

In Re : Chief Judicial Magistrate

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Court : Kerala

Decided On : Apr-07-1987

Reported in : 1988CriLJ812

Judge : S. Padmanabhan, J.

Appellant : In Re : Chief Judicial Magistrate

Judgement :

ORDER

S. Padmanabhan, J.

1. As many as 14 cases popularly known as 'Mark list cases' were charge sheeted, before the Chief Judicial Magistrate, Trivandrum, prior to the establishment of the Special Court. At a time when those cases were pending investigation, the investigating officer, in one of the cases (Crime No. 284/CR/81) filed a report M.P. 3656 of 1982 before the Chief Judicial Magistrate, Trivandrum, under Section 306 of the Code of Criminal Procedure to tender pardon to one Anandan who was one of the accused in the cases, and to record his statement. The offences are not exclusively triable by the Court of Session. By order dated 26-11-1982 the then Chief Judicial Magistrate Mr. Sadasivan turned down the prayer. He doubted his power to grant the prayer and went on to consider how he was to proceed after tendering pardon and recording the statement.

2. The order was challenged by the State in Crl. R.P. 136 of 1982 before the Sessions Judge, Trivandrum. The Sessions Judge allowed the revision and directed the Chief Judicial Magistrate to accept the report of the investigating officer and proceed according to law. It was also provided in the order that when the Chief Judicial Magistrate tenders pardon he would become incompetent to try the case and that the only : other option open to him would be to commit the accused to the Court of Session as enjoined by Section 306(5) of the Code irrespective of the fact that the offences were not exclusively triable by the Court of Session.

3. The order of the Sessions Judge was not capable of removing the doubts of the Chief Judicial Magistrate. He wrote to this Court on 13-1-1983 referring to the establishment of a Special Court for 'Marklist Cases' and therefore doubting his further jurisdiction to entertain the charge-sheets and commit the cases to the Court of Session as directed by the Sessions Judge. The matter was taken up in suo motu revision by this Court in Crl. R.C. 2 of 1983 and a Division Bench of this Court by order dated 19-8-1983 held that the Chief Judicial Magistrate was bound to comply with the order of the Sessions Judge and commit the case to the Court of Session as enjoined by Section 306(5). Accordingly Mr. Sadasivan (the then Chief Judicial Magistrate, Trivandrum) tendered pardon to Anandan in the 14 crime cases.

4. Mr. Rajappan, the present Chief Judicial Magistrate, Trivandrum was then Additional Judicial First Class Magistrate-I, Trivandrum. It was he who recorded the confession statement of Anandan under Section 164 of the Code as directed by the Chief Judicial Magistrate. At the time of tendering pardon Mr. Sadasivan recorded the approvers statement during investigation stage. Subsequently three out of the 14 cases were charge-sheeted and they were committed to the Court of Session by the present Chief Judicial Magistrate Mr. Rajappan without examining the approver Anandan under Section 306(4). Thereafter some other cases were also charge-sheeted.

5. By letter dated 15-12-1984 Mr. Rajappan requested this Court to clarify whether he is competent to entertain these cases and commit them since he has recorded

the confession and since he is cited as a witness in the charge-sheets. For that a reply was already given by this Court on the administrative side. Now by another letter dated 12-11-1986 Mr. Rajappan wants clarification on the following points:

(1) Whether under Section 306(4) he should again examine Anandan who was already examined by his predecessor during the investigation stage when tendering pardon.

(2) Whether he is competent to examine Anandan as a witness since his confession was recorded by him in another capacity.

(3) Whether under Section 209 he can commit the case without examining the approver as provided in Section 306(4) and if examination under Section 306(4) is necessary again whether he could make over the case to any other court for examining the approver and thereafter commit the case to the court of Session, and

(4) Section 306(4)(a) provides that the approver shall be examined as a witness in the court of the Magistrate taking cognizance and in the subsequent trial If so whether his role is the same in the committing court and the trial court and whether in the committing court the accused will have to be given an opportunity to cross-examination.

