

Rayappa and anr. Vs. the State of Mysore

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Court : Karnataka

Decided On : Sep-13-1963

Reported in : AIR1964Kant61; AIR1964Mys61; 1964CriLJ415; (1963)2MysLJ211

Judge : M. Sadasivayya and ;T.K. Tukul, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 173, 207A(4), 207A(10) and 561-A; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 394

Appeal No. : Criminal Revn. Petn. No. 244 of 1963

Appellant : Rayappa and anr.

Respondent : The State of Mysore

Advocate for Def. : G. Shankara Chetty, Addl. Asst. Adv. General

Advocate for Pet/Ap. : B.V. Deshpande, Adv.

Judgement :

T.K. Tukul, J.

1. This is a petition under Section 561-A of the Code of Criminal Procedure, for quashing the order of commitment of the two petitioners to the Court of the Sessions Judge, Dharwar, to stand their trial under Sections 302 and 394 read with Section 34 of the Indian Penal Code. The order was passed by the Judicial

Magistrate, First Class, Navalgund, under Section 207-A (ID) of the Code of Criminal Procedure.

2. The story of the prosecution is that one Channavvawife of Nagappa Jagadannavar of Ahatti village wanted a loan of Rs. 500/- for the performance of her Son's marriage. She approached one Devappa Siddappa Gundolli of Jagapur village on a Sunday. At the time of the Talk, accused No. 1 was present. Devappa told her to approach him the next day. On Monday the 29th April, 1963, Channavva went to Devappa's house at about 7 a.m. Devappa paid her Rs. 300/-. Accused No. 1 who was Devappa's servant was present at that time. On receipt of Rs. 300/- Channavva left the village and Devappa accompanied her upto the post office to see her off. Accused No. 1 also left the house. One Nabi Sab Allisab Agasar of Hebbal saw the dead body of woman lying near Devakkiyavar Tank sometime between 8 a.m. and 10 a.m. on that day. He also saw some two persons sitting at some distance from the dead body near a 'lekki' tree. One of those persons chased Nabi Sab but the latter escaped. Nabi Sab was, however, unable to recognise any one of those two persons. On his way, Nabi Sab met one Gurappa Adveppa Ronad going by the road with his cart and informed him what he had seen. Gurappa who had passed that road by the tank by about 4.30 a.m. stated that he had not seen any dead body and therefore thought that Nabi Sab might be joking with him.

On 1-5-1963, Ningappa Sakrappa Konnur Walikar of Alagwadi saw a dead body lying near the aforesaid tank at about 8.30 a.m. and gave information of it to the police Patil of his village, by name Bhimangouda Kallangouda Patil. Bhiman Gouda went to the place along with four Panchas, verified what Ningappa had told him and sent his 'Khahari' report along with the complaint of Ningappa to the Police Station at Navalgund. The Sub-Inspector of Police registered an offence and started the investigation. The two accused were arrested on 12-5-1963 at Navalgund. After completing the investigation, a charge sheet was sent against them to the Court of the Judicial Magistrate, First Class, Navalgund, on 17-6-1963.

3. During the course of the committal proceedings, the police prosecutor submitted that there were no eyewitnesses and that he did not therefore propose to examine any witness. The learned Magistrate satisfied himself that copies of all documents

referred to in Section 173, Cr. P. C. had been supplied to the accused. The accused were represented by a Pleader. The latter also submitted that there was no evidence for the defence. He did not make any request for examination of any of the witnesses mentioned in the charge sheet. After hearing arguments, of the Police Prosecutor as also of the Pleader appearing for the defence, the learned Magistrate passed an order of commitment on 23-7-1963 holding that the circumstantial evidence disclosed by the documents showed that there was a prima facie case against both the accused.

