MADHYA PRADESH HIGH COURT

Sardar Khan Multan Khan

Vs.

State

Criminal Revn. No. 299 of 1959 Decided on 28.7.1961, from order of Addl. S. J., Mandsaur
(T.P. Naik and N.M. Golvalkar, JJ. On Reference By S.B. Sen, J.)

30.10.1959. 28.07.1961

JUDGMENT

N.M. Golvalkar, JJ.

1. This matter has come up for our opinion on the following two points which have been specifically formulated by Sen, J. :

> "(1) Whether in view of section 20 (g) Opium Act, a complaint filed by Excise Officer under the Opium Act can be deemed a case instituted as a case on police report as contemplated under section 251 A, Criminal Procedure Code?
> (2) If it cannot be so deemed, whether following the wrong procedure would vitiate the trial?"

2. The circumstances, giving rise to the aforesaid two questions, briefly stated, are these. On the report of a certain Excise Officer one Sardarkhan was convicted under Section 9 (a) and 9 (b) of the Opium Act. The Magistrate held the trial in the manner laid down under Section 251 A, Criminal Procedure Code. The accused unsuccessfully challenged his conviction before the Additional Sessions Judge, Mandsaur. This Court was, therefore, moved by a revision petition challenging the correctness of the conviction and it appears that it was during the course of arguments before Sen J. that it was urged that the entire trial was vitiated inasmuch as the trying Magistrate instead of following the procedure for trial laid down in Section 252, Criminal Procedure Code, followed the procedure laid down in Section 251-A of the

Code.
It was contended that the report of the Excise Officer to the Magistrate not being such a 'police report' as is contemplated by Section 251-A, Criminal Procedure Code, the case against the accused could not be said to have been instituted on a 'police report' to enable the trying Magistrate to follow the procedure for trial laid down in Section 251-A of the Code. The trial, it was urged, should have been in the manner as laid down under Section 252 of the Code and the failure to so hold the trial has materially prejudiced the accused rendering his conviction liable to be set aside.

3. The contrary view repelling the contention as raised by the petitioner expressed by a Single Judge of this Court in two cases, one of *Abdul Rehman v. State,* [1] *Madhya Pradesh 285* and the other of *Laxminarayan v. State,* [2] did not find favour with Sen J. He felt inclined to agree with the views supporting the petitioner's contention expressed in the matter by two Division Benches of Calcutta and Madras High Courts, one reported in *Premchand Khetry v. The State,* [3] and the other reported in In re, Pavadai Goundan, AIR 1957 Madras 292 : 1957-1 Mad LJ 41. Accordingly this Bench was constituted to resolve the conflict that seems to have been arisen in this Court.

4. The learned Single Judges of this Court have taken the view that a report submitted by an Excise Officer to a Magistrate complaining of a commission of an offence under the Opium Act was expressly made a report of a police officer within the meaning of Clause (b) of sub-section (1) of Section 190, Criminal Procedure Code, and therefore liable to be taken cognisance of as such by the Magistrate. Hence it was held that the Magistrate shall have to follow the procedure provided in Section 251-A of the Code for a case instituted on a police report, as laid down in Section 251 of the Code. The Excise Officers it was not disputed, have been constituted as Station Officers of a Police Station.

5. The reasoning of the Calcutta High Court in the case of AIR 1958 Calcutta 213 with which Sen, J. felt inclined to agree may be briefly stated as under :-

> "The expression 'police report', as used in the Code for reports of offences made by the Police, carries a special meaning. As used in old Section 190 (1) (b), the expression was interpreted by several High Courts as meaning reports made under Section 173, that is to say, reports of cognizable offences or non-