These never ending process of doubts entertained by the predecessor and the successor Chief Judicial Magistrates right from 1982 protracted committal and trial of many cases till now. The matter was taken up in suo motu revision and it thus came up before me. I heard the Director of Public Prosecutions.

6. The object of the provision for tendering pardon is to get evidence in cases involving grave offences alleged to have been committed by several persons in circumstances making it difficult to get evidence otherwise. Evidence collected by tendering pardon is from a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies. What is tendered is a conditional pardon, the condition being his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to

every other person concerned in the commission thereof. It involves a contract between himself and the State by which in consideration of the conditional pardon and the consequent conditional exoneration from liability he agrees to make a full disclosure. By the acceptance of the pardon tendered he ceases to be an accused and becomes a witness conditionally. When he resiles from that agreement and breaks the conditions the contract is broken and the State becomes entitled to prosecute him. We are not concerned with those aspects here.

7. The person to whom pardon is tendered must be encouraged by removal of the fear of prosecution in order to give the fullest details. The Magistrate should explain to him all the conditions accompanying such tender of pardon and should also record his reasons for tendering pardon. He should exercise sound judicial discretion and proceed with great caution and on ample grounds with the clear consciousness of the risk involved in allowing an offender to escape punishment at the expense of possible innocent persons. It may not be necessary for the Magistrate tendering pardon, whether the confession was recorded by him or some other Magistrate to examine in full the person proposed to be pardoned. But in order to satisfy himself that he is moving in correct lines and that there is a full and true disclosure of the whole of the circumstances by the person, he can question him at the time of tendering pardon. That what the Chief Judicial Magistrate has done in this case when he examined the approver at the time of tendering pardon. That was only for the satisfaction of the Magistrate and nothing more. Such an examination is not compulsory and it is not provided so in the Code or Rules.

8. Such examination or questioning is not the one contemplated in Section 306(4). Examination under Section 306(4) is mandatory. What the sub-section says is that every person accepting a tender of pardon shall be examined as a witness in the Court of the Magistrate taking cognizance and in the subsequent trial. The object of such examination is to ascertain whether he has resiled from his former position and has broken the conditions of his pardon. It has to be remembered that the prosecution is not bound to examine an approver in the subsequent trial if he has resiled from his position and broken the conditions while examined before the Magistrate under Section 306(4). Examination under Section 306(4) is therefore

compulsory and the examination or questioning at the time of tendering pardon is not a substitute for it. Where a person has been made an approver the principal task before the court is to see whether his evidence is corroborated by that of other witnesses and consequently, at the trial the approver must be examined first or at the earliest even though non-compliance cannot be relied on if no prejudice resulted. Such examination of the approver at the trial will depend upon whether he resiled from his position or not in the committing court. That is one of the reasons why his examination under Section 306(4) in the Court of the Magistrate; taking cognizance is made compulsory.

9. Recording the confession is a judicial act which does not involve the exercise of any discretion to decide anything except ascertaining the voluntary nature of the confession and give the requisite warnings for that purpose. In this particular case even if Mr. Rajappan himself was the Chief Judicial Magistrate and he tendered pardon in that capacity after recording the confession there would not have been any bar for him in examining the approver under Section 306(4) and committing the case under Section 306(5). Except examining the approver he need not make any further enquiry in the case. In this case he only recorded the confession statement as directed by the Chief Judicial Magistrate before whom the case was pending at the investigation stage. Thereafter he transmitted the papers under Section 164(6) of the Code to the Chief Judicial Magistrate who tendered pardon after necessary satisfaction. By chance he subsequently became the Chief Judicial Magistrate, Recording of the confession has not in any way disqualified him in handling the case subsequently for the purpose of committal. Forwarding of confession or statement under Section 164(6) to the Magistrate enquiring or trying the case will arise only in cases when the Magistrate who recorded the confession or statement does not himself inquire into or try the case. That only means that he cannot in such a case forward it to the police officer or somebody else.

10. In this connection the Director of Public Prosecutions brought my attention to the decision in *In re Karunthambi* : AIR1950 Mad579 wherein it is said:

Though, in our opinion, there is nothing illegal for a Magistrate who has recorded a confession to conduct the preliminary inquiry it is but proper that a Magistrate who

would be a witness in the case should, as far as possible, not be the Committing Magistrate.

