

State Vs. Mali Jasa Bhoja

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Court : Gujarat

Decided On : Sep-23-1960

Reported in : AIR1961Guj49; 1961CriLJ496

Judge : Mehta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 215, 337(2A), 439 and 561A; [Constitution of India](#) - Article 227

Appeal No. : Criminal Reference No. 39 of 1960

Appellant : State

Respondent : Mali Jasa Bhoja

Advocate for Pet/Ap. : H.K. Thakore, Asst. Govt. Pleader

Disposition : Reference accepted

Judgement :
ORDER

Mehta, J.

1. This is a reference made by the learned Sessions Judge, Kutch, recommending that an order of commitment made by the learned Judicial Magistrate, First Class, Rahpar, committing one Mali Jasa Bhoja, who was accused No. 2, in Sessions

Case No. 10/60, in the Court of the learned Sessions Judge, Kutch, to sessions on a charge of murder under Section 302, read with Section 111 of the I. P. C. be quashed.

2. The facts leading to the reference are briefly this way:

The learned Judicial Magistrate. First Class Rahpar, committed one Mali Panch Vagha, who was accused No. 1, to the Sessions Court, Kutch, for an offence of murder under Section 302 of the I. P. C. and also committed the present accused Mali Jasa Bhoja along with the first accused to stand his trial for an offence under Section 302 read with Section 111, I. P. C. It appears that pending the investigation of this case, the present accused Mali Jasa Bhoja was tendered pardon by the Judicial Magistrate, First Class, Rahpar, on 18-3-1960, after obtaining the previous sanction of the Sessions Judge, under Section 337(1) of the Cr. P. C. The accused Jasa accepted the tender of pardon. It appears that thereafter the police submitted the charge sheet on 19-5-1960, showing the said Mali Jasa Bhoja as accused No. 2 but it was also mentioned in the charge-sheet that Mali Jasa Bhoja was a witness for the prosecution, as the permission of the learned Magistrate was obtained to examine him as an ap-prover. It appears that thereafter the learned Magistrate examined the approver as a witness on 16-6-1960. The learned Magistrate came to the conclusion that there was prima facie a case against the accused and the charge was framed on 18-6-1960, against both the accused and both the accused were committed to the Sessions Court for trial. As Stated earlier, accused No. 1, Mali Pancha Vajha was charged with an offence of murder under Section 302, of the I. P. C. and the approver Mali Jasa Bhoja was committed for a charge of abetment under Section 302 read with Section 111 of the I. P. C. The State has approached the High Court for quashing this order of committal on the ground that the second accused i.e. Mali Jasa Bhoja, who later on became the approver, ceased to be an accused person, as contemplated under Section 337 (2A) Cr. P. C. and that the committal order so far as the approver is concerned is illegal.

2a. Section 337(1) of the Criminal Procedure Code provides for the circumstances in which pardon may be tendered to an accomplice, whose evidence the

prosecution thinks, is necessary to prove the case against the rest of the persons who are accused of the offences mentioned in the said Section 337.

3. Sub-section (2) of Section 337, Cr. P. C., provides as follows:

'Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.'

Sub-section (2-A) of Section 337, Cr. P. C., provides that:

'In every case where a person has accepted a tender of pardon and has been examined under Sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the court of Sessions or High Court, as the case may be.'

4. It is clear from the provisions of Section 337, Cr. P. C., that it is within the competence of the High Court or a Court of Session or a Magistrate of the First Class to tender pardon to any person for a crime in regard to the offences which are mentioned in the said section, with a view to obtain the evidence of such person supposed to have been directly or indirectly concerned in or privy to the offence, on condition to his making a full and true disclosure of the knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. After a pardon is tendered, the Magistrate, who has taken cognizance of the offence, is bound under the provisions of section 337(2), Cr. P. C., to examine the approver as a witness. Then by Sub-section (2-A) it is provided that after the approver has been examined under the provisions of Sub-section (2), if the Magistrate, before whom the proceedings are pending, is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, he shall commit him for trial to the Court of Session or the High Court, as the case may be. In context it is clear that when Sub-section (2-A) mentions that where a person has accepted a pardon and has been examined under Sub-section (2) and when the Magistrate is satisfied that there are prima facie grounds to believe that the 'accused' is guilty, the reference to the 'accused'

can only be to the accused other than the approver, for Sub-section (2-A) comes into operation after the approver is examined as witness under the provisions of Sub-section (2), after he is tendered pardon. Once a person has been tendered pardon, he obviously ceased to be an 'accused' person, till the pardon is in force, and further, under Sub-section (2), the approver has to be examined as a witness.

5. Now, it is fairly clear that a person, who is an accused, cannot be examined, at the same time retaining his capacity of an accused, as a witness for the prosecution in the same proceedings. It is therefore, amply clear that in Sub-section (2-A), the word 'person' in the sentence 'in every case where a person has accepted a tender of pardon', refers to the approver and the word 'accused' in the subsequent portion of Sub-section (2-A) refers to persons who are accused other than the approver, for by the pardon the approver ceases to be an 'accused' till the pardon remains in force. In other words, it is not competent to the learned Magistrate to commit a person who has been tendered a pardon and who has been examined as a witness to Sessions under the provisions of Sub-section (2-A).

