

Subhojit Datta Vs. State of Bihar

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Court : Patna

Decided On : May-09-2007

Judge : Chandramauli Kr. Prasad and V.N. Sinha, JJ.

Acts : Indian Penal Code (IPC) - Sections 406, 409 and 467; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 29, 30, 32, 34, 106, 323, 325, 325(1), 325(3), 347(1), 357, 386, 389, 390, 391, 392, 397, 401, 401(1), 401(4), 421 and 431

Appeal No. : Criminal Revision No. 695 of 2006

Appellant : Subhojit Datta

Respondent : State of Bihar

Advocate for Def. : G.P. Jaiswal, Adv.

Advocate for Pet/Ap. : Sanjeev Ranjan, Adv.

Disposition : Application dismissed

Judgement :

Chandramauli Kr. Prasad, J:

1. Petitioner being aggrieved by the judgment dated 26th of June, 2006, passed by the 1st Additional Sessions Judge, Munger in Criminal Appeal No. 73 of 2005, affirming the judgment dated 8th of June, 2005 passed by the Chief Judicial Magistrate, Munger in G.R. No. 49 of 2000 (G.R.P. Jamalpur case No. 15 of 2000)

holding him guilty of offence under Section 409 of the Indian Penal Code and inflicting the sentence of rigorous imprisonment for seven years and fine of Rs. 5,000/-, in default to suffer rigorous imprisonment for six months, has preferred this revision application.

2. The revision application was posted for consideration before a learned single Judge of this Court on 8.12.2006. Being prima facie satisfied that the petitioner though found guilty of misappropriation of huge amount of public money, let off with inadequate sentence issued notice to show cause as to why the sentence be not appropriately enhanced. This is how this case has been listed before us.

3. Mr. Jaiswal, appearing on behalf of the State submits that sentence inflicted on the petitioner is inadequate to the gravity of the allegation and this Court in exercise of its suo moto power can enhance the sentence.

4. Mr. Sanjeev Ranjan, appearing on behalf of the petitioner however contends that although the case was tried by the Judicial Magistrate, 1st Class but later on transferred to the Chief Judicial Magistrate, the later having inflicted maximum sentence which he was entitled in law to pass, this Court lacks jurisdiction to enhance the same in exercise of its suo-moto power.

5. The rival submission necessitates examination of the scheme of the Code of Criminal Procedure.

6. It is relevant here to state that Section 409 of the Indian Penal Code provides for punishment with imprisonment for life, or with imprisonment for either discretion for a term which may extend to ten years and also fine. First Schedule of the Code of Criminal Procedure, which classifies the offences and provides as to the Court by which offences are triable, make Section 409 of the Indian Penal Code to be triable by the Court of a Magistrate of the First Class. Chapter III of the Code of Criminal Procedure, hereinafter referred to as Code, deals with the power of the Courts to inflict punishment and Section 29 thereof limits the power of the Chief Judicial Magistrate, Magistrate of the 1st Class and the Magistrate of the Second Class in this regard. Section 29 of the Code which is relevant for the purpose reads as follows:

29. Sentences which Magistrates may pass.-(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) The Court of a Magistrates of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees, or of both.

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding five thousand rupees, or of both.

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

7. From a plain reading of the aforesaid provision it is evident, that the Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years. The power of the Court of a Magistrate of the First Class has been limited to the extent of passing sentence of imprisonment for a term not exceeding three years and similarly the Magistrate of the second class power has been limited to sentence of imprisonment not exceeding one year. Here in the present case the Chief Judicial Magistrate had passed the maximum sentence which he is authorised under law to inflict.

8. However, as stated earlier offence under Section 409 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and in view of the first Schedule of the Code of Criminal Procedure, same is triable by a Court of Magistrate of the 1st Class. In such a contingency what should be the procedure, the Court of the Magistrate of 1st Class is to follow when it is satisfied that the gravity of allegation justifies higher sentence than the maximum sentence he or the Chief Judicial Magistrate could inflict.