4. Mr. B. V. Deshpande the learned Advocate for the petitioner submitted that even if all the allegations made by the prosecution witnesses in their statements before the Police were accepted, there was absolutely no evidence against any of the accused justifying the Magistrate to commit any of them to the Court of Sessions. There is no direct evidence for the prosecution and circumstances accepted by the Magistrate as being disclosed by the statements recorded during the investigation against each of the accused do not establish the existence of a prima facie case against any of the accused. The evidence discloses three circumstances common to both the accused -

(1) On the date of the offence Nabisab saw two persons sitting at some distance from the dead body lying near Devakkiyavar Tank. He did not identify any of them and he informed Gurappa Ronad of what he had seen :

(2) The two accused were not to be found in the village till they were arrested at Navalgund on 12-5-1963:

(3) They are full brothers.

The additional circumstances against accused No. 1 are (1) that he was present in the house of Devappaboth when the deceased Channavva requested for a loan and was paid the amount of Rs. 300/- and (2) that he produced a stick which was stained with blood, which is certified by the Serologist 'Not human in origin'. As against the second accused, the only additional circumstance is that when his house was searched on 12-5-1963, at about 2 P.M. after his arrest, two currency notes of Rs. 10/- each, three currency notes of Rs. 5/- each and one currency note

of Re. 1/- were found in an aluminium 'dabba' kept in a box along with other things in the kitchen.

The above evidence is wholly insufficient to justify the case being sent up for trial by the Court of Session.

5. While the learned Additional Assistant Advocate General appearing for the State fairly conceded that he was not in a position to support the order of commitment passed by the learned Magistrate, he seriously contended that in view of the provisions contained in Sub-section (4) of Section 207-A of the Code of Criminal Procedure, it was the duty of the Magistrate to have examined the prosecution witnesses mentioned in the charge sheet in order to scrutinize whether the links in the chain of circumstantial evidence were weak or strong and that the matter should be remitted back to him for recording such evidence with a view to decide whether he should pass an order of discharge or of commitment. In support of his contentions he placed reliance on two decisions of the Rajasthan High Court in *State v. Birda*, and *Mohammad v. State*, .

In order to examine the merits of these contentions it is necessary to consider the following provisions contained in Sub-section (4) of Section 207-A:

'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 alleged; 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.'

A plain reading of these provisions would indicate that where the prosecution produces any witnesses to the actual commission of the offence, alleged against the accused, it is the duty of the Magistrate to record the evidence of such witnesses he has no discretion left in the matter of examination of witnesses if the prosecution produces them for examination. In the present case, there being no eye-witnesses, the question of applying the first part of this Sub-section does not arise. The second part of the Sub-section deals with the discretionary power of the Magistrate. It is open to him to take the evidence of other witnesses including eye-

witnesses not examined for the prosecution if he is of opinion that it is necessary in the interest of justice to take the evidence' of any one or more witnesses. The discretion vested in the Magistrate is judicial discretion and if after applying his mind to the contents of the documents referred in Section 173 and furnished to the accused he feels it necessary in the interest of justice to examine any of the witnesses, he might do so. The condition preliminary to the exercise of the discretion vested in the Magistrate as per the latter part of the Sub-section is that he should be of the opinion that it is necessary in the interest of justice to take the evidence of one or more witnesses for the prosecution.

In the present case, we expressly questioned the learned Additional Assistant Advocate General to take us through the documents referred to in Section 173 and supplied to the accused and to indicate to us the material on the basis of which the Magistrate could have formed an opinion that it was necessary in the interest of justice to record some evidence in the case. He expressed his inability to indicate the existence of such material. The only inference that could be drawn from this inability is that there can be no material from which the Magistrate could have felt the necessity for examining witnesses in the interest of justice. In that view of the matter, we have no doubt that the order of commitment is clearly unsustainable and has to be quashed.

In regard to the authorities cited for the State, they lay down that where a case entirely rests on circumstantial evidence, the Magistrate should find out the links of such evidence implicating the accused and thereafter record the evidence of important witnesses in order to examine the strength of the said links. With the utmost respect, we are of the opinion, that these views regarding the duties of the Magistrate under Sub-section (4) of Section 207-A do not appear to be warranted by the provisions of that Section. The Supreme Court dealt with the scope of Sub-section (4) of Section 207-A of the Code in *Shri Ram v. State of Maharashtra*, : [1961]2SCR890 , and *Subba Rao, J.* who spoke for the Court considered the various arguments abovenamed as regards the construction of that Sub-section.

