

Mango Lohora and ors. Vs. the State

Mango Lohora and ors. Vs. the State

SooperKanoon Citation : sooperkanoon.com/528755

Court : Orissa

Decided On : Mar-16-1965

Reported in : AIR1965Ori214; 1965CriLJ792

Judge : R.K. Das, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 173 and 207A(4)

Appeal No. : Criminal Revn. No. 480 of 1964

Appellant : Mango Lohora and ors.

Respondent : The State

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Asok Das, ;L. Rath and ;B.B. Rath, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

R.K. Das, J.

1. This is an application made by the accused-petitioners for quashing the order of commitment passed by the Sub-Divisional Magistrate, Pan-posh in the district of Sundargarh.

2. On the information lodged by a Sub-Inspector of Police, Rourkela, a case was instituted alleging that on 21-3-1964 some houses in the Muslim Bustee were destroyed by fire and that some Muslims were killed. After investigation and charge-sheet the petitioners were to be committed to the Court of Sessions for trial under various sections of the Penal. Code. During the committal enquiry, the prosecution did not examine any of the occurrence witnesses whose names found place in the prosecution report submitted under Section 173, Criminal P. C. It appears that though the prosecution took time twice to produce the witnesses, ultimately it expressed its inability to produce any. The learned Magistrate on perusal, of the documents filed along with the prosecution report under Section 173, Criminal P. C. came to hold that it was a fit case for commitment to the Court of Session. He accordingly committed the petitioners for offences under Sections 148, 149, 436 and 302, I. P. C. It is against this order of commitment the present petition has been filed.

3. The main contention of Mr. Das, learned counsel for the petitioners, is that the order of commitment is illegal as no occurrence witnesses were examined before the committing Court. Section 207-A, Criminal P. C. lays down the procedure to be adopted in commitment proceedings instituted on police report. Sub-section (4) of this section which is relevant for the present purpose provides that

'(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged: and if the Magistrate is of opinion that it is necessary, in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.'

Thus the procedure laid down in the above sub-section is divided into two parts, that is, firstly the Magistrate shall proceed to take the evidence of witnesses 'if any' produced by the prosecution and secondly to examine other witnesses if he finds necessary. It was contended that the expression 'if any' and 'as may be produced' used in the aforesaid subsection should not be taken to mean that the Magistrate has any discretion in the matter, but if there are any witnesses to the actual commission of the offence, the Magistrate has no option, but to examine them

before the commitment is made and in the absence of such examination the committal order is illegal and is liable to be quashed. In fact, this was the view held by this Court in a case reported in *State v. Anadi Betankar*, AIR 1958 Orissa 241. But this view appears to have been overruled by a later decision of the Supreme Court reported in *Shri Ram v. State of Maharashtra*, AIR 1961 S C 674. Before this decision of the Supreme Court, it appears, the High Courts in India had conflicting views on this question.

One view was that under Sub-section (4) the prosecution is bound to examine in the committing court all the eye-witnesses indicated in the police report and the discretion of the Magistrate is only with regard to 'the other witnesses for the prosecution' as provided in the 2nd part of the Sub-section (4). This was the view taken by the Orissa High Court in the decision stated above as also by the High Courts of Mysore (*Pavalappa v. State of Mysore* (S) A I R 1957 Mys 61); Rajasthan (*Ghisa v. State*, AIR 1959 Raj 294) and Andhra Pradesh (*Chandu Satyanarayana v. State*, AIR 1959 Andh Pra 651). The other view was that the Magistrate's power to examine the eye-witnesses under the 1st part of the Sub-section (4) was confined only to such witnesses as are produced in Court by the Officer conducting the prosecution and if he has not produced any such witnesses the Magistrate cannot examine any witness under the second part of the said sub-section, as the second part deals only with the witnesses 'other than eye-witnesses' and the Magistrate can, if satisfied, discharge or commit the accused to the Court of Session on the basis of documents referred to in Section 173, Criminal P. C.

This was the view taken in some decisions of the Allahabad High Court. *State v. Lakshmi Narain Singh* A I R 1960 All 236. In the decision reported in A I R 1961 S C 674, their Lordships after discussing the conflicting views of the High Courts as stated above, and following their previous decision, reported in *Hanumantha Rao v. State of Andhra Pradesh*, (S) AIR 1957 S C 927 laid down the following propositions:

(i) In a proceeding instituted on a police report, the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court.

(ii) The Magistrate, if he is of the opinion that it is in the interest of justice to take evidence whether of eye-witnesses or otherwise, has a duty to do so.

(iii) If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, the Court has jurisdiction to discharge or commit the accused to sessions on the basis of the documents referred to in Section 173 of the Code and

(iv) The discretion of the Magistrate under Sub-section (4) of Section 207A is a judicial discretion and therefore in appropriate cases the order of discharge or committal as the case may be, is liable to be set aside by a superior Court.

Thus, it has been clearly laid down that the Magistrate is not bound to take evidence of such eye-witnesses who are not actually produced before him by the prosecution and it is within his jurisdiction also to commit the accused persons to the Court of Sessions mainly on the basis of the documents referred to in Section 173, Criminal P. C., unless, of course, the Magistrate is of opinion that it is in the interest of justice that he has to take evidence whether of eye-witnesses or otherwise.

4. In the present case, the prosecution made some attempts to produce some occurrence witnesses and in fact took some time to produce them in Court, but ultimately expressed its inability to produce any witness before the committing Magistrate. The learned Magistrate after examining the documents filed with the prosecution report, came to hold that a case for commitment had been made out against the petitioners. In that view of the matter, it cannot be said that the order of the learned Magistrate is illegal or without jurisdiction. This, however, cannot mean that the practice of not examining eye-witnesses at the committal stage should be encouraged as a rule of practice. In fact, their Lordships of the Supreme Court in that case also made some observations to that effect and I may usefully quote a few lines for guidance of the subordinate Courts. Their Lordships said :

Before closing we would like to make some observations. Rarely we come across cases where the prosecution does not examine important eye-witnesses, for such a procedure would entail the danger of the said witnesses being tampered with by the accused with the result that there will not be any evidence taken by the

committing Magistrate which could be used as substantive evidence under Section 288 of the Code. Even if the prosecution takes that risk, the Magistrate shall exercise a sound judicial discretion under the second part of Sub-section (4) of Section 207A in forming the opinion whether witnesses should be examined or not and any perverse exercise of that discretion can always be rectified by a superior Court. But there may be a case where the Magistrate can make up his mind definitely on the documents referred to in Section 173 without the aid of any oral evidence and in that event he would be within his rights to discharge or commit the accused as the case may be.'

In the present case, nothing has been shown to justify that the learned Magistrate has exercised his jurisdiction capriciously in committing the petitioners to the Court of Sessions. The ultimate decision of the case on its merits is quite a different matter unrelated to the present order sought to be quashed.

5. In the result I do not find any justification to quash the order of the Magistrate and the revision is accordingly dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com