9. I am of the opinion that Section 323 of the Code of Criminal Procedure, hereinafter referred to as the 'Code' takes care of this contingency, same reads as follows:

323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.- If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provision of Chapter XVIII shall apply to the commitment so made.

10. From a plain reading of the aforesaid provision, it is evident that the Magistrate at any stage of inquiry into an offence or trial but before signing of the judgment can commit a case to the Court of Session if he is of the opinion that it 'ought to be tried' by it. Whether the expression 'ought to be tried' by the Court of Session includes only those offences which are exclusively triable by the Court of Sessions under First Schedule of the Code or other offences also? I am of the view that the expression 'ought to be tried' in Section 323 of the Code shall not include only those offences which are exclusively triable by the Court of Sessions in the light of the First Schedule of the Code. One has to bear in mind that an offence exclusively triable by a Court of Session under First Schedule of the Code is to be tried by it and the Code has not given any discretion in this regard. Therefore, the discretion given to the Magistrate to commit the case to the Court of Sessions which 'ought to be tried' by it shall obviously include such offences which are not triable exclusively by a Court of Session. There may be a case like the present one in which the maximum sentence provided in law is imprisonment for life or with imprisonment for either description for a term which may extend to ten years. The legislature has provided punishment for the aforesaid offence and many other offences although triable by a Magistrate of the First Class more than what a Magistrate of the First Class or a Chief Judicial Magistrate could inflict. In case the expression 'ought to be tried' in Section 323 of the Code is read to mean offences exclusively triable by a Court of Session, in no case maximum punishment provided under Section 409 of the Indian Penal Code can possibly be inflicted. Thus, in my opinion, a case in which the Magistrate is of the opinion that the

punishment provided under the law can neither be inflicted by him or by the Chief Judicial Magistrate but the allegations justify higher punishment, he is obliged to commit the case to the Court of Session. This power can be exercised at any stage of the proceeding before signing judgment. On such commitment the provision of Chapter XVIII, which deals with trial before a Court of Session shall apply. The view which I have taken finds support from a judgment of this Court in the case of Emperor v. Deo Narain Mullick AIR 1928 Patna 551 in which it has been held as follows:

The offence in this case is not exclusively triable by the Court of Sessions. Therefore the Magistrate could only commit the accused to the Court of Sessions if he had been of the opinion that the case ought to be tried by that Court. He must give reasons for his entertaining that opinion, for the order of commitment is judicial order.

11. The ancillary question which may arise for consideration is as to whether a Magistrate in a case where he feels that the accused ought to receive a punishment different in kind from, or more severe than that what he or Chief Judicial Magistrate is empowered to inflict, can straightway commit a case to the Court of Session under Section 323 of the Code. A learned Single Judge of the Gujarat High Court had the occasion to consider this question in the case of Narendra Amratlal Dalal v. The State of Gujarat 1978 Criminal Law Journal 1193 and held that Magistrate of the First Class cannot straightway commit a case to the Court of Session. In the said case it has been held as follows:

Therefore, on a correct interpretation of the relevant provisions, no Magistrate can straightway commit a case to the Court of Session, under Section 323, on the ground that the punishment that the accused should receive ought to be different in kind and more severe than that which he is competent to inflict. He has got to follow the procedure under Section 325 of the Code and there is no other alternative left for him in such a case. It follows as a necessary consequence that, after following the procedure under Section 325, if he comes to the opinion contemplated by Sub-section (1) thereof, he has to submit the proceedings to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate, as the case may be.

