consideration. Another criticism was that the learned Sessions Judge who made the order in question was in the position of a complainant, as he had sent the District Munsif's complaint to the police and that his subsequent interference in the matter under Section 436, Criminal Procedure Code was contrary to the principles of natural justice. I do not think that a Magistrate, by merely forwarding a complaint for investigation by a police, is hit by the principle 'No man shall sit as a judge in his own cause'. Indeed, the Criminal Procedure Code expressly provides in Section 202 for a Magistrate directing an investigation by a police officer and that does not disqualify the Magistrate from trying the case. Apart from this, the record shows that the Sessions Judge, who forwarded the complaint to the police, was Sri R. V. Sitharama Rao. But the Sessions Judge, who subsequently heard and disposed of the matter under Sections 435 and 436, Criminal Procedure Code was Sri B. Rama Lal Kishen. On the facts, this line of criticism also does not arise for consideration.

4. It was submitted by the learned counsel that the Sessions Judge had no jurisdiction to interfere as the point was merely one of appreciation of evidence by the Magistrate. This contention is not correct, having regard to the decision of a Full Bench of the Madras High Court in *Narayanaswamy Naidu v. Emperor*<sup>1</sup>. The majority of the Full Bench disagreed with Sankaran Nair, J. and held that misappreciation of evidence is a ground for interference under the old Section 437 corresponding to the present Section 436 and that the restrictions which the High Court imposes on itself in the exercise of its revisional jurisdiction under Section 439 do not apply to the exercise of the powers under Section 436. Moreover, the implied discharge here was under Section 251-A (2) before any evidence was taken and there is no question of interference with the Magistrate's appreciation of the evidence. The learned counsel also submitted that additional material was available to the Sessions Judge, such as the statements recorded from witnesses under Section 164, which were filed into the Magistrate's court only on 28-10-1958. That the Sessions Judge must have made the order in question after taking into consideration the existence of this additional evidence and that he was not entitled to do so.

He relied on a decision of Yahya Ali, J. in *Valayudhan v. Hainan Nair*<sup>2</sup>, for the position that the ground of fresh evidence being available would not be a sufficient ground to set aside an order of discharge or to direct a fresh inquiry. Yahya Ali, J. purported to apply certain observations made by Sankaran Nair, J. in *Lakshmi-narasappa v. Mekala Venkatappa*, ILR 31 Mad 133 to the effect that no injustice is done to the complainant by refusing to interfere, as it is open to him to file a fresh complaint and make the fullest use of the additional evidence. With all respect to Yahya Ali, J. it is difficult to appreciate the force of his reasoning. The course of filing a fresh complaint is open to the complainant in all cases coming under Section 436, Criminal Procedure Code and if that were a proper ground for refusal to interfere, it would follow that the powers under Section 436 should never be exercised. The observations in ILR 31 Mad 133, were made by Sankaran Nair, J. in support of his view that a Sessions Judge who differs from the Magistrate's appreciation of the evidence cannot order further inquiry under Section 436. but can only refer the case to the High Court under Section 438. This view was held to be erroneous and was overruled by the majority of judges of the Full Bench in 1LR 32 Mad 220. So far as the question of the existence of additional evidence being a ground for ordering further inquiry under Section 436 is concerned it has always been held to be a pro-per ground for such interference. Even in the earlier case of *Queen-Empress v. Balasinnathambi*, ILK 14 Mad 334 (FB), the question referred to the Full Bench was whether the power to interfere under Section 436 extended to cases where additional evidence is not forthcoming. It cannot therefore possibly be maintained that a Sessions Judge acting under S. 436, Criminal Procedure Code must not look into or take into consideration the existence of additional evidence.

5. The main contention of Sri M. Lakshman Rao on behalf of the petitioner, was that under the new procedure specified in Section 251-A, Criminal Procedure Code for warrant cases instituted on police reports, there is no inquiry but only a trial by the Magistrate that any order purporting to remand such a case under Section 436 for further inquiry can only amount to an order for a retrial of the case and that such an order is without jurisdiction as the Sessions Judge has no power under Section 436 to direct a retrial. In order to appreciate the argument it is necessary to look at Section 251-A. Under Sub-section (1), when the accused appears or is brought before a Magistrate "at the commencement of the trial", the Magistrate must satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if necessary cause them to be so furnished. Then under Sub-sections (2) and (3), he has to consider the documents, make an examination, of the accused in his discretion, give the prosecution and the accused opportunity of being heard and form an opinion as to whether the charge against the accused is groundless or whether there is ground for presuming that the accused has committed an offence triable as a warrant case. If he considers the charge to be groundless he must discharge the accused. If on the other hand, he forms the opinion that there is ground for presuming that the accused committed an offence triable as a warrant case which the Magistrate is competent to try

and which could be adequately punished by him, he must frame a charge and proceed in the manner specified in the subsequent subsections. Thus the obvious meaning appears to be that as soon as the preliminary conditions of Sub-section (1) are satisfied, the Magistrate commences the trial. The discharge under Sub-section (2) and the framing of the charge under Sub-section (3) occur in the course, of the trial. An inquiry is defined in Section 4(1) (k) as including every inquiry other than a trial conducted under the Code by a Magistrate or Court. The procedure specified in Section 251-A does not contemplate any such inquiry by the Magistrate, except perhaps in the matter of satisfying himself that the documents referred to in Section 173 have been furnished to the accused. Therefore, when an accused has been discharged under Section 251-A (2) and such a case is remanded For further inquiry there can only be a proceeding by way of a retrial.

