

The State of Karnataka Vs. Shakthi Velu

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Court : Karnataka

Decided On : Nov-25-1977

Reported in : 1978CriLJ1238

Judge : D.B. Lal, J.

Appellant : The State of Karnataka

Respondent : Shakthi Velu

Judgement :

ORDER

D.B. Lal, J.

1. This revision by the State of Karnataka is directed. against the order of discharge recorded by the Metropolitan Magistrate, VI Court, Bangalore City for the offences under Sections 363 and 376 of the I.P.C.

2. It appears that a police report was instituted by one S. T. Ramachandra Rao on 18-11-1976. It is stated in the complaint that Shashikala, daughter of S.T. Ramachandra Rao, 'aged about 18 years' left the house on 18-11-1976 at about 6-30 a.m., to purchase some food articles but did not return to her home. Thereafter, the brother of the girl Shashikala went to fetch her and found her in the company of the accused in his room, and on a later date Shashikala was recovered along with the accused. After receiving the complaint the police started investigation,

based on the first information report, examined some witnesses, and ultimately submitted the charge-sheet for the offences under Sections 363 and 376, I.P.C., against the accused Shakthi Velu. The learned Magistrate obviously took cognizance of the offence under Section 190 of the Cr. P.C. The offence was brought to his notice upon a police report on the facts alleged in the first information report as well as on the facts discovered from the statements of the witnesses examined during investigation.

After the Magistrate took cognizance of the offence under Section 190, he proceeded under Section 209 and under that Section he had to find whether the offence was triable exclusively by the Court of Session. The learned Magistrate thereafter proceeded to examine the statements of the witnesses and made his own assessment of that evidence. He drew up certain inferences and in his opinion the girl Shashikala was more than 18 years of age. On that basis he held that the offence under Section 376, I. P. C, could not be made out. Although the learned Magistrate has not categorically stated in that manner yet he seems to have presumed that the girl must have consented to the sexual intercourse. However, in his order the learned Magistrate merely remarks that the age of the girl being 18 years or more, the offence could not be made out. That was obviously a wrong finding. The girl of that age if subjected to sexual intercourse without her consent or by force or compulsion, the person responsible for that, would nonetheless be liable for punishment under Section 376, I.P.C. For the offence under Section 363, I.P.C., the learned Magistrate upon reading of the evidence found that the age of the girl was more than 18 years and as such there could be no offence of kidnapping. On the same question he further scrutinised the prosecution witnesses and held that it was not proved that the accused enticed or kidnapped Shashikala meaning thereby that she herself went to reside with the accused. Having arrived at that finding, the learned Magistrate discharged the accused of the two charges. It is abundantly clear that the offence under Section 376 was exclusively triable by the Court of Session and the learned High Court Government Pleader in support of the revision contends that in any case the learned Magistrate could not have discharged the accused for the said offence.

3. Smt. Karpagam Kamath, the learned Counsel appearing for the accused, referred to Section 209 and her main contention was that the expression "it appears to the Magistrate that the offence is triable exclusively by the Court of Session" occurring in that section necessarily means that the learned Magistrate had to consider the material on the record. In other words, she contended that the learned Magistrate was justified in scrutinising the statements of the witnesses produced during investigation. He was at liberty to derive his own inference upon that evidence. He found, upon considering all such evidence, that the offence formulated could not be placed under Section 375 or Section 376, I, P. C. He could very well arrive at the finding that no such offence was made out which was exclusively triable by the Court of Session. Therefore, the learned Counsel supported the order of discharge made by the learned Magistrate.

4. It is no doubt correct that the Magistrate in order to formulate his opinion as to whether or not an offence triable exclusively by the Court of Session is made out has to consider the police report or the complaint submitted to him for taking cognizance of the offence. It would also be correct to sub-mit that in order to arrive at a prima facie finding the Magistrate has to consider the evidence recorded during investigation. But the crux of the matter would be as to whether he was justified to adumbrate upon a regular appreciation of evidence. In other words will he be justified to consider sufficiency or insufficiency of evidence produced on behalf of the prosecution at that stage. It may be stated that the Magistrate is not to act in an automatic manner so as to commit every case to the Court of Session. He has to see, prima facie, the evidence brought to his notice. Such evidence will obviously be the allegations made in the first information report, assertions made in the charge-sheet, and also the statements of the witnesses examined during investigation. But the Magistrate has to consider all that evidence at its face value, and it is not open to him to hold a mini trial without the witnesses being produced in the Court, properly cross-examined and their evidence assessed, in a manner so that the accused could be convicted or acquitted upon that evidence.