12. In my opinion, Section 323 and Section 325 of the Code operate in different fields, whereas Section 323 of the Code confers on a Magistrate at any stage of the proceeding before signing judgment in any inquiry into an offence or a trial that the case is one which ought to be tried by the Court of Session, he can commit it to that Court. However Section 325 of the Code comes into picture when a Magistrate after hearing the evidence for the prosecution and the accused that accused is guilty and he ought to receive punishment different in kind from, or more severe than, which he is empowered to inflict. Therefore while exercising power under Section 323 of the Code the satisfaction of the Magistrate is in respect of the case which in his opinion ought to be tried by a Court of Session, whereas Section 325 is in the field of punishment. There may be a case in which the Magistrate of the First Class at the initial stage of the trial itself comes to the conclusion that the allegation in the case is so serious that it ought to be tried by a Court of Session. There shall not be any justification for such a Magistrate to proceed with the trial and then hold the accused guilty and submit proceeding to the Chief Judicial Magistrate under Section 325(1) of the Code and expect the Chief Judicial Magistrate to commit the case to the Court of Session. All these exercise up to the stage of holding the accused guilty for submitting the proceeding before the Chief Judicial Magistrate shall then be absolutely futile.

13. It is worthwhile mentioning that in the case of Narendra Amratlal Dalal (Supra) the Gujarat High Court had preserved the power of the Magistrate to commit the case to the Court of Session straight-away under Section 323 of the Code, wherein a question other than quantum of punishment is involved, which would be evident from the following passage of the judgment:

It must be made clear, however, that this interpretation does not affect the power of a Magistrate or a Metropolitan Magistrate to commit under Section 323 of the new Code a case to the Court of Session wherein a question other than the quantum of punishment, which ought to be received by the accused, is involved. It is cases other than the punishment which ought to be received by the accused as contemplated by Section 325(1) in which a Magistrate or a Metropolitan Magistrate can have resort to Section 323 of the new Code.

14. In the said case it has also been held that 'no Magistrate can straight-away commit a case to the Court of Session under Section 323, on the ground that the punishment that the accused should receive ought to be different in kind and more severe than that which he is competent to inflict'.

15. With deepest respect, I am unable to persuade myself to agree to this view. As has been held above the expression 'ought to be tried by a Court of Session' is not confined to offences exclusively triable by a Court of Session under first schedule of the Code. Thus discretion has been conferred on the Magistrate to adjudicate as to the case which ought to be tried by a Court of Session. In my opinion the complexity of the case may be a ground for the Magistrate to come to the conclusion that the case be tried by a Court of Session. Similarly punishment that an accused should receive ought to be different in kind and more severe than what the Magistrate is competent to inflict can be also a good ground for a Magistrate to come to the conclusion that the case ought to be tried by a Court of Session. Hence, I am of the considered opinion that a Magistrate while holding inquiry into an offence or the trial is satisfied that the case is one which ought to be tried by a Court of Session and this satisfaction may be on account of quantum of punishment, he can commit the case to that Court straightway, but this power has to be exercised before signing the judgment.

16. Reference in this connection can be made to a decision of the Supreme Court in the case of Chhadamilal Jain and Ors. v. State of Uttar Pradesh and Anr. : 1960 CriLJ145 wherein it has been held as follows:

The fact that in the complaint Section 467, which is exclusively triable by a Court of Session, was mentioned is of no consequence for the summonses to the accused were only for a trial under Section 406 of the Penal Code. It must, therefore, be held that the proceedings before the Magistrate began as in the trial of a warrant case and if the Magistrate at a subsequent stage of the proceedings was of the view that the case should be committed to the Court of Session, he would have to act under Section 347(1) of the Code. We have been at pains to refer to this aspect of the matter for considerations would be different if the case was exclusively triable by the Court of Session and began from the outset as an

inquiry under Ch. XVIII. What we shall say hereafter must, therefore, be taken to apply only to a case which began as a proceeding in a warrant or summons case and in which the Magistrate at a later stage takes action under Section 347(1).

