

Visheshwar Pathak and ors. Vs. State

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Court : Allahabad

Decided On : Aug-18-1975

Reported in : 1976CriLJ1823

Judge : H.N. Kapoor, J.

Appellant : Visheshwar Pathak and ors.

Respondent : State

Judgement :

ORDER

H.N. Kapoor, J.

1. Petition No. 2158 of 1975 has been filed by 45 persons, who originally belonged to the P. A. C, Force for quashing the criminal proceedings started on the basis of three first information reports in crimes Nos. 169, 170 and 171 of 1973 against them and subsequent commitment orders and pending Sessions trials Nos. A-244 and A-422 of 1974. Cr, Misc. No. 2602 of 1975 was. in fact, an application for bail in the main Cr. Misc. No. 2158 of 1975. In Cr. Misc. No. 2602 of 1975, 27 persons were allowed to be released on parole for short term. This period was extended from time to time and according to the last order passed by this Court the period of parole was extended for one randomly on 21-7-1975. Now there is no question of granting bail to these persons in these proceedings as the main petition itself is being disposed of.

2. The facts of the case are that there was a revolt by the P. A. C. personnel in Gorakhpur in which arms and ammunition were taken away by the police personnel and used. Sri Mohan Lai Kapoor, Commandant of the XXVI Battalion P.A.C. lodged the first information report on 15-5-1973 at 6-10 p.m. to the effect that the entire Battalion has revolted during the period 22-5-1973 at 2-45 p.m. to 24-5-1973. Thirty-nine persons were specifically mentioned as they were the leaders. This report was lodged at P.S. Gulriha Bazar district Gorakhpur. It was under Sections 147/148/149/342/120B/504/ 332/352/307/395/384/427, I.P.C. 6/7 P.A.C. Act. 25/27 Arms Act and 36/43 and 37/119 D.I.R. Serious allegations were made that they had resorted to firing and they had also aimed guns towards him. They looted arms and ammunition, refused to obey orders issued by the superior officers asking them to retire etc. etc. On the basis of this report crime No. 169 was registered. On the same date and at the same time another report was lodged by Sri Brij Mohan Sharma, Deputy Superintendent of Police which was also to the same effect. He being a new man posted there, did not know the names of all the persons. He, therefore, named only eight persons. Many of them were common. In this report, it was stated that Sri Brij Mohan Sharma was even illegally detained by these persons. On the basis of this report, crime No. 170 was registered. A third report was also lodged on 25-5-1973 at 6-30 p.m. 'by Sri Jairam Shukla which made general allegations against the P.A.C. force posted at Bichhiya and it was stated that he was injured' as a result of the firing resorted to by the force. This first information report was taken under Section 307, I.P.C. and on the basis of this report crime No. 171 was registered. Police then investigated the case and a charge-sheet was submitted against 41 persons. In that case, commitment proceedings were started in the court of the Sub-Divisional Magistrate, Sadar, Gorakhpur, and the 41 petitioners serial- Nos. 1 to 41 were committed by Sri Jagannath Singh, Sub-divisional Magistrate, Sadar at Gorakhpur to the court of Session on 9-4-1974 and Sessions trial No. A-244 of 1974 started on the basis of this commitment order. Subsequently another charge-sheet was submitted by the police against four of the petitioners. That case was committed by the Judicial Magistrate on 19-9-1974, and on the basis of this commitment order, sessions trial No. A-422 of 1974 was started. Both these sessions trials were consolidated. On the request of the Government, this Court specially deputed a Senior Addl.

Sessions Judge to try these cases. Both the Sessions trials were accordingly tried by Sri R. P. Pendey, who framed charges against all the 45 persons, who are petitioners, on 16-11-1974. The Government desired that the trial should take place in jail and as such the trial took place in jail and as many as 20 witnesses had been examined in jail.

3. This petition was then filed challenging the very commitment order and the proceedings in sessions trials were stayed.