5. In the present case the learned Magistrate has arrived at the conclusion that the offence under Section 375, I.P.C., is not made out simply because the age of the girl was 18 years or more. That was an incorrect finding and no such inference

could be drawn. Regarding the other offence under Section 363, I.P.C., the evidence of the Doctor who perhaps examined the girl was taken at its face value. The prosecution has to get an opportunity of assessing the value of the Doctor's evidence and they would be at liberty to produce evidence to the contrary to disclose the actual age of the girl. Before that stage arrived the learned Magistrate believed the Doctor's evidence and held that as the age of the girl was more than 18 years and the offence of kidnapping or the offence of rape was not made out, That apart, the learned Magistrate also considered the statements of all the witnesses produced during investigation and at their face value, but he disbelieved them and derived his own inferences, which, perhaps he could not do.

6. The learned Counsel Smt. Karpagam relied on a decision in *Prem Sukh Lal v. State* 1977 Cri LJ 47 (Pat) for the proposition that with a view to find out as to whether the offence is one which is prima facie exclusively triable by the Court of Session, the Magistrate, acting under Section 209 has to look into the allegations made out in that case. He has to examine the materials on the record and if on such examination he is satisfied that the offence is one which is prima facie exclusively triable by the Court of Session he would not be justified in refusing the order of committal of the accused to the Court of Session. In that case the police report indicated the offence under Section 307, I, P. C. The Magistrate took cognizance of that offence under Section 190, Cr. P.C., and automatically drew up an order of committal to the Court of Session. The Patna High Court remanded the case to the Magistrate and on the basis of the language used in Section 209 held that the Magistrate, while acting under Section 209, has to look into the allegations made against the accused with a view to find out whether the offence is one prima facie exclusively triable by the Court of Session. Since the Magistrate did not do so in that case, he was asked to consider the entire material on record and give a prima facie finding in favour or against the prosecution. No one can dispute the ratio of the said decision.

7. In the instant case the learned Magistrate has gone far ahead. He went through the evidence as if it was a final word of witnesses in a trial. He has given a categorical finding that no offence whatsoever under Sections 363 and 376, I.P.C., was made out. That was not a prima facie consideration of any fact. It was a

consideration of evidence on merit which the Magistrate is not required to do under Section 209.

8. The learned Counsel for the accused also relied on a decision in Taddi Rama Rao v. Kondi Aservadam 1977 Cri LJ NOC 259 (Andh Pra). In that case the learned Judges considered Section 209 and at the same time held that while assessing evidence the Magistrate has very limited power. He has to arrive at prima facie decision whether the offence is exclusively triable or not by the Court of Session.

9. The learned Counsel further relied on a decision in P.R. Murugaiyan v. Jayaveera Pandia Nadar 1977 Cri LJ 1700 (Mad). In that case it was held by the Madras High Court that the Magistrate cannot discharge the accused if it does not appear to him that the offence is one triable exclusively by the Court of Session, but he shall then proceed under Chap. XIX or Chap. XX as he is deemed to have taken cognizance of offence falling only under any one of those chapters. In other words, he could proceed as if it was a warrant trial or summons trial under that Section. At the same time at the proper stage when he found that no offence was made out, he could discharge the accused. The very fact that the offence for which the Magistrate took cognizance was exclusively triable by the Court of Session indicates that for such an offence the order of discharge could not be made by the Magistrate. The accused would none the less have an opportunity under Section 227, Cr. P.C., to argue the matter before the Sessions Judge. At that stage perhaps the order of discharge may be justified in this favour.

10. The learned High Court Government Pleader relied on a decision in Kamal Krishna De v. State 1977 Cri LJ 1492 (Cal). Section 209 was considered in that case and the expression 'it appears to the Magistrate' was interpreted. It was held that the normal connotation of the word 'appears' is 'seems' or to be in one's opinion. So it is the mere opinion of the Magistrate that must prevail. The words 'it appears to the Magistrate' do not connote satisfaction of the Magistrate to enable the superior Court to judge whether there was sufficient ground for satisfaction. The learned Judges of the Calcutta High Court held that the opinion of the Magistrate has to be formulated not upon the sufficiency or insufficiency of the

material, but it can be formulated, prima facie, on the material produced by the prosecution.

11. In the instant case a reading of the order of the Magistrate rather indicates that he was careful to judge the entire matter as if he was to hold that there was no offence and if the learned Sessions Judge could at all frame a charge for the offences against the accused. In this manner he assumed jurisdiction for which he was not empowered and the order of discharge obviously is incorrect.

12. The learned High Court Government Pleader also relied on a decision of this Court in *State of Karnataka v. Sangappa Yamanappa* 1976 (1) Kant LJ 27 : 1976 Cri LJ 575). A learned Judge of this Court held that after the Magistrate has taken cognizance of the offence (under Section 302 read with Section 34, I.P.C.) there is no scope for the Magistrate to find out under Section 209, Cr. P.C. whether in fact an offence appears to have been made out or not. It was also held that Section 209 does not at all empower a Magistrate to pass an order of discharge. That power is vested in the Sessions Judge under Section 227.

13. In this view of the matter, the order of the Magistrate was decidedly without jurisdiction. The revision is therefore allowed and the said order of discharge passed by the learned Magistrate is set aside. The learned Magistrate has to commit this case under Section 209, Cr. P.C., to the Court of Session.