**BOMBAY HIGH COURT**

Ramdas Kikabhai

Vs.

State (Bombay)

Criminal Appeal No. 1532 of 1958

(Chainani, C.J. and S.T. Desai, J.)

03.04.1959

**JUDGMENT**

**Chainani, C.J.**

1. (After stating the facts and discussing the evidence, his Lordship proceeded :) Then, there is the statement of the accused made before, the Committing Magistrate. In this Statement, he has stated that, on that night, he had asked Kavita to sleep inside his house, that she refused to do so and that she told him that she would not stay with him and that on the following morning she would send for panchas and take a divorce. She then slept outside in the Pejari. He woke up in the morning and as he was angry with her, he took up a stone and gave two or three blows with it to her and killed her. In this statement, therefore, the accused has admitted that he had killed Kavita. Before recording this statement of the accused, the Committing Magistrate had not recorded any evidence. It has, therefore, been urged that this statement made before the Committing Magistrate is not admissible in evidence. It is, therefore, necessary to consider the relevant provisions of Section 207-A, which lay down the procedure to be adopted in proceedings instituted on a police report. Sub-section (4) of Section 173 provides that, after the investigation is completed, the accused shall be supplied with a copy of the report of the police officer submitted to a Magistrate under sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof on which the prosecution proposes to rely. Sub-section (3) of Section 207-A states that at the commencement of the inquiry, the Magistrate shall satisfy himself that the documents referred to in Section 173 had been furnished to the accused and if he finds that the accused had not been furnished with such documents or any of them, he shall cause the same to be so furnished. Sub-section (4) states that the Magistrate shall then 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 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. This sub-

section has been construed by this Court in The *State v. Dhirajlal Maneklal*[1], in which it was held that it is not obligatory upon the prosecution to produce before the Magistrate at the stage of the committal inquiry all or any of the persons who might have witnessed the actual commission of the offence and that the prosecution has an absolute discretion in the

[1]59 Bom LR 645

matter. It is, therefore, open to the prosecution not to examine any witnesses in the inquiry held by the Magistrate. Then come sub-sections (6) and (7) which are in the following terms :

> "(6) 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 circumstance appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons, and 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.
> 7. When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial he shall frame charge under his hand, declaring with what offence the accused is charged".

The procedure which the Magistrate has to follow, therefore is that after satisfying himself that the accused has been supplied with the requisite documents, he has to take the evidence of such eye-witnesses as may be produced by the prosecution and of those other witnesses, whom he considers it necessary to examine in the interests of justice. He may then, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Thereafter, he has to give the prosecution and the accused an opportunity of being heard. He has then to consider the evidence, if any, taken by him, the documents referred to in Section 173 and the statement of the accused, if any, recorded by him, in the light of the arguments advanced by the prosecution and the accused and decide whether the accused should or should not be committed for trial.

2. These previsions draw a distinction between evidence and the documents referred to in Section 173, which also the Magistrate has to consider before deciding whether the accused should be committed for trial. The evidence referred to is the evidence, if any, taken under sub-section (4). It cannot, therefore, include the documents referred to in Section 173. The learned Assistant Government Pleader has urged that the word "evidence" which follows the words "any circumstances appearing in the" in sub-section (6) is used in a wider sense so as also to include the documents referred to in Section 173. This argument cannot be accepted, in view of the latter part of the sub-section, which requires the Magistrate to form an opinion on "such evidence and

documents". Here again the documents are referred to separately from evidence. It is, therefore, clear that "evidence" does not include the documents, which are mentioned separately in both sub-sections (6) and (7). Consequently, "evidence" in these provisions means evidence, if any, recorded under sub-section (4). The section, therefore, contemplates an examination of the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, that is in the evidence, if any, recorded under sub-section (4). It has, therefore, been urged that the Magistrate has no power to question the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in Sec 173. This argument ignores the requirement of the section that the Magistrate should give the prosecution and the accused an opportunity of being heard before deciding whether there are or are not sufficient grounds for committing the accused for trial. The hearing is given to the accused in order to enable him to show cause why he should not be committed for trial. The Magistrate is, therefore, under an obligation to give a hearing to the accused, so that the accused may be able to satisfy him that sufficient grounds do not exist for committing him to the Sessions Court. In cases in which no evidence has been recorded under sub-section (4), the accused can satisfy the Magistrate by reference only to the documents referred to in Section 173. The Magistrate is, therefore, bound to hear the explanation of the accused in regard to circumstances appearing in the documents referred to in Section 173. Instead of hearing this explanation orally and making notes about it, the Magistrate may question him and record it in writing. There is undoubtedly a lacuna in sub-section (6), but this does not appear to be intentional, having regard to the provisions which require the Magistrate to give the accused an opportunity of being heard as to why he should not be committed for trial. It is implicit in these provisions that the Magistrate may examine the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in Section 173. There is also nothing in the section which debars him from doing so.

3. Mr. Bhatt has urged that, if the Magistrate questions the accused in regard to the documents referred to in Section 173, matters may be brought on record, which are inadmissible under Section 162 of the Cri. P. C. There is no force in this argument, for the Magistrate can only question the accused with regard to the circumstances disclosed against him in the documents. The questions put by the Magistrate will not be evidence of the facts stated therein. What will be evidence will be the replies given by the accused to the questions put to him. It is, therefore, not likely that any matters, which cannot be brought on record under Section 162, will become admissible in evidence by the Magistrate's questioning the accused in regard to circumstances appearing against him in the documents referred to in Section 173.

4. Mr. Bhatt has relied on a decision of a Single Judge of the Orissa High Court in *State v. Anadi Betankar*[2], With respect, we are unable to agree with the views taken in this case.

5. We are accordingly of the opinion that, while a Magistrate is not bound to question the accused and ask him to explain the circumstances appearing in the documents referred to in Section 173,

he may do so, if he so deems it proper or necessary in the interests of justice. If he examines the accused and records his statement, that statement will be admissible in evidence under Section 287 of the Cri. P. C. The statement of the accused recorded by the Committing Magistrate is, therefore, admissible in evidence.

(The rest of the judgment is not material for the purpose of this report.)

Appeal dismissed.

[2] AIR 1958 Oris 241