4. learned Counsel for the petitioners has argued that there could not be three first information reports in respect of the same matter, It is significant that two reports were lodged simultaneously at 6-10 p.m. one by the Commandant Sri Mohan Lai Kapoor and the other by Sri Brij Mohan Sharma, They were obviously independent of each other. As many as five persons were common even according to the second report. In fact in the report of Sri Mohan Lai Kapoor itself it was stated that the entire Battalion had revolted. Thirty-nine persons were only mentioned as leaders but the complicity of others was also alleged. Even if this report alone was there, it was possible to prosecute all the 45 persons as a result of investigation as they all belonged to the same Battalion, In fact, all the three reports were lodged independently of each other and I see no reason why they cannot be taken into account.

5. learned Counsel for the petitioners has also argued that after the investigating officer had made a complete investigation and submitted the charge-sheet against 41 persons only, he could not have made further investigation and submitted a separate charge-sheet against four other persons. It was also argued that, in fact, it was on the basis of the examination of one Sharda Pd. in the court of the Committing Magistrate in connection with his case that the names of four other persons were revealed who are petitioners Nos. 42 to 45. They were persons on guard-duty. Even according to the first information report lodged by the Commandant Sri Mohan Lai Kapoor there is a clear indication that the entire Battalion had revolted. When it was found that these four persons were on guard-duty and their complicity was also known, there is no reason why a fresh investigation could not have been made against these persons, and subsequent

charge-sheet could not be submitted. In fact, on the basis of their commitment, another sessions trial No. A-422 of 1974 was registered.

6. learned Counsel for the petitioners also argued that the charges are false and fictitious and no case whatsoever can be made out against the petitioners. I have seen the first information report as well as the charges framed by the learned Sessions Judge. In fact, the allegations are of very serious nature against the (Petitioners. The first information report does disclose a prima facie case against the petitioners and it is a different matter that they may be ultimately acquitted, But in these (proceedings under Section 482, Cr.P.C. these proceedings cannot be quashed on the ground that no case is made out against the petitioners.

7. learned Counsel for the petitioners then argued that the commitment of 39 .persons by Sri Jagannath Singh, Sub-divisional Magistrate Sadar, Gorakh-pur on 9-4-1974 was illegal as under the new Code of Criminal Procedure he had become an executive Magistrate after 1-4-1974 while in such a case under the Indian Penal Code and other Acts in which punishment is provided, enquiry or trial court have been made by a Judicial Magistrate only under Section 3 of the Cr.P.C. 1973 and thus the Judicial Magistrates can be appointed by the High Court only under Sections 11 and 12 of the Code. According to the learned Counsel, the Sub-divisional Magistrate being the Executive Magistrate, could be appointed under Section 20, Cr.P.C. by the State and he. could (perform only such functions which-could be performed by the Executive Magistrate under Criminal P.C. There is no dispute that after 1-4-1974 on coming into force of the New Criminal P. C, Judicial Magistrate alone can try cases while the Executive Magistrates can pass such orders as under Sections 144, 145 and 146, Cri, P.C. etc. But there is a saving clause in Section 484(2). Clauses (a) and (b) thereof read as follows:

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, enquiry or investigation ,pending, then, such appeal, application, trial, enquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force:

Provided that every enquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code. (b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions denoted, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the Old Code and which are in force immediately before the commencement of this Code, shall be made, respectively, to have been published, issued, conferred, (prescribed, defined, passed or made under the corresponding provisions of this Code....

Clause (a) clearly provides that trial, enquiry or investigation which was pending can be disposed of and continued according to the (provisions of Criminal P.C. 1898. Clause (b) provides that all notifications published, powers conferred etc. are to be deemed to have been conferred under the corresponding provisions of the New Cr.P.C. It automatically follows that the powers of the First Class Magistrates conferred on sub-divisional Magistrates would be deemed to have been conferred under the New Cr.P.C. also. Of course, it would be for the limited purpose of enquiry or trial of the cases which were pending. learned Counsel for the petitioners has placed reliance on an un-reported decision in the case of *Devi Singh v. State* (Cr. Misc. No. 4207 of 1974) decided by Hon. Bakshi, J. on 12-5-1975 (All.). He had referred two questions to a Division Bench and the Bench had answered those questions on 14-3-1975 in the negative. The questions referred to were as follows:-

(1) Does the Canal Magistrate appointed under Section 14 of the Code of Criminal Procedure, 1898 cease to have jurisdiction to try the cases which are pending before him, prior to the enforcement of the Code of Criminal Procedure, 1973, in the absence of any power being conferred upon him under Section 13 of the Criminal Procedure Code, 1973;

(2) Whether Special Magistrate appointed under the Old Criminal Procedure Code, 1898 who have not been conferred with fresh powers under Section 13 of the Code of Criminal Procedure, 1973 would, at all, have any jurisdiction to try the cases pending before them in their capacity as such Special Magistrate, after

coming into force of the Code of Criminal Procedure, 1973.

