

State of Assam Vs. Hit Ram Deka

State of Assam Vs. Hit Ram Deka

SooperKanoon Citation : sooperkanoon.com/133965

Court : Guwahati

Decided On : Jun-28-1989

Judge : S. Haque, J.

Acts : Indian Penal Code (IPC) - Sections 312, 313, 366, 376 and 493; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 173, 207, 208, 209, 227, 228 and 319; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 202(2), 204, 206 to 220 and 351

Appeal No. : Criminal Revn. No. 35 of 1989

Appellant : State of Assam

Respondent : Hit Ram Deka

Advocate for Def. : P.C. Gayan and A. Hai, Adv.

Advocate for Pet/Ap. : C.R. De, Public Prosecutor

Disposition : Petition allowed

Judgement :

S. Haque, J.

1. This Criminal Revision has been initiated suo motu by this Court on perusal of the records of G. R. Case No. 3559 of 1986 and the order dt. 3-6-1988 passed in

the case by the Judicial Magistrate Shri G. K. Sangmai, Gauhati.

2. Initially case No. 486 was registered at Dispur Police Station on 28-10-1986 under Sections 366/312/313, I.P.C. on the basis of the First Information Report lodged by Srimati Sabita Bala Das. Shri Hit Ram Deka was the named accused. Thereupon, the C.R. case No. 3559 of 1986 had been registered on the Court of Chief Judicial Magistrate, Gauhati. On completion of investigation, charge-sheet had been submitted against the accused to face the trial for commission of offences under Sections 376/312/313 of the Penal Code. Relevant documents with copy of the police report had been furnished to the accused as required under the law. The case came to the file of Shri C.K. Santmai, Judicial Magistrate, First Class, Gauhati;

3. The Magistrate took up the case on 3-6-1988, and passed the order after hearing counsel of both sides and considering all facts and materials on record. It is revealed from the order that the Assistant Public Prosecutor had submitted that the case should be committed to the Court of Session directly as the investigating agency submitted charge-sheet for offence under Sections 376/312, I.P.C. against the accused and the offences were exclusively triable by the Court of Session. Whereas, the counsel for the defence had submitted that the Magistrate should not commit the case to the Court of Session as there was no material particulars in the record referring to some decisions including one reported in AIR 1958 SC 57 (as disclosed in the order); that there was no element on record for charging the accused under Section 376, IPC because the victim girl was above 19 years of age and had sexual intercourse with consent; that the accused also could not be charged under Section 493, IPC for absence of deceitful act on the part of the accused to believe the victim girl that she was lawfully married to him and both did never live together for some period as husband and wife; that the accused had sexual intercourse with the girl occasionally availing the chances and that too with her consent; and that the accused could not be found to have committed offences under Section 312 as miscarriage was done by Medical Surgeon who was exempted from this offence as per provision of law. On hearing these, submissions of the counsel the Magistrate gave concluding decision in his order dt. 3-6-1988 as follows : --

'So, considering all relevant facts and after perusal of relevant papers under Section 173, Cr. P.C., I find no element on record to charge the accused Hit Ram Deka with the offence under Sections 376/312, IPC and accordingly, I discharge him from the said charge and set him at liberty forthwith.'

4. Had the Magistrate committed illegality? Learned counsel Mr. P. C. Gayan or the accused-opposite party submits that no error was made by the Magistrate in discharging the accused by adopting the procedure in his order dt. 3-6-1988. In view of the provisions under the Cr. P.C., 1973, we find no substance in the submission of Mr. Gayan. Learned Public Prosecutor Mr. C. R. De has referred to the relevant provision of the Code, 1973 and submits that the Magistrate committed grave illegality and did it knowingly having fully conversant with the provisions of the law in such cases due to his long experience as Magistrate. Admittedly, the offences in the charge-sheet are triable exclusively by the Court of Session.

5. Section 209 of the Cr. P.C. reads as : --

'When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) Commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) sent to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.'

