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State Vs. Ambaram and ors.

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Court : Madhya Pradesh

Decided On : Oct-04-1950

Reported in : 1953CriLJ98

Judge : Kaul, C.J. and ;Mehta, J.

Appellant : State

Respondent : Ambaram and ors.

Judgement :

Kaul, C.J.

1. This case has been referred to a Bench by a learned Single Judge of this Court. A reference was made by the Additional District Magistrate Dhar, recommending that an order passed by the District Sub-Judge (First Class Magistrate) Sardarpur, dated 11th August 1949 be set aside. It came up before a learned Single Judge of this Court. He was of opinion that the question raised by the reference was one on which there was considerable difference of opinion among various High Courts in India, and accordingly has referred the matter to a Bench. The point of law which came up for consideration before the learned Judge arose thus:

Six persons were challaned by the Amzera Police to take their trial for various offences under sections 135, 314 and 444 of the Gwalior Penal Code (corresponding to Sections 148, 452 and 323 of the Indian Penal Code). The case came up before the District Sub-Judge, Sardarpur, a first class magistrate. After

recording some evidence, he framed the charges. After the prosecution evidence was closed and all the accused persons except one had been examined, the case was transferred under an order of the Law Department (Gwalior State) to another Magistrate-viz., Sub-Divisional Magistrate, Sardarpur. The case was taken up by the Sub-Divisional Magistrate on the 15th of April, 1949, and on that day the accused asked for a de novo trial. The learned Magistrate directed that the prosecution witnesses be examined afresh. In an order recorded on 11th August 1949, he held that under Section 350 of the Code of Criminal Procedure though the accused were entitled to demand that the witnesses or any of them be re-summoned and re-heard, the transfer of the case, from the court of the District Sub-Judge, Sardarpur, to his Court did not have the effect of wiping out the charges that were framed. The accused went in revision against this order before the Additional Sessions Judge, Dhar, who made this reference recommending that the order passed by the Sub-Divisional Magistrate, Sardarpur, be set aside.

The question for consideration therefore is, whether on a correct interpretation of Section 350 of the Code of Criminal Procedure if, a warrant case pending before a Magistrate is, as a result of his transfer or for some other reason taken up by another Magistrate, and the accused makes the demand referred to in Proviso (a) to Sub-section (1), is the charge framed by the first Magistrate necessarily wiped out, and must the entire proceeding in the case, be commenced afresh before the second Magistrate? Section 350(1) reads as follows:

Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial:

Provided as follows:

(a) in any trial, the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;

(b) the High Court, or, in cases tried by Magistrate subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

2. An examination of Sub-section (1) will show that of the two options given by it to the Magistrate, the first is controlled by two provisos. For the purposes of the present discussion we need consider only proviso (a). The Sub-section empowers the Magistrate:

(1) Either to proceed on the evidence recorded by his predecessor or partly by his predecessor and partly recorded by himself, or

(2) to resummon the witnesses and recommence the inquiry or trial.

if he adopts the latter course i.e., resummons the witnesses and recommences the entire proceeding, the charge is automatically wiped out with the rest of the proceeding, and the question which forms the subject-matter of this reference does not arise. In case, however, the Magistrate decides to proceed on the evidence recorded by his predecessor or partly by his predecessor and partly by himself, the accused, if he is on trial can demand that the prosecution witnesses or any of them whose evidence was not recorded by the second Magistrate be re-summoned and re-heard. This demand must be made at the commencement of the proceeding by the second Magistrate.

3. It is noteworthy that the language used in the sub-section is different from that used in proviso (a). While under the sub-section, the Magistrate may if he so chooses, 'recommence the inquiry or trial', but if he decides otherwise, the only demand an accused on trial can make is, 'that the witnesses or any of them may be re-summoned and re-heard'. We cannot assume that the distinction between the. language employed at two places in the same sub-section is devoid of significance.

4. Reading the words of sub-section and of proviso (a) in their ordinary natural meaning we find that it is open to the succeeding Magistrate either of his own accord or at the request of the accused, to re-summon all the witnesses and re-commence the entire proceeding. The question, however, is whether the accused has a right to insist that the entire proceeding should be re-commenced. As the proviso omits the word 'inquiry' and refers only to 'trial', it is clear that if the proceeding before the Magistrate is only an inquiry, the accused cannot make a demand that the witnesses be re-summoned and re-examined. He can do so only in a trial. We have, therefore, to determine when does a proceeding detailed in Chapter XXI of the Code of Criminal Procedure become a trial. Is it a trial from its inception as held in - Gomer Sirda v. Queen Empress 25 Cal 863, i.e., when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and for the defence if the accused be defended, present in Court for the hearing of the case. Or is it that the proceeding till the stage before the charge is framed and is read out to the accused, or some anologous procedure is adopted is only an inquiry which develops into a trial only after this is done. A comparison of the definitions of certain terms in the Codes of 1861, 1872, 1882 and 1898 may be helpful in determining the question.

