

Onkar Singh and ors. Vs. State

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Court : Allahabad

Decided On : Feb-17-1976

Reported in : 1976CriLJ1774

Judge : H.N. Kapoor, J.

Appellant : Onkar Singh and ors.

Respondent : State

Judgement :

ORDER

H.N. Kapoor, J.

1. This revision is directed against the order of the Judicial Magistrate, Ghaziabad dated 1-12-1975 committing the applicants to the Court of Session for trial in case under Section 302, I.P.C. By this commitment order four persons were committed to the Court of Session, namely, Ranvir, Rishipal, Onkar and Brijpal, Ranvir alone was present in court on the date of commitment. Rishipal was absent but his attendance had been exempted through counsel. Onkar and Brijpal were in jail. They were not brought before the Magistrate on the date of commitment. The commitment order has been challenged by Onkar Singh and Brijpal only who were in jail.

2. Learned Counsel for the applicants has argued that under Section 209, Cr. P.C., it is mandatory that the accused should either appear or be brought before the Magistrate and only then he can commit the accused to stand their trial before the Court of Session. Section, 209, Clauses (a) and (b) of the Cr. P.C. are as follows:

209 When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit the case to the Court of Session;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

3. Learned Counsel for the applicants has argued that in the case of Kamlesh Kumar Dikshit v. State (Habeas Corpus Petition No. 3643 of 1975 decided on 5-8-1975) (All) a Division Bench of this Court had held that detention of the accused in that case was illegal as he had appeared before the court only once and was then sent to jail, and further remands were granted under Section 167, Cr. P.C. without his being brought before the court and he was ultimately committed under Section 209, Cr. P.C. without having been brought before the court when he was in jail. His argument is that the same provision will apply with regard to the commitment order under Section 209, Cr. P.C. in the absence of the accused when they were in jail and were not brought before the Magistrate. I have carefully perused the judgment in that case. The Division Bench mainly considered the provisions of Section 167, Cr. P.C. Proviso (b) to Sub-section (2) of Section 167, Cr. P.C. is as follows:

No Magistrate shall authorise detention in any custody under this section unless the accused is produced before him.

There can be no doubt that this provision is mandatory and the orders passed under Section 167, Cr. P.C. remanding the accused to jail custody from time to time in his absence were illegal. When the accused was not brought before the court at the stage of Section 209, Cr. P. C, also, the Division Bench took the view

that his detention remained illegal throughout and so he was ordered to be set at liberty. The Division Bench, nowhere held that the commitment order was also illegal. On the other hand, it was observed that the order directing the accused to be set at liberty would not stand in the way of the respondents in initiating appropriate proceedings before the appropriate authorities for retaking the petitioner into custody in accordance with law. This would imply that he could be retaken into custody and remanded to custody under Section 309, Cr. P.C. by the Sessions Judge as the case had been committed.

4. In that case, the learned Judges also took the scope of Section 465, Cr. P.C. into consideration. No doubt, in their opinion, the detention being illegal from the stage of Section 167, Cr. P.C. was not curable. They also took the view that Section 465(1), Cr. P.C. did not, in term, apply to the consideration of Habeas Corpus petition as the Court exercised jurisdiction under Article 226 of the Constitution of India and not sitting as a Court of Appeal, confirmation or revision. Section 465(1), Cr. P.C. reads as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, or any error or irregularity in any sanction for the prosecution unless in the opinion of that court, a violation of justice has in fact been occasioned thereby.

It has now been held by that very Bench consisting of H. N. Seth and G. D. Srivastava, JJ. in the case of Lakshmi Brahman v. State 1975 All WC 369 : 1976 Cri LJ 118 that commitment under Section 209, Cr. P.C. is a mechanical process and the commitment proceedings do not amount to an enquiry. No prejudice was, therefore, caused to the applicants by their non-production in court at the time of commitment as they were in jail and had already appeared before the Magistrate or brought before him earlier. There also appears to be force in the argument of the learned Asstt. Govt. Advocate that the object of Section 209, Cr. P.C. is that the commitment order should not be passed when the accused is absconding or

has never been brought before the court at all.

5. Under the circumstances of this case, in my opinion non-production of the applicants before the Magistrate at the time of commitment under Section 209, Cr. P.C. when they were in jail, is a mere irregularity and is curable under Section 465(1). I am also satisfied that no prejudice has been caused to the applicants on account of this irregularity.

6. The revision is accordingly dismissed.

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