But in that case there was no dispute over the point that the Canal Magistrate was also a Special Magistrate. Under Section 484(2)(b), Cr.P.C. it is specially provided 'not being appointments as Special Magistrates'. Thus the appointments of the Special Magistrates have not been saved and a fresh notification as contemplated under Section 13 of the new Cr.P.C. has got to be made appointing certain persons as Special Magistrates before they can continue with old cases or try new cases. That Bench observed as follows:

As we have pointed out above, Section 484(2)(b) validates the appointments which were made under the Old Code and those appointments shall be deemed to have been made under the corresponding provisions of the New Code. Similarly the powers conferred under the Old Code shall continue to be exercised in accordance with the provisions of the New Code. But because the Special Magistrates have been excluded from the purview of this clause, the powers conferred on them under the Old Code and their appointments made under the Old Code shall not remain valid after the Old Code had been repealed by the New Code, simply because Section 484(2)(b) cannot be invoked to validate those appointments and the powers which were conferred under the Old Code.

It is clear from these observations that the case of the Special Magistrates was treated separately because their appointments had not been saved. But so far as the Sub-divisional Magistrates are concerned, the powers of all First Class Magistrates conferred on them for trying cases under the Indian Penal Code and other Acts have been saved for continuing with the cases which were 'already pending before them. No doubt, as Executive Magistrates they are not to try fresh cases under the Indian Penal Code etc.

8. learned Counsel for the petitioners has particularly drawn my attention to the proviso to Section 484(2)(a), Cr.P.C. and has argued that in view of this proviso, the Sub-Divisional Magistrate could not have committed the cases to the court of session as enquiry under Chapter XVIII of the Old Code is now to be disposed of in accordance with the provisions of the New Code. That is, with regard to the procedure, commitment is now to be made under Section 209, Cr.P.C. But this

proviso has nothing to do with the powers of the Sub-divisional Magistrate to commit under Section 209, Cr, P. C as those powers were kept intact under Section 484(2)(b), Cr.P.C.

9. Lastly, learned Counsel for the petitioners has argued that the trial in jail is not proper as under Section 9(6) of the Cr.P.C. the accused persons had not given their consent, In the counter affidavit, it was stated that no objection was raised on behalf of the petitioners but in the rejoinder affidavit it has been affirmed that 36 persons had raised objections and applied on 2-5-1974. In the counter-affidavit, it has also been stated that the State Government had requested this Court and the Court had allowed that the trial be conducted in jail. The letter of request of the State Government in this respect is -Annexure 6 to the main .petition while the order passed by this Court is Annexure 'E'. The action taken by this Court, on the basis of that letter was that the District Judges were directed to transfer the cases to senior Addl. District and Sessions Judges and to direct them to try the cases expeditiously and do other work only when they were free. But there is no direction that the cases be tried in jail. I Since the accused persons have not given their consent, it is not proper that the trial should be conducted in jail any further unless a clear notification is issued by the High Court to this effect under Section 9(6), Cr.P.C. (New). It is, therefore, directed that the trial shall now take place in open court. No doubt, it will be open to the Sessions Judge to pass suitable directions under Section 327, Cr.P.C. It is also possible that the High Court on the administrative side may issue a notification as provided under Section 9(6), Cr.P.C. specifically notifying that the trial be conducted in jail. However, the proceedings so far taken shall not be deemed to be invalid on this ground.

10. In the result, both the .petitions are accordingly dismissed subject to the directions given above that the trial shall now be conducted in open court.

11. Let a copy of this order be sent to the Sessions Judge concerned within two weeks, who shall now proceed with the trial expeditiously.