This section is new in the Code, 1973. The old procedure of committal inquiry in Sections 206 to 220 of the 1898 Code was abolished. As soon as the accused appears before the Magistrate or is brought before him in answer to the process issued under Section 204, and it appears to the Magistrate that the offence for which accused appears or is brought before him is exclusively triable by the Court of Session, the case shall be committed to the Court of Session. The apparent distinction with regard to the commitment under the old Code and the new Code are :--

(i) under the repealed Code, the Magistrate had to commit particular accused person or persons to stand trial on framing charge or charges, while under the new Code the Magistrate shall commit the case in accordance with Section 209.

(ii) The Magistrate had to hold an inquiry for commitment of the case under the repealed Code, whereas no such inquiry is to be held while committing a case under the provision of Section 209 except to the extent the Magistrate has to record the whole of the evidence in Complaint Case for the prosecution under the proviso to Section 202(2).

(iii) The Magistrate had to record the statement of the accused under the old Code, but it is not to be done under the new Code.

(iv) The Magistrate could discharge the accused if he found no ground for committing the accused for trial under the old Code, but under the new Code the Magistrate has no such power. Once it appears to the Magistrate that the offence is one exclusively triable by the Court of Session he shall commit the case to that Court.

(v) Charges were to be framed by the committing Magistrate under the old Code. But the charges have to be framed by the Court of Session only under the new Code.

(vi) Limited provision was there in Section 351 of the old Code to add a person as an accused who was present in Court. That provision was not comprehensive enough. So, the Section 319 has been enacted in the 1973 Code under which,

after a case has been committed by the Magistrate for trial by a Court of Session, the Court can summon a person not committed for trial by the Magistrate as accused in the case provided there is evidence before it to arraign him as accused.

6. If an offence is triable exclusively by the Court of Session, the Magistrate under the 1973 Code has no power to discharge the accused, but he shall have to commit the case in accordance with the provision of Section 209. Once the accused is charge-sheeted to face trial for an offence exclusively triable by the Court of Session, the Magistrate shall have no other option but to commit the case to the Court of Session for trial. Even if it appears that distinct offences have been committed in the course of the same transaction, some triable by the Magistrate and some exclusively triable by the Court of Session, the case involving all the offences shall have to be committed to the Court of Session for trial. In a case on a police report or otherwise where some offences triable by the Magistrate alleged to have been committed by one set of accused and some other offences exclusively triable by the Court of Session alleged to have been committed by another set of accused, in the same occurrence or in the course of some transaction, the Magistrate cannot split the case but shall have to commit the case as a whole to the Court of Session for trial. Once a Magistrate commits a case, on the basis of charge-sheet submitted by police, to the Court of Session, it does not prevent the Magistrate to commit the case on complainant with regard to the same occurrence or offence and also no detail inquiry is necessary in such complaint case before passing the committal order; but the Sessions Judge shall consolidate the two committal orders and try them as one case.

7. Under Section 209 the Magistrate is merely to ascertain whether the case, as disclosed by the charge-sheet, appears to him to be an offence triable exclusively by the Court of Session. It is not open to him to satisfy himself that a prima facie case has been made out on merit. If on a plain reading of materials on record it appears to the judicial mind of the Magistrate that there exists an offence triable exclusively by a Court of Session, then he has no option but to commit the case to the Court of Session. The committing court cannot apply its mind to find out whether there is a prima facie case for a charge to go into trial. The Code has

vested this power exclusively to the Court of Session under Sections 227 and 228 either to discharge or charge the accused to transfer the case to the Court of Magistrate if in his opinion the offence is not exclusively triable by Court of Session.

8. The expression 'it appears to the Magistrate' does not connote satisfaction of the Magistrate. The normal connotation of the word appear 'is seem' or 'to be in one's opinion'. Mere opinion of the Magistrate must prevail. It does not depend upon the fact of sufficiency or insufficiency of the material. There is no scope for a formal inquiry except to comply the formalities of Section 207 or 208, as the case may be, and shall formally commit the case to the Court of Session.

