The State Vs. Ramniranjan and anr.

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SooperKanoon Citation : sooperkanoon.com/460972

Court : Allahabad

Decided On : Apr-21-1955

Reported in : AIR1955All506; 1955CriLJ1230

Judge : Mukerji and ;Upadhya, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 346, 346(2), 350 and 350(1)

Appeal No. : Criminal Ref. No. 245 of 1952

Appellant : The State

Respondent : Ramniranjan and anr.

Advocate for Def. : Shyam Bahadur Varma, ;Sehat Bahadur and ;S.N. Kacker, Advs.

Advocate for Pet/Ap. : A.G.

Judgement :

Upadhya, J.:

1. This is a reference by the Addl. Sessions Judge of Banaras at Jaunpur recommending that an order passed by Shri N. K. Roy, Magistrate, First Class committing the accused to Sessions be set aside and that this Court should order that the commitment proceedings be started afresh.

2. The case originally started on the complaint, of one Sub Karan filed against the accused and some others under Section 498/109, I. P. C. The case came up for hearing before Shri Jagdeo Prasad, Magistrate, Second Class Jaunpur, who recorded some evidence in the case. The learned Magistrate came to the conclusion that the girl Sm. Phula was only 14 years old and that in his opinion an offence under Section 366, Penal Code, was made out.

He, therefore, stayed the proceedings and submitted the case to the District Magistrate with a report that the case being triable by the Court of Session and not by him should be transferred to some other Magistrate for proceeding under Chapter 18, Criminal P. C. The learned District Magistrate by his order dated 8-5-1951, transferred the case to Shri N.K. Roy, Judicial Officer, Jaunpur, who is a Magistrate of the 1st Class. Shri N. K. Roy passed an order on 1-6-1951 as follows:

'Let the whole case be started 'de novo' as the learned Special Magistrate was not competent to hold an enquiry as he himself arrived at the conclusion that the case was one under Section 366, I.P.C. which was beyond his jurisdiction.'

It appears that Shri N. K. Roy changed his mind afterwards and on 9-6-1951, passed the following order;

'In view of Section 350(2), Criminal P. C. I think question of 'de novo' trial does not arise in this case. I proceed to hear argument whether the case is fit to be committed to the Court of Session, Jaunpur under Section 366, I.P.C. or not.'

Thereafter Shri N. K. Roy did not take any evidence but heard arguments and weighing the evidence already recorded by Shri Jagdeo Prasad, II Class Magistrate, passed an order committing the accused to stand their trial in the Court of Session at Jaunpur under Section 366, I.P.C. Before the Sessions Judge the accused challenged the validity of this order of commitment inasmuch as, Shri N. K. Roy was not justified in basing his order on evidence recorded by a Magistrate who had no jurisdiction to try the case or to hold that enquiry.

This contention found favour with the learned Addl. Sessions Judge and he has recommended that the order of commitment should be set aside as mentioned above.

3. This reference came up before a learned Judge of this Court, who considered the point raised to be of some importance and as no reported decision of this Court was placed before him and there appeared to be some conflict of opinion among the other High Courts, he ordered the case to be placed before a Division Bench.

4. It may be taken as a general principle adopted in the Code of Criminal Procedure that evidence taken by one Magistrate is no evidence, in a trial before another Magistrate unless some provision of law expressly makes it so. One of the earliest cases is -- 'Queen Empress v. Bashir Khan', 14 All 346 (A). A case which was heard in part by a Bench of Honorary Magistrates was transferred to a First Class Magistrate.

The accused thereupon applied that the witnesses who had been examined before the Bench should be resummoned and examined 'de novo'. -This was not done and Straight J. considered this to be 'most objectionable', The Patna High Court in -- 'Ambika Singh v. Emperor', AIR 1918 Pat 676 (B) explained that Section 350(1) of the Code provides that the accused should have the option of demanding a 'do novo' trial or proceeding with it from the stage at which it was left by the Magistrate who ceased to have Jurisdiction and this provision of an option is based upon the consideration that the Magistrate who ceased to have jurisdiction was competent equally with the succeeding Magistrate to try the accused.

As the Second Class Magistrate who heard the case first was not qualified to proceed with the trial and the case had to be stayed under Section 346 of the Code, the provisions of Section 350(1) did not apply. The Court further held that the Code required the evidence to be recorded by the Magistrate trying the case and the defect was not a mere 'irregularity' or curable by the consent of the accused. The Court ruled that the trial was not in accordance with law.

