

Avinash Singh and anr. Vs. State of Chhattisgarh and anr.

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Court : Chhattisgarh

Decided On : Mar-20-2006

Reported in : 2006CriLJ4152

Judge : Sunil Kumar Sinha, J.

Appellant : Avinash Singh and anr.

Respondent : State of Chhattisgarh and anr.

Disposition : Petition allowed

Judgement :

ORDER

Sunil Kumar Sinha, J.

1. Invoking inherent jurisdiction under Section 482, Cr.P.C. the two accused persons of S.T. No. 334/2003 State v. Vinod Singh @ Badal and 4 Ors. have called in question the legality of the order dated 17.11.2005 passed in S.T. No. 329/2005 State through C.B.I. v. Amit Jogi and 30 Ors. whereby the two Sessions Trials having diametrically opposite versions have been directed to be consolidated by the 3rd Addl. Sessions Judge, Raipur (C.G.).

2. The brief facts are that one Ram Avtar Jaggi, a leader of National Congress party was shot at 11.40 p.m. on 4.6.2003 and in this connection, a First

Information Report was lodged in P.S. Moudhapara Raipur vide F.I.R. No. 104/2003 for the offences under Sections 447 and 307, I.P.C. This F.I.R. was lodged at the instance of V.K. Pandey, the Station House Officer, P.S. Moudhapara Raipur. Ram Avtar Jaggi was then sent to Macahara Hospital, Raipur, where he died. On 5.6.2003, at 2.15 a.m. another report vide F.I.R. No. 105/2003 was again registered for the same incident under Section 302, I.P.C. on the instance of one Satish Jaggi, son of the deceased. Thereafter, five accused persons namely Vinod Singh, Avinash Singh, Jamwant Kashyap, Shyam Sunder and Vishwanath Rajbhar were arrested in connection with Grime No. 104/ 2003 by the State Police and a charge-sheet was filed against them before the concerned Court Later on, the case was committed to the Court of Sessions and the learned Sessions Judge, Raipur, made over this case to the Court of 9th Addl. Sessions Judge, Raipur on 15.10.2003 for its lawful disposal. This was ultimately registered as S.T. No. 334/2003. It appears that during the course of trial, an application Under Section 173(8), Cr.P.C. was moved by the Addl. Public Prosecutor for allowing a further investigation in the said case. This application was allowed and further investigation was permitted. Thereafter, on the instance of the State Government, this matter was handed over to the C.B.I, for further investigation and C.B.I., then registered Crime No. R.C.-1/S/2004, dated 22.1.2004 under Sections 120B, 302 & 427, I.P.C. and Section 25/27 of the Arms Act. It is stated that though the further investigation was permitted but the proceedings of the Sessions Trial No. 334/2003 pending in the Court of 9th A.S.J., Raipur was not stayed and ultimately out of 21Cited prosecution witnesses, 18 were examined in the aforesaid trial. However, by that time, the investigation permitted was, complete and the C.B.I. filed another charge-sheet against 31 persons, including the 5 accused persons of S.T. No. 334/2003, under Sections 120B, 302, 427 & 201/34, I.P.C. and Section 25/27 of the Arms Act. This case was also committed to the Court of sessions on 8.9.2005. The learned Sessions Judge, Raipur, after committal, made over this case for trial to the Court of 3rd A.S.J., Raipur, (different Court than the earlier Court) which was ultimately registered as S.T. No. 329/ 2005.

3. It is very important to mention that in the Sessions Trial No. 334/2003, in which the charge-sheet was filed by the State Police, the prosecution case is that these

petitioners and three other co-accused persons committed murder of deceased Ram Avtar Jaggi and the motive for the murder is said to be the robbery. Whereas in the subsequent Sessions Trial No. 329/2005. In which the charge-sheet was filed by the C.B.I. the prosecution case is that the deceased Ram Avtar Jaggi was shot dead by accused Chiman Singh for political reasons as a rally was organized by the National Congress Party in Raipur on 10.6.2003 by Ram Avtar Jaggi and it was reported that lakhs of people are gathering in the said rally at Raipur and this posed a political threat to the then Chief Minister Shri Ajit Jogi and his son Amit Jogi and the murder was committed after a criminal conspiracy hatched between Chiman Singh, Amit Jogi and other co-accused persons. As stated by learned Counsel for the petitioners, it is alleged in the subsequent charge-sheet that the present petitioners and other three co-accused persons in S.T. No. 334/2003 had not committed the murder of Ram Avtar Jaggi and were made to make false confessions In this regard so that they are prosecuted and the actual culprits including the conspirators may be saved who were in fact responsible for the murder of the deceased which was committed for political gains.