6. No doubt prior to the enactment of Section 251-A. it has been, held in a catena of cases by the several High Courts that the trial would commence only on the framing of the charge and that an inquiry includes not only the taking of evidence but also the consideration of that evidence before the framing of the charge. But under the procedure specified in Section 251-A, the Magistrate is not required to take evidence and consider the same before discharging the accused under Sub-section (2). The object of the amendment of the Criminal Procedure Codes by Act 26 of 1955, which introduced Section 251-A, was to secure a speedy trial of offences without any avoidable delay: *Hanumantha Rao v. State of Andhra Pradesh*, . There is nothing obnoxious to any principle of law, when the Legislature says that in certain cases there will be a trial without the preliminary steps of a judicial inquiry. In the case of *State of Bihar v. Ram Naresh* . it was observed by the Supreme Court :

"The word 'trial' is not defined in the Code. 'Trial' according to Stroud's Judicial Dictionary means 'the conclusion, by a competent tribunal, of question in issue in legal proceedings, whether civil or criminal' (Stroud's Judicial Dictionary, 3rd Edition, vol. 4, page 3092) and according to Wharton's Law Lexicon means 'the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land' (Wharton's Law Lexicon, 14th Edition, page 1011). The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt in quite a number of sections in the Code to which our attention has been drawn the words 'tried, and 'trial' have been used in the sense of reference to a stage after the inquiry.

That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular

context in which they are used and with regard to the scheme and purpose of the provision under consideration."

As a rule of construction, it would be wrong to begin by assuming an intention apart from the plain meaning of the words used and bend the language in favour of the presumption so made. -- Per Lord Halsbury in *Leader v. Duffey*<sup>3</sup>,

7. The only point for consideration is whether the conception of a 'trial' without a Judicial inquiry would be repugnant to the natural and ordinary meaning of the word. No doubt under Section 2(7) of the Bankers' Books Evidence Act XVIII of 1891, a 'trial' means 'any hearing before the Court at which evidence is taken.' But this meaning is for the purpose of that Act. The lexicographical meaning of a 'trial' is 'the examination and determination of a cause by a Judicial tribunal; determination of the guilt or innocence of an accused person by a court' (The Oxford English Dictionary, 1938 Edition, Vol. XI, page 334). The hearing, the examination and the determination of the case begin when a Magistrate proceeds under Section 251-A (2). In my opinion, there is nothing repugnant to the context or to the ordinary meaning of the word 'trial', if, in regard to warrant cases instituted on police reports, the trial is held to commence its soon as the stage of Sub-section (1) of Section 251-A is passed. It cannot possibly be said that there is no trial until effect is given under Sub-section (7) to the accused's claim to be tried and evidence is taken, because, there is obviously a trial even when the accused pleads guilty and is convicted thereon under sub-section (5). The question of framing charges may occur in the course of a trial -- See Section 227. A discharge may also occur in the course of a trial. See Section 333. A trial may be held without its being proceeded by a judicial inquiry in summons cases. See, Chapter XX. There appears no reason why effect should not be given to the plain meaning of the expression 'at the commencement of the trial' used in sub-section (1) of Section 251-A. Therefore, the contention on behalf of the petitioner that as the trial has already commenced, there is no scope for an inquiry and that, a Sessions Judge has no power to interfere in cases of discharge under Section 251-A (2) is well founded. If a Sessions Judge acting under Section 435 finds in such cases that a trial should be conducted on charges in respect of which there was a discharge, the only course available to him is to report the matter under Section 438 for the orders of the High Court. It follows that the order in question of the Sessions Judge has to be set aside.

8. This leads us to the question whether, upon setting aside the learned Sessions Judge's order, the proper course is to direct re-trial after framing the additional charge under Section 332, I. P. O., or to leave the proceedings of the Magistrate undisturbed. On the merits, it was argued by the learned counsel that if the petitioner committed the assault the chiding could not have been the motive and that there must have been some private animosity unconnected with the District

Munsiff's duty as a public servant. But there are admittedly no materials on record to show that the District Munsiff had any relations with the petitioner otherwise than in his official capacity. It cannot therefore be said, at this stage, that the chiding by the District Munsiff was unconnected with duty as a public servant and that the charge laid under the third part of Section 332, I. P. C., was groundless. No doubt the learned Sessions Judge in the course of his order expressed himself against the contention on behalf of the petitioner that at the time of the assault, the District Munsiff was not acting in the discharge of his duty. He also observed that prima facie the petitioner's intention was to prevent the District Munsiff from taking drastic action against him. These observations are not correct, because it was not the prosecution case nor did the learned Public Prosecutor in this Court seek to support the view that the offence falls under the first or the second part of Section 322, I. P. C.