In -- 'In re China Venku Naidu', AIR 1923 Mad 327 (C) and -- 'Sher Khan v. Emperor', AIR 1983 Sind 191 (D), the Courts took the word 'try' in Section 346(2) of the Code to mem that the Magistrate must try the case 'de novo'. A Division Benchof the Calcutta High Court took the same view in -- 'Sashti Gopal v. Haridas Bagdi' : AIR1938 Cal415 . Henderson J., held that when a case is transferred under the provisions of Section 346, the Magistrate is bound to hold a 'de novo' trial. In -- 'Gura v. Emperor' AIR 1943 Lah 27 (FJ, Tek Chand J. reviewed earlier decisions and observed that the plain meaning of Section 346 (2) is that there is to be a trial 'de novo' before the District Magistrate or the Magistrate to whom the case has been assigned by him.

5. In -- 'Emperor v. Ram Prasad', AIR 1916 Nag 115 (G), a Judicial Commissioner of Nagpur, however, took a different view. In that case the accused were challaned for murder and abetment thereof respectively but after examining them upon the evidence tor the prosecution the Subordinate Magistrate thought the principal offence, if any committed, to be the lesser form of culpable homicide and he, therefore, acted under Section 346, Criminal P. C., with a view to disposal of the case by the District Magistrate in the exercise of his powers under Section 30 of that Code.

The Magistrate, however, charged the accused with murder and abetment of murder respectively, explained the charges to them and committed them to the Court of Session for trial. The accused were not represented nor did they raise any objection. The Sessions Judge took the view that the order of the District Magistrate was illegal inasmuch as he had not heard the evidence 'de novo' and made a reference recommending that the order be set aside.

The learned Judicial Commissioner took the view that Section 350, Criminal P. C. had no application to the case. He observed that the second subsection of Section 350 expressly laid down that nothing in the first sub-section applied to cases in which action had been taken under Section 346. But he felt that the section afforded no guidance as to the procedure to be followed on receipt of a case under Section 346.

He, therefore, relied on a Division Bench case of the Calcutta High Court--'Kamini Baurini v. Faqir Chand Sarkar', 12 Cal WN 136 (H), and rejected the reference. With great respect, we find ourselves unable to accept this view. The learned Judicial Commissioner ignored the well-settled principle that in criminal cases the Magistrate, who is to decide the case, should hear the evidence produced at the trial unless there is some provision in the Code expressly authorising him to act on evidence already recorded by his predecessor.

Section 350 provides an exception to the above general principle and lays down that when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry or trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate, who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor.

There is an important proviso to this rule that in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and re-heard. This is a right given to the accused. Sub-section (2) of Section 350 expressly lays down that the above exception to the general principle to be followed in criminal trials is not applicable to cases in which proceedings have been stayed under Section 346.

It is, therefore, clear that the provisions of Section 350, Sub-section (1) which enable a succeeding Magistrate to act on the evidence recorded by his predecessor, cannot be applicable where action has been taken under Section 346. The Magistrate in such a case cannot exercise an option that would be available under Section 350(1) and has. no option but to try the case 'de novo'. The learned Judicial Commissioner has himself observed:

'It is no doubt a general rule that only an authority who has heard all the evidence is competent to decide whether the accused is innocent or guilty.'

He, however, felt that as the case before him related to a commitment for trial the above 'general rule' was not applicable. With great respect again, we are unable to accept the distinction drawn by the learned Judicial Commissioner between a trial and an enquiry. In an enquiry the accused has a right to produce evidence and the

Magistrate may discharge him if he finds that there are no sufficient grounds for committing him for trial.

Thus the accused has a valuable right and there appears to be little justification for the view that the 'general rule' applicable to trials may not be applicable to 'commitment proceedings. The judgment in' the Calcutta case relied upon by the learned judicial Commissioner is extremely short and the learned Judges have not been pleased to give any reason whatever for the decision taken by them.

6. It appears that this point came up before this Court in -- 'Panna Lal v. State' : AIR1952 All657 , where Desai J. took the view that according to Section 346(2) itself the Magistrate who receives a case after the transfer, has to try the case afresh and that had the Legislature intended that the Magistrate could try the case from the stage at which it came to his Court it would have used the appropriate words to confer that power.

It appears that this case was not placed before the learned Single Judge who referred the present case to be heard by a Bench in the belief that there was no decision of this Court on the point. We respectfully agree with the view taken by Desai J., in the above case and accept the reference. The order of commitment is set aside and the Magistrate is directed to make the enquiry afresh by recalling and rehearing all the witnesses.