4. During the pendency of these Sessions trials In two different Courts, a memo was sent by, the 9th Addl. Sessions Judge, Raipur (Presiding Officer in S.T. No. 334/2003) on 22.10.2005 that the subject-matter of the aforesaid sessions trial No. 334/2003 and Sessions Trial No. 329/2005 pending in the Court of 3rd Addl. Sessions Judge, Raipur ,are one, and the same as both relate to the murder of same deceased, therefore, it is expedient in the interest of justice that both these cases should be decided together, otherwise, in case of trials in two different Courts a possibility of two findings would be there and it may also amount to a double jeopardy as all the five accused persons of S.T. No. 334/2003 have also been arrayed as the accused persons in subsequent Sessions trial No. 329/2005. Another application was moved to the Sessions Judge by C.B.I. Counsel on 27.10.2005 in which, he also made a prayer that since both the charge-sheets relate to the similar crime and the investigations in both the cases arise out of the same F.I.R. No. 104/2003, therefore, the records of the Sessions Trial No. 334/2003 should be attached with the Sessions Trial Which is pending before the Court of 3rd A.S.J., Raipur on the charge-sheet of C.B.I.

5. It is important to mention that neither the C.B.I. nor any other party ever took Objection before the Sessions Court at the time of transfer of this subsequent committal (S.T. No. 32/2005) to a different Court than the Court where earlier S.T. No. 334/ 2003 was pending and by the time they prayed for transfer, 18 witnesses in S.T. No. 334/2003 were already examined.

6. The learned Sessions Judge on these two applications, registered a Miscellaneous Criminal Case No. 114/2005 and called upon the parties to hear on the point of transfer of those cases to one Court vide order dated 27.10.2005 and fixed the same for hearing on 28.10.2005. On 28.10.2005, the matter was taken up. The C.B.I. was represented through its counsel and the accused Shyam Sunder @ Anant, Jamwant Kashyap and Vinod Singh were also represented through counsel Shri Faisal Rizvi. However, the remaining two accused persons namely Ashwini @ Lallan and Vishwanath Rajbhar (Present applicants) were not represented. The learned Sessions Judge, ultimately, after hearing the parties, passed an order for transfer of S.T. No. 334/2003 from the Court of 9th Addl, Sessions, Judge, to the Court of 3rd, Addl, Sessions Judge, op. the] grounds that if the transfer would not be made to one Court, the accused persons, who were common in both the cases (5 accused persons in S.T. No. 334/2003) Shall have to face two trials for the alleged commission of single offence. A perusal of the order dated 28.10.2005 would show that it was an order Under Section 408 of Cr.P.C. by which the learned Sessions Judge, has withdrawn the above Sessions Trial No. 334/2003 from the Court of 9th A.S.J. Raipur.

7. After the aforesaid order, the said Sessions Trial No. 334/2003 was received by the Court of 3rd A.S.J., Raipur and ultimately the 3rd A.S.J. passed the impugned order and directed that since the subject-matters of both the Sessions Trials are one and the same, therefore, now both the sessions trial shall be consolidated and thereafter he directed for amendment of the charge against 5 accused persons in earlier sessions trial and further directed that no order sheets shall be recorded to earlier sessions trials and the order sheets would be recorded in S.T. No. 329/2005 only. It is at this stage the two accused persons of the earlier sessions trial have challenged the legality of the aforesaid action taken by the Addl. Sessions Judge and have prayed for separation of their trial.

8. At the arguments learned Counsel for the petitioners, raised two points. His first submission was that the Sessions Judge was not empowered to withdraw the Sessions Trial No. 334/2003 from the Court of 9th A.S.J., and to transfer the same to the Court of 3rd A.S.J. at the stage, when the evidence in the trial was altogether complete. The second submission was that the 3rd Addl. Sessions Judge committed an error of law by passing an order dated 17.11.2005 for consolidation of two Sessions Trials when two diametrically opposite versions are put-forth by the prosecution in both the cases.

