Abdul Rashid Vs. State

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SooperKanoon Citation : sooperkanoon.com/466765

Court : Allahabad

Decided On : Nov-22-1963

Reported in : 1966CriLJ200

Judge : M.H. Beg, J.

Appellant : Abdul Rashid

Respondent : State

Judgement :
ORDER

M.H. Beg, J.

1. This is an application under Secs. 439/215 of the Cr. P. C. directed against an order committing the applicant and others for trial to the Court of Session for alleged offences under Section 395 I. P.C. The question of law which is involved in this case has resulted in some conflicting decisions on the requirements of the procedure to be followed by Committing Magistrates under Section 207-A of the Cr. P.C. Reliance was placed on behalf of the applicant on a recent decision of this Court in Abdul Aziz v. State 1963 All. L. J 79 : 1963 (I) Cri. L. J. 513. On the other hand, the learned Counsel for the State, R. K. Shukla, has relied on State of U. P. v. Satyavir : AIR1959 All408 and on State of West Bengal v. Tulsidas Mundhra 1963 All. L. J. 813 : (1964) (1) Cri. L. J. 443. Other cases were also cited which need not be referred to by me.

2. The view taken in 1963 All. L. J. 79 : 1963 (1) Cri. L. J. 513 may be considered to have been overruled by the view taken by the Supreme Court of India in the case of 1963 All. L. J. 813 : 1964 (1) Cri. L. J. 443.

3. It is, however, desirable that in those cases where the prosecution case depends upon the evidence of identification, the committing Magistrate should examine witnesses if only for the purpose of giving them an opportunity of identifying accused persons. Otherwise, the argument would remain open to the accused persons whether there is sufficient corroboration of the evidence of identification against the accused in the trial court. Evidence of identification in the trial court is generally corroborated by the evidence of identification in the committing Magistrate's court as well as at a test identification parade conducted during the investigation of the case. If the accused persons are not put up for identification at the intermediate stage, there is certainly room for argument that the corroborative evidence is insufficient. Such an argument would probably not be available to the present applicant because it is alleged that he was known from before and has been named in the first information report.

4. It was also pointed out on behalf of the applicant that he wanted to make a statement before the committing Magistrate, but he was not given an opportunity of making any statement whatsoever. An affidavit was filed in this Court in support of this assertion, and no counter-affidavit has been filed on behalf of the State. Here again, the committing Magistrate would do well to remember that the whole object of commitment proceedings is to send only those cases for trial in which conviction is possible. There may be cases in which the statements made by the accused may show that there is evidence which will, if taken, so completely demolish the prosecution case that it will be a waste of public time to commit the case for trial to the court of session. If the accused is not permitted to make a statement at all, an opportunity is lost of finding out whether the case is one which cannot possibly result in conviction.

For example, apparently cast iron evidence, which may appear to be in the possession of the investigation authorities from the statements of prosecution witnesses recorded by the police, may be completely shattered by some

unquestionable evidence of alibi showing that the accused could not possibly be at the scene of occurrence at the place and time alleged. In such exceptional cases, which will be quite rare(the Committing Magistrate could take some evidence in defence in the performance of his duty to give the accused an opportunity to be heard of under Section 540, Cri. P.C. In other cases, the accused may himself make some statement or fail to raise some plea at the commitment stage which may serve as a useful guide in the trial court in determining whether the plea taken by him in the trial court should or should not be accepted. It is, therefore, desirable and proper, in my opinion, that Magistrates should permit accused persons to make statements even though the accused may not be entitled to give their explanations under Section 342 of the Cri. P.C. This is particularly so in a case like the present one in which the accused requested that he should be heard.