Reference may be made to the following passage from paragraph 8 of the Judgment wherein the views that found favour with the Rajasthan High Court have

beendealt with:

'..... But it is said that Sub-sections (6) and (7) indicate that taking of evidence by the Magistrate is a condition precedent for making an order of discharge or of committal and, therefore, the provisions of Sub-section (4) must be so construed as to impose a duty on the Magistrate to examine some witnesses. Firstly, we cannot hold that the Sub-sections impose any such condition. The argument is that the clause in Sub-section (6) namely, when the evidence referred to in sub-section (4) has been taken is a condition precedent for making an order of discharge. The adverb 'when' in the clause in the context denotes a point of time and not a condition precedent. The clause means nothing more than that an order of discharge can be made under Sub-section (6) after the events mentioned therein have taken place. Secondly, the two clauses necessarily refer to the corresponding or appropriate situation under the earlier subsections. The first clause will not come into play if the Magistrate has not taken any evidence. So too, in Subsection (7) also the adverb 'when' denotes the time when the Magistrate can make the order of committal. If evidence has not been taken, that Sub-section is not applicable and the Magistrate proceeds to make an order of committal on other material referred to in the Sub-section. On the other hand, if the said two Sub-sections are construed as imposing a condition precedent for making an order of discharge or commitment, as the case may be, the said two Sub-sections will directly come into conflict with the provisions of Sub-section (4). When one Sub-section clearly confers a discretion on the Magistrate to take or not to take evidence, the other Sub-sections take it away. It is not permissible to create conflict by construction, when by an alternative construction all the three Sub-sections can be harmonized and reconciled. If the construction suggested by the learned counsel for the appellants is adopted, it would also lead to an anomaly in that the Magistrate, though the documents referred to in Section 173 clearly pronounce the innocence of the accused has to go through the pretence of examining one or more witnesses to satisfy the provisions of the subsection.'

His Lordship summarised the view of the Court thus:

'(1) In a proceeding Instituted on a police report,the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court.

(2) The Magistrate, if he is of opinion that It is in the interest of justice to take evidence, whether of eyewitnesses or others, has a duty to do so.

(3) If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused to sessions on the basis of the documents referred to in Section 173 of the Code.

(4) The direction of the Magistrate under Sub-section (4) is a judicial discretion and therefore, in appropriate cases the order of discharge or committal, as the case may be, is liable to be set aside by a superior Court.'

In the instant case, the State has not been able to point out that the judicial discretion in not examining the witnesses has not been properly exercised by the Magistrate. In deciding whether it is necessary in the Interest of justice to take the evidence of one or more witnesses for the prosecution, the Magistrate has to pay due regard to the strength for the weakness of the case disclosed by the material before him, the arguments advanced on behalf of the prosecution and the accused and the defence, if any, put forward by the accused. In the present case, the Magistrate has overlooked the fact that the order of commitment is a judicial order and that he can commit an accused when there is credible evidence which if believed, discloses the existence of a prima facie case for which the accused ought to be tried by the Court of Session. It is only where the material placed before the Magistrate involves the weighing (by the Court of Session] of probabilities and of the value to be attached to the evidence which prima facie makes out a case against the accused that the Magistrate ought rather commit the accused to the Court of Session. Where there is no prima facie case made out against the accused, as in the present case, the Magistrate should not abdicate his responsibility by failing to pass an order of discharge. In the instant case, the circumstances relied upon by the prosecution are most Insufficient to implicate any of the accused for the murder of Channavva and the Magistrate was clearly in error in committing them to the Court of Session.

6. In the result, we allow the petition, set aside the order of commitment and discharge the accused. We direct that the accused be set at liberty forthwith.

7. Revision allowed.

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