9. On the other hand, learned Counsel for the State and also learned Counsel for the C.B.I. submitted that the Sessions Judge was fully competent to withdraw the first sessions trial even after the commencement of the evidence Under Section 408 of the Code of Criminal Procedure (hereinafter referred to as the Code) and the action was justified in the prevailing facts and circumstances of this case. Their submission was that even the order of consolidation of both the sessions' trials by the 3rd Addl. Sessions Judge was fully justified as the order satisfies the requirement of Section 223 of the Code.

10. I have heard learned Counsel for the parties at length and have also perused the records of the Miscellaneous Petition as also the copy of the records of M.J.C. 114/2005 regarding withdrawal and transfer of the case by the Sessions Judge.

11. In the matter of Radhe Shyam v. State of U.P. 1984 (2) Crimes 50 : 1984 All LJ 666, the Full Bench of Allahabad High Court held that all Additional Sessions Judges in a Sessions Division are separate criminal Courts for the purposes of the proviso to Sub-section (2) of Section 407, Cr.P.C. and Section 408(1) of the Code, although they exercise jurisdiction in the same Court of session. It also held that the Sessions Judge is empowered Under Section 408 of the Code to transfer a part heard case or an appeal from a Court of an Additional Sessions Judge to another competent Court within his sessions division if it is expedient in the interest of justice and the limitations imposed Under Section 409(2) of the Code are not applicable in exercise of the power of transfer conferred under Section 408 of the Code. The reason being that the power conferred on the Sessions Judge Under Section 408(1) of the Code to transfer a case or an appeal pending in the

Court of Addl. Sessions Judge to another A.J.S. in his Sessions Division whether its hearing has commenced or not, is an independent judicial power which is not subject to the bar imposed by Section 409(2), Cr.P.C. on the administrative power of the Sessions Judge for recalling a case or an appeal from an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced.

12. Agreeing with the views expressed by the Delhi High Court in *Avinash Chander v. State* 1983 Cri LJ 595 and the Allahabad High Court in the matter of *Radhe Shyam* (supra), the Division Bench of the M.P. High Court held in a reference case *In Re : Disquiet and Sessions Judge Raisen* 2005 (3) JLJ 19 that the power to be exercised under Sections 406, 407 and 408 is Judicial power to be, invoked and exercised in the manner stated; therein. On the other hand, the power of withdrawing or recalling of cases under Sections 409, 410 & 411 is an administrative power, complementary to the administrative power of making over cases vested in the Chief Judicial Magistrate/Magistrate and the sessions Judge under Sections 192 and 194 of the Code. It further held that the power conferred in Sessions Judge Under Section 408 is on the same level as the power conferred in the High Court Under Section 407 and the power under the two sections is identical. The Court observed that if the High Court has the power to transfer 'part-heard' cases under Section 407, the Sessions Court have will have the power to transfer 'part-heard' cases as the wordings of the two sections are the same. In fact, Sub-section (2) of Section 407 places an embargo on an application for transfer being filed before the High Court unless an application for such transfer has been made to the sessions Judge under Section 408 and rejected by him. It further held that the Sessions Judge in exercise of judicial power Under Section 408 of the Code may transfer any case pending before any criminal Court in his Sessions Division to another criminal Court in his sessions division. That would mean that he can transfer even those cases where the trial has commenced from one Additional sessions Judge in his Sessions Division to another Additional Sessions Judge in his Sessions Division. The transfer of a case under Section 408, of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further the reason why it is expedient for the ends of Justice to transfer the case, has/have to be recorded.