The decision was rendered at a time when the old Code was in force and committal inquiry including examination of witnesses which involved cross-examination was also there. Under the new Code committal proceedings are given a go-by. What is provided under Section 209 of the Code is only that it must appear to the Magistrate that the offence is triable exclusively by the Court of Session. The question of inquiry under Section 202 involving the proviso to Sub-section (2) itself will arise only in a complaint case disclosing offences exclusively triable by the Court of Session. The case in hand is one under a police report which even does not involve offences exclusively triable by the Court of Session. The only question that has therefore to be considered by the Magistrate is whether the offences are disclosed. There is no question of exercising any judicial discretion to decide anything else by assessing the evidence of witnesses. The recording of confession will not in any way disqualify him from examining the approver under Section 306(4) and committing the case under Section 306(5). At the same time there may not be any illegality also if the Chief Judicial Magistrate who recorded the confession makes over the case for examination of the approver under Section 306(4) to another competent Magistrate on the grounds of 'desirability' or 'embarrassment' or the prospect of himself being examined as a witness at the trial even though that is not necessary.

11. In order to apply the provisions of Section 306, particularly Section 306(5) the offence need not be exclusively triable by the Court of Session. The examination of the approver under Section 306(4) is also not exclusive to cases involving offences triable by Court of Session alone. A Magistrate tendering pardon cannot try the case even if the offence is triable by him. After tendering pardon and its acceptance and after examining the approver under Section 306(4) the Magistrate taking cognizance of the offence, without making any further inquiry, will have to commit the case to the Court of Session if the offence is exclusively triable by that Court or to the Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 if the offence is exclusively triable by that Court. If the Magistrate taking cognizance of the offence is the Chief Judicial Magistrate,

irrespective of the question whether the offences triable by the Court of Session or not, there is no other option but to commit the case to the Court of Session. If cognizance is taken by any other Magistrate and if the offence is not exclusively triable by the Court of Session or the Special Judge the case will have to be made over to the Chief Judicial Magistrate who shall try the case himself. In all these cases where pardon is tendered and accepted, examination of the approver under Section 306(4) by the Magistrate taking cognizance is a must irrespective of the question whether any committal is involved or not. Such examination is unconnected with committal and is not an integral part of it. Sections 209 and 306 are independent provisions unconnected with each other. Examination under Section 306(4) is not part of the committal under Section 209. Simply because Section 209 does not involve any committal inquiry or examination of witnesses, compliance of Section 306(4) even in a case involving committal to the Court of Session or Special Judge cannot be dispensed with. There is no necessity of making over the case to any other court for examining the approver under Section 306(4) and then getting back the records and committing the case. The Chief Judicial Magistrate himself could examine the approver under Section 306(4) and then commit the case under Section 306(5).

12. Examination of the approver under Section 306(4) before the Magistrate taking cognizance and his subsequent examination at the trial are entirely for different purposes. His examination before the Magistrate is not to treat it as evidence to consider the guilt of innocence of the accused, but only for the purpose I have mentioned earlier. Such examination will be even before process is issued to the accused. At that stage no enquiry even is involved and further the accused will be nowhere in the picture. There is no question of the accused being permitted to cross-examine the approver at that stage. Accused has no right to participate in that examination. But his examination in the subsequent trial is for the evidence in the case. Necessarily and naturally the accused has a right to cross-examine him at that stage because without cross-examining and challenging his veracity the evidence cannot be used against the accused.

The reference is therefore answered as below:

(1) In spite of the fact that the approver was examined at that time of tendering the pardon during investigation he will have to be examined again before the Magistrate under Section 306(4) before committal.

(2) Recording of confession will not debar the Chief Judicial Magistrate from examining the approver under Section 306(4) or from committing the case.

(3) The Chief Judicial Magistrate need not make over the case to any other Magistrate for examining the approver.

(4) In the examination of the approver before the Magistrate under Section 306(4) there is no question of allowing the accused to cross-examine him.

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