

PATNA HIGH COURT

Rambalam Pd. Singh

Vs

State of Bihar

Criminal Revision No. 114 of 1960

(R.K. Chaudhuri and Tarkeshwar Nath, JJ.)

04.04.1960

JUDGMENT

R.K. Chaudhuri, J.

1. This is an application in revision for quashing a commitment directed by the learned Additional Sessions Judge of Monghyr, under section 437 of the Code of Criminal Procedure. The prosecution case was that on 21-11-59 at about 8 or 8-30 A.M. the petitioners along with others raided the padav field of the complainant and wrongfully harvested the crop from an area of about one bigha and a half. They are also alleged to have removed this harvested paddy and also some more paddy which had been kept near his dera and set fire to the dera itself. A written complaint about the occurrence was lodged at the police station. The Police after investigation submitted a charge-sheet against the petitioners under Sections 143 and 379 of the Indian Penal Code. On a petition filed by the complainant the learned Magistrate converted the trial into an enquiry under Chapter XVIII of the Code of Criminal Procedure. The prosecution examined altogether five witnesses to prove the occurrence including the arson. The learned Magistrate found that there was prima facie evidence to show that offences under sections 143 and 379 of the Indian Penal Code had been committed. Regarding arson he, however, took the view that it was an embroidery on the main prosecution case. This finding was based on what he considered to be certain improbabilities regarding the story of arson as laid in court. He pointed out that the allegation about arson was mentioned last in the written complaint and did not mention who in fact had set fire to the dera although at the trial specific evidence was led to show that it was petitioner Rambalam who had done so. He also referred to the evidence of the Assistant Sub Inspector of Police as to what he saw on the spot in the course of his investigation. This officer stated that he found heaps of ashes at the site of the dera and bamboo poles and Khatia pauas with patti thereon. He did not find any trace of any burnt marwa nor were the "extremities of the posts or signs of eaves water" shown to him by removing the ashes, from the place." He further stated that he did not find any unburnt part of any wooden posts in the ash or any trace of burnt Khatia, sutri or beds. He also noticed some freshly kept earth on the ash heap. The learned Magistrate also referred to the fact that a school building situated nearby had not caught fire. Referring to all these circumstances the learned Magistrate observed that the story of the complainant was absurd and unbelievable. He took the view that "as there is not only no

probability but no possibility of their conviction under section 436 of the Indian Penal Code" there was no ground for committing the accused persons under that section. He accepted the evidence of the prosecution witnesses with regard to the rest of the occurrence and held that a prima facie case under sections 143 and 379 of the Indian Penal Code had been made out against the petitioners. Since both these offences were triable by him the learned Magistrate framed charges under those sections and ordered that he would try them himself. Aggrieved by this order the complainant moved the Sessions Judge of Monghyr. It was contended on his behalf that as there were sufficient grounds for charging petitioner Rambalam with the offence of arson he must be deemed to have been improperly discharged under that section. The learned Additional Sessions Judge, who heard the revision observed that as many as five witnesses had deposed that opposite party Rambalam had set fire to the dera of the petitioner. On a review of the evidence the learned Judge came to this conclusion :

"Having considered all the aspects of the case, I am of opinion that the prosecution has established a prima facie case about Rambalam Singh having set fire to the Dera. In my opinion, there can be little doubt that there was sufficient ground for committing the accused persons for trial and the learned Magistrate was not justified in discharging the accused as far as section 436 I.P.C. was concerned."

Molding that Rambalam Prasad Singh had been improperly discharged within the meaning of section 437 of the Code of Criminal Procedure he directed him to be committed to the court of Session for trial on that charge.

2. Mr. K.K. Sinha appearing for the petitioners has challenged the correctness of the learned Additional Sessions Judge's order. He submitted that having regard to the materials, on the record the learned Magistrate's finding that there were no sufficient grounds for committing the accused under section 436 of the Indian Penal Code was correct and the court below was in error in interfering with that order and directing commitment of the accused on the charge of arson. The functions of a Magistrate holding an enquiry under Chapter XVIII of the Code of Criminal Procedure have been the subject of a long series of decisions in various High Courts. So far as this High Court is concerned the matter is now well-settled. In *Moinuddin v. Sheogobind Sahu*¹, Meredith J. while holding that it was never the intention of the law that the committing Magistrate should merely act as an automaton observed :

"It clearly empowers him to weigh the evidence and to exercise his judicial discretion and it plainly contemplates that he should do so. A number of rulings have been cited in support of this proposition. It was hardly necessary to do so because its correctness cannot be questioned. Nevertheless it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment within the meaning of section 209, and another to balance the evidence as it is the duty of the Sessions Court to do in order to decide upon the guilt of the accused after considering the case as a

whole. It is not for the Magistrate to usurp the functions of the Sessions Court.