13. A perusal of Sections 408 and 409 of the Code would make it clear that the powers under these two sections are independent. Section 408 deals with the power of Sessions Judge to transfer the cases and appeals, whenever it is made to appear that an order under Sub-section (1) is expedient for the ends of justice. It has further been provided that the Sessions Judge may act either on the report of the lower Court or on the application of a party interested or on his own initiative. Section 409 provides for withdrawal of cases and appeals by the Sessions Judge which he has made over to any Assistant Sessions Judge or the C.J.M., subordinate to him. Sub-section (2) of Section 409 indicates that the Sessions Judge would exercise this power at any time before the trial of the case or hearing of the appeal has commenced before the Addl. Sessions Judge. Sub-section (3) provides that, after calling of the case back, the Sessions, Judge may either try the case in his own Court or hear the appeal himself or make it over in accordance with the provisions, of this Code to another Court for trial of hearing as the case may be. A perusal of both these sections would show that the power exercisable Under Section 408 is a judicial power whereas the power exercisable Under Section 409 is an administrative power and for exercising a power Under Section 408, there is no such embargo on the Sessions Judge to see as to whether the trial of the case or the hearing of an appeal, as the case may be, has commenced or not. I am in respectful agreement with the views taken by the Allahabad High Court and also by the M.P. High Court in the above referred cases and hold that in the present case, the Sessions Judge was fully competent to exercise his Jurisdiction Under Section 408 of Cr.P.C. for withdrawal of the earlier sessions trial from the Court of 9th Addl.: Sessions Judge and to transfer the same to the Court of third Addl. Sessions Judge, even if out of 21 witnesses, 18 were already examined by the 9th Addl. Sessions Judge.

14. If we examine the records of the Misc. Case for transfer before the Sessions Court, it would appear that the steps were taken by the Sessions Judge on a memo written by 9th Addl. Sessions Judge and also on an application filed by the counsel for the C.B.I. in subsequent sessions trial. The Sessions Judge, after receiving these applications took up the matter on 27.10.2005 and thereafter has fixed the same for 28.10.2005 and has passed a reasoned order on the said date for withdrawal of the Sessions Trial No. 334/2003 from the Court of 9th Addl.

Sessions Judge and to transfer the same to the Court of 3rd Addl. Sessions Judge. The sessions Judge has taken this view that since both the Sessions trials arise out of the same incident and 5 of the accused persons are also common in both the cases and the subsequent charge-sheet was filed after taking a permission Under Section 173(8) of Cr.P.C. both the matters should be tried by the same Court. The Sessions Judge also took this view that if two sessions trials are allowed to be prosecuted in two different Courts, the 5 accused persons shall have to face two trials. This is an order Under Section 408 of Cr.P.C. and the said order has been passed by the Sessions Judge in exercise of the judicial powers after recording the aforesaid reasons for the same. It has also been passed after giving due opportunity of hearing to all the concerned. In the opinion of this Court, the reason recorded by the Sessions Judge for transfer of earlier sessions trial to the Court of 3rd Addl. Sessions Judge appears to be correct. My reasons in this regard would come in the later part of this order while discussing on the point of consolidation.

15. So far as consolidation of two sessions trials is concerned, the provisions of Section 223, Cr.P.C. are important. It has been provided vide Sub-clause (a) and (d) of Section 223 that the following persons may be charged and tried together namely:

(a) persons accused of the same offence committed in the course of the same transaction.

(d) persons accused of different offences committed in the course of the same transaction;

A bare perusal of these two provisions would show that the persons accused of the same offence or of the different offences committed in the course of the same transaction may be charged and tried together.

16. The Apex Court held in the matter of *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao* : [1964]3SCR297 that the series of acts which constitute a transaction must of necessity be connected with the another and if some of them stand but independently, they would not form part of the same transaction but

would constitute a different transaction or transactions. Therefore, even if the expression 'same transaction' alone had been used in Section 235(1) (of the old Code) it would have Meant a transaction consisting either of single act or of a series of connected Acts. The expression same transaction occurring in Clause (a)(c) and (d) of Section 239 as well as that occurring in Section 235(1) (both old Code) ought to be given the same meaning according to the normal rule of construction of statute.

17. The Apex, Court further held in the matter, Harvinder Singh v. State of Punjab : 1986 CriLJ831 that it is not permissible for the Court under Section 223 of the Code to club and consolidate the case on a police challan and the case on a complaint where the prosecution versions in the Police challan case and the case on a complaint where the prosecution versions in the Police challan case and the complaint case are materially defferent, contradictory and mutually exclusive. However, it was directed that the two cases in such a situation should be tried by the same Judge, but not consolidated.

