

K.D. Appachu and ors. Vs. State of Mysore

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Court : Karnataka

Decided On : Aug-09-1961

Reported in : AIR1962Kant167; AIR1962Mys167

Judge : A.R. Somnath Iyer, J.

Acts : Code of Criminal Procedure (CrPC) , 1899 - Sections 173, 251A (2), 251A (3), 251-A(6) and 540

Appeal No. : Criminal Revn. Petn. No. 113 of 1961

Appellant : K.D. Appachu and ors.

Respondent : State of Mysore

Advocate for Def. : A.B. Mariappa, High Court Govt. Pleader

Advocate for Pet/Ap. : S.R. Ramanathan, Adv.

Judgement :

ORDER

(1) The petitioners were charged with having committed an offence punishable under section 385 of the Penal Code. The case was instituted on a police report and since it was a warrant case the provisions of Chapter XXI of the Code of Criminal Procedure were applicable to its trial.

(2) On December 22, 1960, the District Magistrate before whom the case was pending made the order against which this revision petition has been presented, purporting to do so under Section 251-A (2) and 540 of the Code of Criminal Procedure. He was of the view that in order to understand more fully the case of the complainant, and to decide whether a charge should or should not be framed, it was necessary for him to examine the complainant at that stage. He accordingly directed the complainant to appear before him and examined him on a subsequent date of hearing.

(3) In this revision petition, Mr. Ramanathan, appearing for the petitioners contends that the procedure adopted by the District Magistrate amounts to a transgression of the provisions of section 251-A of the Code of Criminal Procedure.

(4) Now, section 251 directs that a Magistrate trying a warrant case instituted on a police report, shall follow the procedure specified in section 251-A.

(5) The relevant sub-sections of section 251-A read :-

'251-A. Procedure to be adopted in cases instituted on police report :--

(1) When, in any case instituted on a police report the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished.

(2) If, upon consideration of all the documents referred to in section 173 and making such examination, if any of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard the Magistrate considers the charge against the accused to be groundless, he shall discharge him.

(3) If, upon such documents being considered such examination, if any, being made and that prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the

accused had committed an offence triable under this chapter, which such Magistrate is competent to try and which in his opinion, could be adequately punished by him he shall frame in writing a charge against the accused.

* * *

Sub-sections (2) and (3) contain clear provisions as to the procedure to be adopted by a Magistrate trying a warrant case, instituted on a police report. Under sub-section (2) the Magistrate has the power to discharge the accused if, on a consideration of the documents referred to in section 173 and the examination, if any, of the accused which the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, such discharge is in his opinion justified. If, on the contrary, on a consideration of these documents and the examination of the accused if he was examined, and after hearing the prosecution and the accused the Magistrate considers that there is ground for presuming that the accused has committed the offence, he would have the power under sub-section (3) to frame a charge against the accused. The procedure prescribed by sub-sections (2) and (3) is the procedure which every Magistrate trying a warrant case instituted on a police report, must adopt either for the purpose of discharging the accused under sub-section (2) and those on which a charge could be framed under sub-section (3) are the materials referred to in these two sub-sections, and it would not be permissible for a Magistrate to depend upon any other materials than those specified in those two sub-sections, either for discharging the accused or for framing a charge.

(6) Now, the three steps to be taken by a Magistrate under the sub-sections (2) and (3) of section 251-A are these : He should first consider the documents referred to in section 173. He has the power next to examine the accused if he chooses to examine him. Lastly, he has a duty to give the prosecution and the accused an opportunity of being heard.

(7) It is clear, therefore, that the only materials on which the Magistrate may depend either for the purpose of discharging the accused or for framing a charge against him are the documents referred to in section 173 and what might emerge from the examination of the accused, if he is examined. The Magistrate of course,

is further bound to take into consideration the arguments that may be presented by the accused and the opportunity of being heard.