It is not for him to decide whether upon the whole this witness or that witness should or should not be believed."

The correct view of the matter has to my mind, been very clearly and accurately expressed by the late Sulaiman, J. in *Akbar Ali v. Raja Bahadur*², In that case his Lordship said,

"Section 213 uses the expression 'not sufficient grounds for committing the accused'. This expression is quite different from such expressions as 'the case not proved' or 'the accused are innocent'."

3. Dhavle J. similarly held in *Ganga Prasad Naik v. Bhagwat Deo*³, that where the evidence is balanced however unevenly in the opinion of the Magistrate, then it is a matter which has to be tried and it is his duty to commit it for trial.

4. In *Bhola v. Kaushalya*⁴, Sarjoo Prosad J. thus laid down the function of the Magistrate :

"His function is to see whether the case is a fit one for trial or commitment and not whether the case is a fit one for conviction. Therefore, if there are two views possible of the evidence, although the Magistrate may be inclined to a view in favor of the accused he should not merely on that account refuse to commit the accused so long as there is a possibility of another view being taken by the court which finally comes to try him. It is only where, on the evidence on record, no other view is possible except the one in favor of the accused, that a Magistrate should refuse to commit such a case because there is really no evidence for trial."

5. His Lordship also pointed out that while it was open to a Magistrate holding a preliminary enquiry in a case triable by a Court of Session to examine the credibility of the testimony of witnesses he can do so only for the limited purpose of seeing whether there is a prima facie case for commitment and not for the purpose of coming to a decision whether the accused is actually guilty.

6. I shall finally refer to the case of *Ramgopal Ganpatrai v. State of Bombay*⁵, The Supreme Court on a review of a large number of cases on the subject pointed out that there were apparently conflicting observations about the power of a committing Magistrate but those observations have to be read in the light of the facts and circumstances disclosed in the case then before the Court. The conclusion at which their Lordships arrived was this :-

"In each case, therefore, the Magistrate holding the preliminary inquiry, has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit, and unless he is so satisfied, he is not to commit."

7. Judged by these tests I hold that, the learned Magistrate's order is open to serious comment. He has accepted the evidence of the prosecution witnesses so far as the rest of the occurrence is concerned. Obviously he has held that these witnesses are entitled to a reasonable degree of credit. He, however, refused to commit the accused on the ground of certain so called

improbabilities in the prosecution case regarding arson. So far as the evidence of the Assistant Sub-Inspector of Police is concerned he laid stress more on the negative aspect that is to say what the officer did not find or was not pointed out to him and not on the positive facts found by him which were consistent with the oral evidence of the witness. As we intend to uphold the order of commitment made by the court below it would not be proper to say anything on the merits of the case. It is, however, clear that while the Magistrate was within his jurisdiction in weighing the evidence and in exercising this judicial discretion he certainly exceeded the limits of his power when he sought to balance that evidence by considering it as a whole. It was no part of his duty to balance the probabilities and to come to a decision that the case was not fit for conviction. Clearly, two views were possible on the evidence and in these circumstances it was his duty to commit the accused for trial. The finding of the court below that the accused persons had been improperly discharged in regard to the charge of arson is therefore correct and must be affirmed.

8. Mr. K.K. Sinha next referred to the Full Bench decision of the Allahabad High Court in *Nahar Singh v. The State*⁶, That was a case where there was only one offence alleged against the applicant. In that case the Additional Sessions Judge had cancelled a charge framed against the applicant under section 304-A, Penal Code by a Magistrate and directed him to be committed to the Court of Session to stand trial on the charge under section 304, Penal Code. The question that arose for decision was whether having regard to the circumstances of the case the Additional Sessions Judge had jurisdiction to do so in exercise of the powers conferred upon him by section 437 of the Code of Criminal Procedure. The passage on which learned counsel relied is to be found in the observations of Malik C. J. to this effect :-

"In such a case also the mere non-framing of a charge with respect to one distinct offence should not necessarily amount to an implied discharge as even in that case the Magistrate can frame a fresh charge in the course of the proceedings if he considers it necessary as is clear from sections 227 to 230 of the Code."