17. In a case in which the Magistrate is of the opinion that the accused deserves to receive punishment more than what he is empowered to inflict, after hearing the evidence for the prosecution and the accused and after holding him guilty can submit the proceeding to the Chief Judicial Magistrate and the latter may pass judgment and sentence as he thinks fit and is according to law. As in the present case the Judicial Magistrate of the First Class being satisfied that the accused deserved more punishment than what he is empowered to inflict, submitted the proceeding to the Chief Judicial Magistrate. The Chief Judicial Magistrate in turn had passed the maximum sentence which he was entitled in law to inflict but there may be a case in which the Chief Judicial Magistrate before whom the proceeding is submitted under Section 325(1) of the Code is of the view that the case involves an offence of a gross nature and the sentence which deserves to be awarded must exceed seven years i.e. the maximum sentence, he is authorised in law to inflict, what the Chief Judicial Magistrate is to do. To answer this it would be apt to reproduce Section 325 of the Code:

325. Procedure when Magistrate can not pass sentence sufficiently severe.-(1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under Sub-section (1) in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

18. Section 325(3) enables the Chief Judicial Magistrate to not only pass judgment and sentence but also confers on him the power to pass 'order' in the case as he thinks fit.

19. I am of the opinion that this wide power to pass 'order' as the Chief Judicial Magistrate thinks fit in Section 325(3) of the Code in respect of a proceeding submitted to him under Section 325(1) of the Code will obviously include the power to commit the case to the Court of Session when it appears to him before signing judgment that the case is one which ought to be tried by the Court of Session. The word Magistrate occurring in Section 323 of the Code shall also include a Chief Judicial Magistrate. The Gujarat High Court had the occasion to consider this question in the case of Narendra Amratlal Dalal (supra) in which it has been held as follows:

Now, suppose, before a Chief Judicial Magistrate, or a Chief Metropolitan Magistrate, the case involves an offence of a gross nature and the sentence which he ought to award must exceed seven years, what is the Chief Judicial Magistrate or the Chief Metropolitan Magistrate to do ? Sub-section (3) of Section 325 in such a case enables the Chief Judicial Magistrate to pass such order in the case as he thinks fit and is according to law. He can, therefore, commit the case submitted to him under Section 325(1) to the Court of Session under Section 323 of the new Code. The word 'Magistrate' occurring in Section 323 in this connection should be held to include a 'Chief Judicial Magistrate', or a 'Chief Metropolitan Magistrate' as well.

20. I respectfully agree with the view of the Gujarat High Court on this question.

21. Mr. Ranjan is right when he contends that this Court in exercise of its suo moto revisional power cannot inflict more severe punishment than what the Chief

Judicial Magistrate was empowered to do. This question came up for consideration before the Supreme Court in the case of Jagat Bahadur v. State of Madhya Pradesh AIR 1966 Supreme Court 945 which would be evident from paragraph 5 of the judgment, which reads as follows:

The only other question urged by learned Counsel is regarding sentence. He points out that the appellant was tried by a Magistrate of the First Class and that under Section 32 of the Code of Criminal Procedure the maximum sentence which such a Magistrate is entitled to pass is imprisonment for a term not exceeding two years and a fine not exceeding Rs. 2,000. There is nothing to show that the learned Magistrate was invested with powers under Section 30 of the Code by virtue of which he could under Section 34, pass a sentence of imprisonment upto the limit of seven years. If the learned Magistrate, instead of acquitting the appellant, had convicted; him, he could therefore, not have passed a sentence of imprisonment in respect of the offence under Section 392 for a term exceeding two years and that, therefore, the High Court was incompetent to pass the sentence of imprisonment of four years.

22. The answer to the aforesaid question has been furnished by the Supreme Court in the following words:

In In re Tirumal Raju AIR 1947 Mad 368 it has been held that an appellate court is not competent to impose a punishment higher than the maximum that could have been imposed by the trial Court. It seems to us that these cases lay down the correct law. An appeal court is after all 'a court of error', that is, a court established for correcting an error. If, while purporting to correct an error, the Court were to do something which was beyond the competence of the trying Court, how could it be said to be correcting an error of the trying Court. No case has been cited before us in which it has been held that the High Court, after setting aside an acquittal, can pass a sentence beyond the competence of the trying Court. Therefore, both on principle and authority it is clear that the power of the appellate court to pass a sentence must be measured by the power of the court from whose judgment an appeal has been brought before it. The High Court, was thus in error in sentencing the appellant to undergo imprisonment in respect of the offence under Section 392

for a period exceeding two years.