'Year' 'Inquiry' 'Enquired into' 'Trial'

1861 Not defined Comprises every proceeding Not defined.

preliminary to trial.

1872 Includes every inquiry conducted Comprises every proceeding Proceedings

taken in Court

by a Magistrate or Court under preliminary to trial. after a charge

had been drawn

the Code. up.

1882 Do. Not defined. Not defined.

1898 Includes every inquiry other than Not defined. Not defined.

a trial conducted by a Magistrate

or Court under the Code.

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5. The Act of 1872 further, provided that for purposes of Chapters XVI and XVIII a 'trial' includes all proceedings from the time that accused appears in a Court. It will be noted that the Indian Legislature has always maintained a distinction between an inquiry and a trial and though the Code of 1882 did not contain any definition of the expression 'trial' and denned 'inquiry' as including every enquiry conducted by a Magistrate or a Court under the Code, the High Court of Calcutta held in - Haridas Sanyal v. Saritulla 15 Cal 608, that an inquiry did not include a trial. The Legislature made it clear in the Code of 1898 that me view taken by the Calcutta High Court was correct. As has been seen the Code of 1872 expressly laid down that 'trial' meant only the proceeding taken in court after a charge had been drawn up. The fact that this definition was dropped and not reproduced in the Code of 1882, need not lead to the inference that there was an intention to give the term 'Trial' a connotation different from what it bore in the Code of 1872. Nor should the headings of Chapters XX and XXI lead us to a different conclusion. These chapters are headed 'Trial of summons cases by Magistrate' and 'Trial of Warrant cases by Magistrates'. It does not necessarily follow from these headings that every section contained in these chapters relates to the proceeding known as 'trial'. The term 'trial' as used in the Code pre-supposes the commission of an offence but an inquiry may cover inquiries into matters other than offences e.g., inquiries concerning disputes as to immovable property or as regards forfeiture of bonds executed by sureties etc. etc. See: - Hemasingh v. Emperor AIR 1929 Pat 644; - Charan Mahto v. Emperor AIR 1930 Pat 274; - Queen Empress v. Chotu 9 All 52; - Palaniandy v. Emperor 32 Mad 218; - Narayanaswami Naidu v. Emperor

32 Mad 220; - Shriramulu v. K. Veerasalingam 38 Mad 585; - S. Mohammad Hussain v. Mirza Fakhrulla Beg AIR 1932 Oudh 298; - Sher Muhammad v. Emperor AIR 1923 Lah 270.

6. I am aware that a different view has been expressed in some reported cases. These cases like - Gomer Sirda v. Queen Empress 25 Cal 863, do not take into account the considerations to which reference has been made above and proceed mainly on the popular meaning of the word 'trial'. The view taken in - Sahib Din v. Emperor AIR 1922 Lah 49 at p. 54 was that a trial cannot be said to commence only when a charge is framed. It was pointed out that if a trial be held not to commence before a charge is framed, then what is spoken of as a trial of summons cases and a summary trial are not really trials at all but only inquiries. With the greatest respect, I may point out that under our Code though the law dispenses with the necessity of framing a formal charge in a summons case, it is incumbent upon the Magistrate to state to the accused the particulars of the offence and to ask him to show cause why he should not be convicted (Section 242). In summary trials also the procedure prescribed for summons cases is to be followed in that class of cases, and that prescribed for warrant cases in cases of that class. The only difference is that the record of the proceeding shall not be elaborate but will be as provided in Sections 262 and 264.

7. I respectfully agree with the view of law taken in - T. Shriramulu v. K. Veerasalingam 38 Mad 585, that the proceeding before the Magistrate in a warrant case under Chapter XXI of the Code of Criminal Procedure is only an inquiry until a charge is framed. It becomes a trial only after a charge is framed. If this distinction is borne in mind, the answer to the question raised by this reference is clear. If in proceedings relating to a warrant case a charge has been framed by one Magistrate and then the case is taken up, by another Magistrate the charge is not necessarily wiped out because the accused chooses to exercise the right given to him by proviso (a) to Sub-section (1) of Section 350. In the case under reference the Sub-Divisional Magistrate, Sardarpur, decided not to re-commence the inquiry. He, however, acceded to the demand of the accused that the prosecution witnesses be re-summoned and re-examined. This in my opinion was sufficient compliance with the law.

8. The reference made by the Additional District Magistrate, Dhar is therefore, rejected.

Mehta, J.

9. I agree.

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