18. Referring to the above decisions, the Apex Court held in the matter of Balbir v. State of Haryana : 2000 CriLJ169a that when two commitments are made before the Court of Sessions pertaining to the same offence and pertaining to the same victim, one giving one version against one accused and the other giving another against a different accused, in such cases the most appropriate procedure to be followed by a Sessions Judge should be the same as followed in the said case i.e., the two trials were separately conducted one after the other by the same Court before the same Judge and judgments in both the cases were separately pronounced on the same day and the Sessions Judge, should take care that he would confine his judgment in one case only to the evidence adduced in that particular case. It has been further held that if more than one Public Prosecutor is available at the same station, it is advisable that the Public Prosecutor who prosecuted one case should avoid prosecuting the other case. It has also been held that as perfection 223, all persons falling under any one of the 7 categories enumerated therein can be charged and tried together. In both the Clauses (a) and (d) of Section 223, the primary condition is that persons should, have been accused either of the same offence or of different offences 'committed in the

course of the same transaction'. The expression advisedly used is 'in the course of the same transaction'. That expression is not akin to saying 'in respect of the same subject matter'. Where there is commonality of purpose or design, where there is continuity of action then all those persons involved can be accused of the same or the different offences committed in the course of the same transaction, but if in one case the accused is alleged to have killed a person, without any junction with the accused in the other case, then it cannot be treated as the same offence or different offences 'committed in the course of same transaction'. If such two diametrically opposite versions are put to joint trial, the confusion which it causes in the trial would be incalculable. It would then be a mess and then there would be no scope for a trial. Hence the attempt to bring the two cases under the umbrella of Section 223 of the Code has only to be foiled as untenable.

19. If we examine the case set forth by the prosecution in each Sessions trial it would appear that in the earlier sessions trials the case of the prosecution is that the 5 accused persons attempted the life of deceased Ram Avtar Jaggi for the purpose of a robbery being committed by them and ultimately he died in the said incident. There is no mention at all about the involvement of the remaining accused persons of the subsequent sessions trial in the charge-sheet of earlier sessions case. However, in the subsequent sessions trial, the story set forth by the prosecution is regarding commission of the murder of deceased by accused Chiman Singh after a criminal conspiracy between himself and the co-accused Amit Jogi and many other accused persons. Needless to say that on comparison, the versions of the prosecution in both the cases are diametrically opposite and are materially different, contradictory and mutually exclusive. Though the 5 accused persons of the earlier sessions trial are common in the subsequent sessions trial, but the role attributed to them is not that of commission of murder and the same is about making a false confession so as to take the responsibility of the incident on their head with an intention to save the actual culprits and also the conspirators of the subsequent case.

20. In the opinion of this Court, the stories set forth by the prosecution in these two cases and the allegations made by them against the accused persons in these cases are totally different and since they are diametrically opposite, they cannot be

consolidated as per the principles laid down by the Apex Court in the abovereferred cases as on the basis of allegations, the alleged offence/offences cannot be classified as the offence(s) committed in the course of the same transactions and the guidelines laid down by the Apex Court in the matter of Balbir v. State of Haryana 2000 Cri LJ 169 (supra) are the only course to be followed in such cases. Therefore, I also hold these reasons to be the good reasons for transfer of the case from the Court of 9th Addl. Sessions Judge to the Court of 3rd Addl. Sessions Judge and by this point of view and on these reasonings, the order passed by the Sessions Judge regarding transfer of the case from 9th Addl. Sessions Judge to the Court of 3rd Addl. Sessions Judge finds support of this Court.

21. In the result, for the foregoing reasons, the action taken by the Sessions Judge regarding, transfer of Sessions Trial No. 334/2003 from the Court of 9th Addl. Sessions Judge to the Court of 3rd Addl. Sessions Judge is held to be in order, but the order passed by the 3rd Addl. Sessions Judge regarding consolidation of both the cases, as mentioned above, is not in accordance with law and, the same deserves to be and is accordingly set aside. Keeping in mind the principles laid down in Balbir Singh's case 2000 Cri LJ 169 (supra), the 3rd Addl. Sessions, trial in the following manner:

- (i) The two trials vide S.T. No. 334/2003 State v. Vinod Singh alias Badal and 4 Ors. would be separately conducted one after the other by the Additional Sessions Judge and the judgments in both the cases will be separately pronounced on the same day;
- (ii) The evidence should be recorded separately in both the cases one after the other;
- (iii) The Addl. Sessions Judge would confine his judgment in one case only to the evidence adduced in that particular case;
- (iv) Two separate public prosecutors shall conduct the prosecution of each case and they should avoid to appear in each other's case.

22 The petition is allowed to the extent indicated above. No cost.

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