9. The learned counsel for the petitioner also urged that it would be wrong to bisect the Magistrate's proceedings of 6-10-1958 and to interfere with the implied discharge in respect of the offence under Section 332, I. P. C., while maintaining the charge in respect of the offence under Section 355, I. P. C. The decision in *Mohammad Ibrahim Sahib v. Bazhul Asu Habu*, was cited in this connection. But I am unable to see how it has any bearing, because there the evidence, which was held to have been rightly disbelieved, was the only evidence available in respect of both the charges. Here there is no bisection, in the sense of any inconsistency between the charge under Section 355, I. P. C. already framed by the Magistrate and the framing of an additional charge under Section 322, I. P. C. It was also urged that there is no need for any interference, because the Magistrate can frame an additional charge under Section 32, I. P. C. if he finds, in the course of the trial, that there is sufficient evidence to support it. Apart from its being dilatory, I see no force in this contention, because the evidence which exclusively relates to the charge under Section 332, I. P. C. would be naturally excluded as being irrelevant at the trial of the charge under Section 355, I. P. C. alone.

10. Sri M. Lakshman Rao raised two objections of law to an order by this Court under Section 439, Cr. P. C. directing a re-trial after framing an additional charge under Section 332, I. P. C. The first is that only the record of the proceeding before the Court of the Sessions Judge has been called for by the High Court under Section 435, Cr. P. C. On this footing he, urged that the jurisdiction of this Court on this revision petition is confined to the proceedings of the Sessions Judge and does not extend to the proceedings of the Magistrate. No doubt the record of the proceeding before the Magistrate has also been received in this Court. But that appears to have been submitted by the Magistrate in response to a direction by the Sessions Judge. However, the matter comes within the meaning of the clause 'or which otherwise comes to its knowledge' used in Section 439 Cr. P. C. A similar expression occurring in Section 322 of the Cr. P. C. of Singapore was construed accordingly by the Privy Council in *Mohindar Singh v. The King*<sup>4</sup>,

Hence there can be no doubt as to this Court's jurisdiction. The second objection is that as the petition is directed only against the order of the Sessions Judge, the power of this Court, upon setting aside that order, is limited by Section 423 (1) (d), Cr. P. C., to making 'any amendment or consequential order or incidental order'. On this construction, it is urged that there can only be a consequential order directing the Sessions Judge to make a report under Section 438, Cr. P. C. if he thinks fit. But such a construction of the powers of the High Court under Section 439 is opposed to the observations of the Supreme Court in *R. G. Ruia v. State of Bombay*, . His Lordship Sinha, J. who delivered the judgment of the Supreme Court observed that it was fallacious to read all the words of Section 423 into Section 439, which the latter section does not contemplate and said :

"Section 439 only authorises the High Court in revision to exercise any of the powers conferred under Section 423. It does not further make reference to the cases in which such powers have to be exercised. The latter question does not arise because section itself makes the sweeping provision that 'in the case of any proceeding', the High Court may exercise the powers enumerated in Section 423. We have, therefore, to look into Section 423 to find out not the cases in which the High Court can interfere but only the nature of the power that it can exercise in a case, in its revisional jurisdiction, that is to say, we have to incorporate only the several powers contained in Section 423 into Section 439, except the power to convert a finding of acquittal into one of conviction."

If the construction of Sri M. Lakshmana Rao is correct, it would follow that the High Court has power to interfere under Section 439 only in cases of acquittal or of conviction or of some other order made by an inferior Court and does not extend to proceedings in which no order is made by the inferior Court. Even if a most flagrant error is committed by an inferior Court, the High Court would have no power to interfere unless there is an acquittal or a conviction or some other order made by the inferior Court. Such a construction is against the plain meaning of Sections 435 and 439 Cr. P. C. The power to order retrial is one of the powers conferred by Section 423 and if such an order is found to be proper, there can be no doubt that it could be exercised in the case of any proceeding which comes within the purview of Section 439, Cr. P. C.

11. In the result, the order of the learned Sessions Judge is set aside and there will be an order by this Court for the retrial of the petitioner on a charge to be framed under Section 332 I. P. C. besides the charge already framed under Section 355, I. P. C. The trial will be held by a Magistrate of competent jurisdiction to whom the case will be transferred by the District Magistrate.

12. Before leaving the case, I may also observe that Section 436, Cr. P. C. does not authorise the Sessions Judge to direct further inquiry by a particular Magistrate. The learned Sessions Judge

ought to have directed the District Magistrate by himself or by a Subordinate Magistrate to make the further inquiry, leaving the Dist. Magistrate a discretion as to the selection of the Magistrate. See *Ramaswami Thevar v. M. Subban*<sup>5</sup>,

#### Cases Referred.

1ILR 32 Mad 220 (FB)

2AIR 1947 Mad 307

3(1888) 13 AC 294 at p. 301

451 Cr LJ 1483 at p. 1486

5AIR 1930 Mad 983