(8) Now, in this case, which the Magistrate proposed to examine the complainant at what I consider to be an extremely premature stage both the accused and the prosecution objected to the examination of the complainant at that stage. I have no doubt in my mind that the objection by the accused and the prosecution to the procedure which the Magistrate proposed to follow was quite a well-founded objection. It is true that the Magistrate examined the accused and it is equally true that he also heard the accused and the prosecution. He also perused the documents referred to in section 173. Having done these three things, what the Magistrate was required to do was to make up his mind whether he should discharge the accused or frame a charge against them.

(9) Instead, the Magistrate adopted what I consider to be curious procedure of proceeding to examine the complainant under section 251 -A (2) and section 540 of the Code of Criminal Procedure. The view taken by the District Magistrate that he would examine the complainant under section 251 -A (2) rested upon the words 'after giving the prosecution and the accused an opportunity of being heard'. That opportunity, according to the Magistrate included also the examination of the complainant if the Magistrate wanted to examine him. It is plain to my mind that the interpretation placed upon those words by the District Magistrate is an unsupportable by those words is an oral hearing and does not include the examination of any one as a witness at that stage. Likewise, the District Magistrate was in my opinion, not right in thinking that he could invoke his power under section 540 of the Code of Criminal Procedure to examine the complainant and before he decided either to discharge the accused or to frame a charge against them. Although that section enables a Court at any stage of any inquiry , trial or other proceeding to summon or examine any person as a witness it is clear that power cannot be exercise before a charge is framed under sub-section (3). Sub-section (2)of section 251-A of the Code.

(10) Those two sub-sections are a completed code in the matter of the procedure to be followed for the purpose of discharging the accused or for framing a charge

against him, and that procedure, it is clear, cannot be disregarded by invoking the power conferred by Section 540 of the Code.

(11) Section 540 of the Code appears to be plainly controlled by sub-sections (2) and (3) of Section 251-A, (3) sub-section (4) requires that the charge should be read and explained to the accused. Sub-section (5) directs the Magistrate to record his plea if he pleads guilty and convict him thereon. Sub-section (6) which is the important sub-section in this context reads :

'251-A. Procedure to be adopted in cases instituted on police report :--

(6) If the accused refuses to plead or does not plead, or claims to be tried, the Magistrate shall fix a date for the examination of witness. Sub-section (7) reads :

'(7) On the date so fixed the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution:.. ..

(13) I am of the view that Section 540 of the Code of Criminal Procedure cannot be used by a Magistrate trying a warrant case, instituted on a police report, before a date is fixed by him for examination of witness under sub-section (6). The words 'at any stage of any inquiry, trial or other proceeding under this Code,' occurring in Section 540 do not refer to a stage antecedent to the stage at which a date is fixed under sub-section (6) of Section 251-A for the examination of witness. Those words occurring in Section 540, it is plain, confer power on a Magistrate to examine a witness as a Court witness even after the prosecution has closed its case and even after the trial has come to an end under the provisions of the Code if it appears to the Magistrate that the evidence is essential to the just decision of the case.

(14) Those words do not certainly make it permissible for a Magistrate to use Section 540 in transgression of the plain provisions of sub-section (2) and (3) of Section 251 -A.

(15) In my opinion, the order made by the District Magistrate on December 22, 1960, has to be quashed as made in violation of the provisions of Section 251-A. It is so ordered. All the subsequent proceedings conducted by the District Magistrate

in pursuance of that order are similarly quashed.

(16) The learned Advocate General appearing on behalf of the State suggests that this is a case in which, having regard to the way in which the District Magistrate conducted that proceedings it would be desirable that I should exercise power under Section 526 of the Code of Criminal Procedure, and transfer the case now pending before this District Magistrate to the file of another Court.

(17) It seems to me that the learned Advocate General is right in making that suggestion. Under the provisions of Section 526 of the Code of Criminal Procedure, I transfer this case to the file of the District Magistrate Shimoga, and I direct that the Magistrate shall try the case and dispose of it according to law.

(18) DF/ V.B.B.

(19) Petition allowed.

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