

State Vs. Joseph

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Court : Kerala

Decided On : Jul-14-1959

Reported in : AIR1960Ker16

Judge : Sankaran, C.J. and; Anna Chandy, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 347 and 348

Appeal No. : Criminal Ref. No. 5 of 1959

Appellant : State

Respondent : Joseph

Advocate for Pet/Ap. : Public Prosecutor

Disposition : Reference accepted

Judgement :

Sankaran, C.J.

1. This reference relates to the order passed by the Second Class Magistrate at Meenachil, committing the accused in C. C. No. 19/1959 to stand his trial before the Sessions Court for the offences punishable under Section 379 read with Section 75 of the Indian Penal Code. Before passing the Order of committal the Magistrate had formally convicted the accused under these two sections. The committal order passed after such conviction is stated to be illegal and accordingly

the learned Sessions Judge has referred the case to this Court under Section 438 of the Code of Criminal Procedure with a recommendation that the illegal order passed by the Magistrate may be quashed and the Magistrate directed to proceed in accordance with law.

2. The procedure to be followed in the trial of the case mentioned above is that prescribed by Section 348 of the Code of Criminal Procedure. Sub-section (1) of that section runs as follows:

'Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted:

Provided that, if any Magistrate in the district has been invested with powers under Section 30 the case may be transferred to him instead of being committed to the Court of Session.'

Under this section, two courses are open to the Magistrate before whom a case against an offender is charge-sheeted. If, on a consideration of the evidence produced against the accused, the Magistrate is satisfied that there are sufficient grounds to make out a prima facie case that the accused is guilty of the offence alleged against him, the normal course to be adopted by the Magistrate is to commit the accused to the Court of Session or High Court, as the case may be so that an adequate sentence may be passed against the accused in the event of his conviction. The next alternative contemplated by the section is that in any particular case where the Magistrate is of opinion that the case against the accused is such that the Magistrate himself is competent to try it and to pass an adequate sentence against the accused if the trial ends in his conviction, the Magistrate himself may proceed with the trial of the case without committing the

accused to the superior court.

It is obvious that in forming an opinion in that direction the Magistrate has to exercise a judicial discretion in the light of all the relevant circumstances relating to the particular case against the accused. The question of the Magistrate himself convicting and sentencing the accused can arise only after the Magistrate has, in the exercise of such discretion, formed the opinion that the circumstances of the case are such that he himself is competent to try it and to award an adequate sentence against the accused. If, after, forming such a definite opinion the Magistrate proceeds with the trial of the case and finally convicts the accused, there will be no further scope for committing the accused to a superior court for trial of the same offence. Such a subsequent trial is barred by Section 403 of the Code of Criminal Procedure. The Magistrate after trying the accused and convicting him, will be acting without jurisdiction in committing the accused to the superior court to try him again for the same offence.

Such an order of committal will be illegal. The procedure to be followed by a Magistrate in cases which he himself is competent to try is that indicated in Ss, 254, 255 and 255-A of the Code of Criminal Procedure. These sections state that if, on a consideration of the evidence adduced by the prosecution, the Magistrate is of opinion that there are sufficient grounds for presuming that the accused has committed the offences charged against him and the Magistrate is competent to try the same and to award an adequate punishment, the Magistrate shall proceed to frame a charge against the accused and then call upon him whether he pleads guilty, or whether he proposes to enter on his defence. If he pleads guilty the Magistrate shall record the plea and may in his discretion convict him. If he does not plead guilty the case shall proceed and after taking such further evidence as may be found necessary and after hearing arguments, the Magistrate shall record his final decision in the case.

3. If, on the other hand, the Magistrate feels that the case is one that ought to be committed to a superior court, he has to follow the procedure prescribed by Section 347 or 348 of the Code of Criminal Procedure. Section 348 lays down the general procedure to be followed in such a case. Sub-section (1) of that section

states that

'if in any enquiry before a Magistrate or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or the High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained.'