cognizable offences with regard to which there had been a direction by a Magistrate to investigate, made after an investigation under Chapter XIV. The result of that interpretation was that cognisance of an offence could be taken under Section 190 (1) (b) only on police reports. Other police reports were to be treated as complaints, coming under Section 190 (1) (a). Apparently, the Legislature did not desire that the operation of Section 190 (1) (b) should be so restricted and so in 1923 it amended the section by replacing the expression 'police report' by the more general words 'report in writing' of such facts (i. e. facts constituting an offence) made by any 'police officer' which would cover all police reports. At the same time, the Legislature left the expression, as occurring in Sections 170 and 173, untouched. It must therefore ' be presumed that the Legislature accepted the judicial construction of the expression 'police report', as used in the Code for reports of offences made by the police, and that where it left the expression used in a similar context untouched, it intended the expression to continue to bear the meaning which had been put upon it by the Courts. Not only did the Legislature not make "any change in the expression 'police report', when amending the Code in 1923, at any place other than Section 190 (1) (b), but when it amended the Code again in 1955, it itself used the same expression in enacting the new Sections 207, 207A, 251 and 251 A and in amending Sections 208 and 252. In those circumstances, it must equally be presumed that in the amendments made by it in r955, the Legislature used the expression 'police report' in the sense in which it had been construed to bear in the old Section 190 (1) (b)". Hence it was held by their Lordships of the Calcutta High Court "that in order that the procedure prescribed by Section 251 A may be applicable to the trial of warrant case, it must be a case "Instituted on a police report" and the investigation resulting in its institution must be an investigation to which Section 173 may be applied. On the basis of the aforesaid view it was held by their Lordships of the Calcutta High Court that the report of an offence under the Opium Act made by an Excise Officer though "a police report" within the meaning of Section 251 A of the Code by virtue of Section 20 (g) of the Opium Act, yet it will continue to bear the same interpretation as was put upon it to be a report made under Section 173 of the Code.

6. We do not see any good reasons to differ from the aforesaid view of the Calcutta High Court. Even under Section 251 of the Code of Criminal Procedure, which provides two procedures in the trial of warrant cases by a Magistrate the procedure

specified in Section 251A is made applicable to a case instituted on 'a police report'. Admittedly the investigation into an offence under the Opium Act has to be made as provided in that Act itself. The result, therefore, is, that the investigation resulting in the prosecution of an offender under the Opium Act can never be said to be one under the provisions of Chapter XIV of the Code of Criminal Procedure. The amended Clause (b) of Section 190 of the Code now would be deemed to include both, 'the police report' as interpreted by several High Courts in the manner already indicated as also 'police reports' as a result of investigation in the manner otherwise than that provided by the Code of Criminal Procedure. Since Section 251 continues to have the same expression 'police report' and not 'a report in writing of such facts made by any police officer', the inevitable result must be that the import in the instant case would not come within the meaning of Clause (a) of Section 251 of the Code, but of Clause (b) of that section requiring the Magistrate to follow the procedure for trial of warrant cases as provided in Section 252 and onwards of the Code.

7. In the view, therefore, that we have taken we feel no hesitation to answer the first question in the negative.

8. As regards the second question, whether by following the wrong procedure, i. e., by following the procedure provided in Section 251 A instead of that under Section 252 and onwards of the Code, the trial is vitiated or not, our answer to that is that it will, inasmuch as there would be denial to the accused of the valuable rights to cross-examine the prosecution witnesses, both before the charge as also after it, and to claim either that no charge could be framed or that the charge is unfounded and he is entitled to acquittal. No doubt, under the procedure under Section 251 A of the Code, the accused comes to know of the entire prosecution evidence before hand which is not available to him under the procedure prescribed under Section 252 of the Code. This may be of some advantage to him but in our opinion the advantage does not outweigh the advantage which the accused has of getting an opportunity of cross-examining the prosecution witnesses and of inducing the Magistrate not to frame a charge against him at all. In our opinion, the denial of such an opportunity is by itself sufficient to cause prejudice and to occasion a failure of justice vitiating the whole trial (see also *Chhadamilal Jain v. State of Uttar Pradesh,* [4] In this view, therefore, we would answer the second question in the affirmative.

9. Our answers thus to the questions referred to us are as under :

(1) Whether in view of Section 20 (g) of the Opium Act, a complaint filed by excise officer under the Opium Act can be deemed a case instituted as a case on police report as contemplated under Section 251-A Criminal Procedure Code? . . . No.

(2) If it cannot be so deemed, whether following the wrong procedure would vitiate the trial? . . . Yes.

Answers accordingly.
Cases Referred.

1. 1958 MP LJ 196 : AIR 1958
2. (Cr. Revn. No. 220 of 1960) : AIR 1961 Mad Pra 13
3. AIR 1958 Cal 213
4. AIR 1960 SC 41