23. Section 386 of the Code deals with the power of the appellate court and 386(c)(iii) confers on the appellate court in an appeal to enhance or reduce the sentence. Section 401(1) deals with the High Court's power of revision and Section 401(1) thereof confers on the High Court such of the powers as conferred on a Court of appeal by Section 386, 389, 390 and 391 or on a court of Session by Section 397 of the Code. Section 397 confers on the High Court to call for the records to exercise the power of revision. Hence I am of the opinion that from the conjoint reading of Section 397, 401 and 386 of the Code, the High Court while exercising the power of revision can enhance the sentence, if it is satisfied that the same is inadequate. However, the High Court while in exercise of the revisional power cannot impose punishment higher than the maximum that could have been imposed by the trial court. Reference in this connection can be made to a decision of the Supreme Court in the case of Eknath Shankarrao Mukhawar v. State of Maharashtra AIR 1977 Supreme Court 1177 in which it has been held as follows:

6. We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, suo motu. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under Section 397 read with Section 401 Criminal Procedure Code, 1973, inasmuch as the High Court can 'by itself' call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code.

24. There may be a case in which the Magistrate of the First Class or for that matter the Chief Judicial Magistrate had inflicted the maximum punishment which they are empowered under law to inflict. Still this Court while exercising its power

comes to the conclusion that case involves an offence of a gross nature and the sentence which the accused must receive beyond what the Judicial Magistrate of the First Class or the Chief Judicial Magistrate may inflict. This Court may record its satisfaction that the case is fit to be tried by a Court of Session and exercise the power of a Judicial Magistrate or the Chief Judicial Magistrate as the case may be under Section 323 of the Code and commit the case to the Court of Session.

25. Having said so, in the facts and circumstances of the case, I am not inclined to exercise that power and commit the case to the Court of Session.

26. Petitioner has been awarded the maximum sentence which the Chief Judicial Magistrate was empowered in law to inflict. Hence I lack jurisdiction to enhance the sentence inflicted on him.

27. Mr. Jaiswal submits that in view of the fact that petitioner has defalcated a huge amount, sentence of fine commensurate with the gravity of the allegation be inflicted and further compensation to the victim of crime as contemplated under Section 357 of the Code be awarded.

28. Mr. Ranjan, however, submits that fine cannot be awarded as it is not part of a sentence and compensation can only be awarded to the extent of maximum fine provided under the law.

29. Mr. Ranjan is factually incorrect. Section 409 of the Indian Penal Code makes the accused guilty of that offence liable to fine also. His submission otherwise is also not tenable and absolutely misconceived. There is misconception that compensation can be awarded in case it is part of sentence or compensation can only be to the extent of maximum fine provided under law. There is no doubt that in case the convict undergoes the sentence imposed in lieu of fine, amount of fine cannot be recovered but in my opinion it is not mandatory to award substantive sentence. Section 409 of the Indian Penal Code makes the offence of criminal breach of trust by public servant punishable with substantive imprisonment and also fine. Similarly Section 357 of the Code confers power to award compensation to the victims of crime and there is no outer limit for that. Section 431 of the Code provides for recovery of any money other than fine payable by virtue of any order

as if it is a fine. Section 421 of the Code provides the procedure for recovery of the fine. Therefore, in my opinion, as a proposition of law this Court while exercising its power of revision either at the instance of the party or suo motu can levy fine, grant compensation and it may not be necessary to provide for imprisonment in default of the fine. However, taking into account the entire facts and circumstances of the case as also the fact that the petitioner is in custody for about seven years, I do not find it a fit case either to impose fine or grant compensation.

30. In that view of the matter, the rule of enhancement is discharged.

31. Now I take up the case on merit.

32. The two courts below on appraisal of evidence came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt and convicted and sentenced the petitioner as above. The finding so arrived being on appraisal of evidence and based on the evidence on record cannot be said to be perverse calling for interference in the present revision application.

33. Accordingly, I do not find any merit in the application and it is dismissed accordingly.

V.N. Sinha, J.

34. I agree.

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