Sub-section (2) states that if the Magistrate is not empowered to commit for trial, he shall proceed under Section 346 to have the case transferred to the court of another Magistrate having jurisdiction to deal with the same. Section 348 deals with the special procedure to be followed in cases against persons accused of offences falling under Chapter XII or Chapter XVII of the Indian Penal Code and who have been previously convicted for a similar offence. Where the accused has to be committed for trial to the superior court under Section 347 or Section 348, the only effective order that the Magistrate is empowered to pass is the order of committal and he will be acting illegally if he signs and declares a judgment convicting the accused and then commits the accused to stand his trial by the superior court for the same offence. If the order of committal is vitiated in this manner that order as also the order convicting the accused have to be quashed and the case sent back to the Magistrate so that the accused may be properly committed to the superior Court after framing the necessary charge against the accused in the manner contemplated by Section 210 of the Code of Criminal Procedure. The decisions in *Emperor v. Po Yin*, 17 Cri LJ 201: (AIR 1916 Low Bur 65) *In re, Kora Sellandi*. AIR 1914 Mad 149(2) and in *In re, Sangili Velan*, AIR 1944 Mad 498, are also in support of this view,

4. It may not be necessary to adopt the course indicated above in a case where the only effective and final order passed by the Magistrate is the order committing the accused to the superior court to stand his trial for the offences charged against him. The Magistrate will proceed to commit the accused to the superior court only if he is satisfied that there are sufficient grounds to show that there is a prima facie case against the accused. In other words, the Magistrate has to record his opinion that there is prima facie evidence to show that the accused is guilty of the

offence charged against him. The mere recording of such an opinion as the basis of the committal order cannot render that order illegal. Even if the Magistrate in the course of that order happens to state that the accused is convicted of the offence charged against him, that statement has only to be ignored as a faulty, and erroneous manner of expressing the Magistrate's view that there is prima facie evidence against the accused to show that he is guilty of the offence charged against him, so as to justify the order committing him to the superior court.

The order of committal may sustain such a construction where it is the only effective and final order passed by the Magistrate. An order of this type was considered in *Emperor v. Narayanan Dhaku*, ILR 52 Bom 456: (AIR 1928 Bom 240). That was a case where the Magistrate was acting under Section 349 of the Code of Criminal Procedure. In the course of the order by which the case was sent up to the superior Magistrate competent to award a more severe sentence to the accused than the subordinate Magistrate was empowered to do, there was the statement that the subordinate Magistrate had convicted the accused. In dealing with that statement it was pointed out that it need not be considered as a formal conviction having any legal force or validity so as to prevent the superior Magistrate from proceeding with the trial of the case and that the statement about the conviction of the accused could be treated as a mere surplusage, reiterating the opinion of the Magistrate that there is prima facie evidence about the guilt of the accused. The position will be different where the Magistrate has passed a separate and independent judgment convicting the accused and has thereafter passed a separate order committing the accused to the superior court for being tried for the same offence. In such cases the conviction and also the order of commitment will both be illegal and will have to be quashed and the Magistrate directed to proceed afresh in accordance with Section 210 of the Code of Criminal Procedure.

5. The present case falls under the second category mentioned above. In this case the accused was first tried for the offences under Section 379, I. P. C. and On 13-1-1959 the learned Magistrate declared his judgment in open court convicting the accused of the offence under that section. Subsequently, charge was framed against him under Section 75 of the I. P. C., and was again tried and on 15-1-1959

the court passed an order convicting the accused under that section also. The order committing the accused to the Sessions Court was passed after recording both these convictions and formally declaring the same in open court on two different dates. The procedure followed by the learned Magistrate is clearly illegal.

6. In the result, the reference made by the learned Sessions Judge is accepted and the order of committal passed by the learned Magistrate and the two convictions entered against the accused are quashed. The case will be sent back to the Magistrate's Court for being dealt with afresh in accordance with law and in the light of the observations made above.

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