6. It may also be noted in this connection that after a person is tendered pardon and after he is examined as a witness in consonance with the conditions of his pardon, if it is found that he has not observed the conditions of his pardon, in disclosing all the information which he has in connection with the offence in question, then in that case, on a certificate of the Public Prosecutor to the effect that the accused has not complied with the terms of his pardon, he can be tried for the offence, in respect of which the pardon was so tendered. In Other words, the conditional par-don, which he has been given previously comes to an end and he resumes, on a certificate of the Public Prosecutor aforesaid, the position of an accused, and it is thereafter that he is to be sent again to a Magistrate for committal and thereafter he can be committed by the Magistrate to the Sessions Court. But under Sub-section (2-A), till the conditional pardon is in force, it is not competent to the learned Magistrate to commit the approver to the Sessions Court. In this view of the matter, it is clear that the commitment made by the learned Magistrate, in this case is illegal.

7. In this connection, I may refer to a decision in the case of Emperor v. Nana Amrita Savant, reported in 36 BLR 1211: (AIR 1935 Bom 70), where similar question came before the former Bombay High Court. In that case three persons were charge-sheeted before the learned Chief presidency Magistrate, where one person, by name Nama Amrita Savant, was tendered pardon by the learned Chief Presidency Magistrate. After the approver was examined, the learned Magistrate framed charges against the two other accused as well as the approver Nana Amrita. The Government applied in revision for quashing the order of commitment of Nana on the ground that Nana, having been tendered pardon, could not be committed to the Court of Session unless there was a certificate of the Public Prosecutor as required by Section 339, Cr. P. C. Murphy, J., in the course of his judgment, after referring to the provisions of Sub-section (2-A) of Section 337, Cr. P. C., observed as follows:

'In the learned Chief Presidency Magistrate's view the word 'accused' in the action includes the approver; but if this were so, he would not be referred to in the first six words of the section as a 'person' and then further on in the same sentence referred to as 'the accused'. It is clear that the section contemplates two individuals, one the 'person' who accepts the pardon; and the other, the 'accused' -- someone who has to stand his trial, and against whom evidence is to be given by the 'person'. The real object of the charge appears to have been that where a Magistrate tenders a pardon to an accused person who so becomes an approver, the remaining accused shall be committed to the Sessions and the Magistrate becomes incompetent to try the case himself, provided he is satisfied that a prima facie case has been made out against the accused, though he can of course discharge him under Section 209, if he thinks that this has not been done.'

8. In the circumstances, the Division Bench quashed the committal order in the case before them. I respectfully agree with the view expressed in the above Bombay decision.

9. The learned Sessions Judge while making the reference expressed some difficulty about this Court's power to quash the commitment. The learned Sessions Judge referred to Section 215, Cr. Pro. Code, which provides as follows:

'A commitment once made under section 213 by a competent Magistrate or by a Civil or Revenue Court under Section 478, can be quashed by the High Court only, and only on a point of law.'

10. Section 213, Cr. P. C., refers to commitment in those cases in which the inquiry is in cases other than on police report. The learned Sessions Judge, therefore, seemed to think that the powers of the High Court to quash a committal order were limited only to the cases contemplated under section 215, Cr. P. C. In other words, the learned Sessions Judge thought that a committal order could be quashed by the High Court only in cases provided for under Section 215, Cr. P. C. In other words, if the committal order was in a case, which started on a police report, the High Court had no power to quash the commitment under Section 215, Cr. P. C. The learned Sessions Judge, however, expressed the view that the committal order could be quashed under the inherent powers of the High Court under Section 581-A, Cr. P. C. It seems to me that there is no difficulty so far as the powers of the High Court are concerned for quashing a commitment order made by a committing Court, for the High Court has ample powers under its powers of revision as also under Section 561-A, Cr. P. C.

11. In this connection, I may refer to a decision of the former, Bombay High Court, in the case of Arunachalam Swami v. The State of Bombay, reported in 58 Bom LR 628: ((S) : AIR1956 Bom695 , where in referring to a difficulty of the rule raised here, Chief Justice Chagla, after reterring to the provisions of Section 215, Cr. P. C., observed as follows.

'Therefore, this section provided a certain limi-tation upon the power of the High Court in the case of commitment orders passed under Section 213. If an order of commitment was passed under section 213, then it could be quashed only by the High Court and only on a point of law. The result of enacting Section 207-A is that an order of commitment passed under this section does not fall under Section 215, and the argument put forward by Mr. Kavlekar is that however erroneous in law the order of commitment might be under Section 207-A, the accused would have no right to approach the High Court under Section 215. Now, if Section 215 is a limitation upon the power of the High Court, then that limitation only applies to

orders made under Section 213. It does not apply to an order made under Section 207-A. Therefore, the ordinary power of the High Court to revise any order passed by a criminal Court subordinate to it or the power of the High Court under Section 561-A remains unaffected as far as the orders of commitment made under Section 207-A are concerned. Apart from these two sections the accused has always the right to approach the High Court under Article 227 of the Constitution. It may perhaps be difficult to understand why this distinction was made in the case of an order of commitment passed under Section 213 and one passed under Section 207-A. But it may be that it confers a wider power upon the High Court with regard to orders of commitment passed under Section 207-A and the reason for conferring this wider power may be that as orders of commitment under Section 213 are passed after elaborate inquiry and they would be passed rather rarely by the Magistrate who would realise that he is dealing with a serious case which has not been taken up by the Police but is being proceeded with on a private complaint, that in such cases ordinarily the order of commitment should not be set aside except on a point of law and the power should be confined to the High Court.'

12. In other words, these observations show that the powers of the High Court, to quash a committal order, which is made otherwise than under the provisions of Section 213, of the Cr. P. C., are sufficiently wide under the revisional powers of the High Court as well as under Section 561-A, Cri. P. C., as well as under Article 227 of the Constitution. I respectfully agree with the observations of the learned Chief Justice. It is, therefore, sufficiently clear that there is no difficulty so far as the power of the High Court is concerned in quashing the illegal committal order in this case. In the circumstances, the committal order is quashed.

13. Reference is accepted.

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