The learned Judges directed that the Magistrate was to proceed with the trial of the accused under section 304A but if in the course of the trial it appeared to him at any stage of the proceedings that the case was one which ought to be tried by the Court of Session then he would be at liberty under section 347, Criminal Procedure Code, to commit the accused. Learned counsel for the petitioners has urged that since it is yet open to the Magistrate in the course" of the trial to commit the accused if he came to the conclusion that the case was one which ought to be tried by the Court of Session

this Court should not hold that there was an implied discharge of the accused calling for interference under section 437 of the Code of Criminal Procedure, I am unable to agree with this contention. In this case the Magistrate came to a clear finding that since on the face of it the prosecution story of arson was "absurd and unbelievable there was no ground for committing the accused persons to the Court of Session". In view of this finding it is no longer possible for the learned Magistrate to come to a wholly different conclusion in the course of the trial that it was a case which ought to be tried by the Court of Session. Although therefore, in the present case there was no express order of discharge the accused must be deemed to have been discharged impliedly.

9. In the result, the application fails and the rule is discharged.

Tarkeshwar Nath, J.

10. I agree, Mr. K.K. Sinha urged that the Additional Sessions Judge had no jurisdiction to order commitment in respect of the charge for arson, as there was no order of discharge by the Magistrate and he relied on the decision in the case of AIR 1952 Allahabad 231 (FB) which has already been referred to by my learned brother. I wish to add that Desai, J. who delivered the leading judgment in that case, made it clear that he was dealing with a case in which only one offence was said to have been committed by the accused and that when the accused was tried for two or more distinct offences, he could certainly be discharged in respect of one or more and be proceeded against in respect of others. It was further observed that great confusion was likely to result from the failure to distinguish between a trial for one offence and a trial for more than one offence. The following observations can be usefully quoted :

"The mere fact that for the sake of convenience and facility the two trials are allowed to be merged in one should not produce a different legal result. In one trial the accused can be discharged in respect of one matter, while he is being proceeded against in respect of the other matter. This is the only case in which an accused can be discharged as well as charged."

Bind Basni Prasad J. was pleased to observe that where a person was accused of only one offence his discharge would bring about a complete termination of the proceedings against him. But if he was accused of several distinct offences each independent of the other, then it was possible that he might be discharged of one or more of such offences and might be proceeded with in respect of the rest. In that event there would be a termination of proceedings so far as they related to the offences of which he was discharged but no termination in respect of the others. Their Lordships were dealing with a case in which only one offence was said to have been committed by the accused and, therefore, that decision is of no help to the petitioners and on the other hand, the observations referred to above indicate that if there are more than one offence, there can be a discharge in respect of one and committal in respect of the other.

11. A similar question arose in the case of Nalla Baligadu, In re, AIR 1953 Madras 801 (FB) and the provisions of Sections 209 (1) and 437 of the Code of Criminal Procedure were considered. In that case there was a charge-sheet against seven persons for offences under Sections 147, 148, 324 and 302 of the Indian Penal Code and Section 4 (1) of Madras Prohibition Act. The Stationary Sub Magistrate held an enquiry under Chapter 18, Criminal Procedure Code and in exercise of the powers conferred on him by Section 209 of that Code discharged accused 1 to 3 in respect of the offence under Section 302 but decided to frame charges in respect of other offences to try them himself. The Assistant Public Prosecutor moved the District Magistrate in revision and he reversed the order discharging accused 1 to 3 and directed the Sub Magistrate to commit accused 1 to 7 to take their trial before the Sessions Court. The accused then moved the High Court to revise the order of the District Magistrate. The case was then ultimately referred to a Full Bench and the question formulated for consideration was as follows :

"Where under Section 209(1), Criminal Procedure Code a Sub Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such persons to

be tried before himself or some other Magistrate can the revisional powers under Section 437 be exercised before the conclusion of the trial before such Magistrate."

On a consideration of the various provisions of the Code and a large number of decisions it was held that when a Magistrate discharged an accused in respect of an offence exclusively triable by Court of Session and proceeded to try him himself for an offence, within his jurisdiction on the language of Section 437, Criminal Procedure Code, it was open to the District Magistrate to direct the committal of the accused for trial "upon the matter of which he had been in the opinion of the District Magistrate, improperly discharged. The decision of the Full Bench in the case of AIR 1952 Allahabad 231 was considered and the view taken therein was not accepted. Reliance was placed on a catena of decisions of Madras High Court and the question referred to was answered in the affirmative. I would adopt the reasons given by the learned Judges for answering the question referred to the Full Bench in the affirmative. In this view of the matter, the learned Additional Sessions Judge was within his jurisdiction directing committal in respect of the charge for arson.

Rule discharged.

Cases Referred.

¹ AIR 1941 Pat 50

² 24 All LJ 133 : (AIR 1925 All 670)

³ AIR 1942 Pat 38

⁴ AIR 1951 Pat 453

⁵ AIR 1958 SC 97

⁶ AIR 1952 All 231