5. One of the decisions relied upon by the State counsel, : AIR1959 All408 (supra), makes it clear that Section 207-A allows the Magistrate to act on the strength of documents referred to in Section 173 of the Cri. P. C, which include statements of prosecution witnesses recorded by the police under Section 161 of the Cri. P.C. The statements of the witnesses recorded by the police during investigation are not really admissible prosecution 'evidence'. They merely constitute material on the basis of which the police submits the charge-sheet. In other words, Section 207-A now authorises the committing Magistrates to act on the basis of what is material available to the investigating authorities which could not be used by the prosecution as evidence at the trial. The statements of prosecution witnesses, used in this manner by committing Magistrates under Section 207.A of the Cr. P. C. are not used in violation of Section 162 of the Cr. P. C which lays down that such statements cannot be used at any inquiry or trial for any purpose other than that 'hereinafter provided'. This means that the exceptional use made of the statements under Section 207.A of the Cr. P.C. comes within one of the exceptions to Section 192 Cr. P.C. which is 'hereinafter provided.

6. It is true that the material which is used by the investigating authorities for submitting a charge-sheet in court need not be put to the accused persons at all under Section 342 of the Cr. P.C. This material is not 'evidence' as explained by Desai J. (as he then was) in AIR 1969 All 408 (supra). With great respect, I find

myself in entire agreement with the view expressed there. It must, however, be remembered that this decision proceeds on the assumption that the accused has had an opportunity to have his say. His Lordship held:

If no evidence has been recorded under Sub-section. (4) the accused is not required to be examined at all because there is nothing that he can explain. As no evidence has been recorded there are no adverse circumstance appearing against him. If there are adverse circumstances appearing in the documents, the accused is not required to be examined to explain them; all that he is entitled to in every case is that he should be heard before the Magistrate frames a charge against him.

7. I may also point out that the provisions of Section 207-A (6) and 207-A (7) place the examination of the accused, under Section 342, Criminal P. C for the purpose of enabling him to explain any circum-stances appearing in evidence against him, on a separate footing from 'an opportunity of being beard' which it is mandatory duty of the Magistrate to give the prosecution as well as the accused. This mandatory duty is separate from and independent of the discretion of the Magistrate to examine or not to examine an accused under Section 342 of the Criminal P.C. If a Magistrate does not give an accused person an opportunity of making a statement, the accused is certainly denied 'an opportunity of being beard.' This opportunity of being heard is a matter of right even though the accused cannot claim, as a matter of right) that he should be examined under Section 342 of the Criminal P.C. when do evidence whatsoever is taken by the committing Magistrate or to lead evidence in defence.

The difference between the two is that 'an opportunity to be heard' is wider in scope and purpose than the restricted scope and purpose of the examination under Section 342 of the Criminal P.C. As to what should be included in this 'opportunity to be heard' depends upon the facts and circumstances of a particular case. This is a matter upon which a Magistrate ought to exercise a judicial discretion and decide what the right, should include in a particular case. In my opinion, the judicial discretion has not been exercised and the mandatory duty has not been performed when, in spite of the request of the accused to be heard, the

committing Magistrate refused to give him any hearing altogether.

8. I tried to ascertain from the applicant's counsel whether applicant had something so important to state as to make it necessary to quash the commitment order and send back the case to the committing Magistrate for the purpose of enabling the Magistrate to perform the duty which he failed to perform. But the information which I got shows that the accused applicant wants to establish his innocence by producing evidence which will demolish the prosecution case. In suitable cases evidence may be taken by the committing Magistrates as indicated above. In the present case, however, I think that the ends of justice will be served by leaving the accused applicant to substantiate his defence in the trial court to which the accused has been committed for trial together with that of a number of other persons, who have not similarly applied for quashing the commitment order In these circum-stances, I do not find it necessary to quash the commitment order in part. The accused applicant will get an opportunity of being heard in the course of the trial which will take place. In the particular circumstances of this case, I think no justice or prejudice will be caused to the accused in leaving him to the exercise of his rights to put forward and establish his case during the course of his trial.

9. I, therefore, dismiss this application and discharge the stay order.