9. Furnishing copies of document under Section 207 or 208, as the case may be, and passing the order of committal under Section 209 are all judicial functions and not administrative. So, the proceeding before the Magistrate, from the time the accused is produced or appeared before him, furnishing copies to the accused under Section 207 or 208, and till the commitment order is passed, is an enquiry as contemplated by Section 2(g) of the Code. But the scope of this enquiry is very limited confining only to the matters in the sections. Enquiry under Section 209 shall confine only with regard to production or appearance of the accused, furnishing documents to the accused and committing the case to the Court of Session. The Magistrate shall have no option nor discretion to assess the merit as to the availability of materials for a prima facie case or offence for commitment.

(Relied : State of Karnataka v. Sangappa Yamanappa, 1976 Cri LJ 575 (Kant); Sanjay Gandhi v. Union of India, AIR 1978 SC 514 : (1978 Cri Lj 642); Kamal Krishna De v. State, 1977 Cri Lj 1492 (Cal); Joginder Singh v. State of Punjab, AIR 1979 SC 339 : (1979 Cri LJ 333); Alim v. Taufiq, 1982 Cri LJ 1264 (All); State of U. P. v. Lakshmi Brahman, AIR 1983 SC 439 : (1983 Cri LJ 839); State of Himachal Pradesh v. Madhoram, 1983 Cri LJ 65 and Kasavan Natesan v. Madhavan Peethambharan, 1984 Cri LJ 324, (Full Bench) (Ker)).

10. The procedure followed by the Magistrate Shri G. K. Sangmai on 3-6-1988 was not in accordance with law. He was an experienced Magistrate and was reminded by the Assistant Public Prosecutor to follow the provisions and

procedure of the prevalent Code, 1973 relating to commitment of the case involving offences exclusively triable by the Court of Session. But the Magistrate was determined to follow the procedure of the repealed Code, 1898. The Magistrate in his order referred, AIR 1958 SC 57 quoting that: -- 'It is the duty of the committing Court to weigh all evidence on record to arrive at a conclusion that there is a fit case for committal or not.' No such decision was rendered and published in AIR 1958 SC 57. Either the defence counsel made wrong reference or the Magistrate quoted imaginarily without caring to look into the case reported in AIR 1958 SC 56/57. Either the Magistrate was callous or intentionally acted in order to arrive at the premeditated conclusion to discharge the accused. The case reported in AIR 1958 SC 56/57 was on different point not concerning to commitment. Any decision that might be in the year 1958 regarding commitment was under the old Code 1898 which was repealed from the date of enforcement of the Code, 1973. The Magistrate committed illegality in discharging the accused Hit Ram Deka by adopting a procedure contrary to the provisions of law. The Magistrate acted deliberately in adopting a procedure so as to achieve his premeditated plan to discharge the accused having ulterior motive. He did not even care to be cautious in spite of reminding him the correct procedure by the Assistant Public Prosecutor. The Magistrate acted beyond his jurisdiction. This illegal order dt. 3-6-1988 was brought to the notice of the High Court by Government letter No. JDR. 286/88/1, dt. Dispur the 14th Dec., 1988 of the Judicial Department, Government of Assam, and so, the scope of this suo motu revision arose. Besides rectifying such illegal order judicially/administrative action is also considering necessary against the officer in order to correct him and also to deter other Judicial Officers. Conniving such illegal orders and act of the judicial officers without action, would be source of encouragement rather deterrent.

11. The order dt. 3-6-1988 discharging accused Hit Ram Deka was illegal and is liable to be set aside.

12. This revision is allowed. The whole order dt. 3rd June, 1988 in G.R. Case No. 3559 of 1986, Gauhati is set aside. The case is remanded to the Court of Chief Judicial Magistrate, Gauhati to proceed in accordance with the provision of law for committing the case to the Court of Session.

Send down the records immediately.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com