

Sarkar Vs. Madho Ram

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Court : Rajasthan

Decided On : Mar-21-1950

Reported in : AIR1950Raj34

Judge : Bapna and; Gupta, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 350(1)

Appeal No. : Criminal Ref. No. 3 of 1950

Appellant : Sarkar

Respondent : Madho Ram

Advocate for Pet/Ap. : Sumerdan, Adv. for;Govt. Adv.

Disposition : Reference accepted

Judgement :

Bapna, J.

1. This is a reference by learned Sessions Judge, Nagaur. The accused Madho Ram, was challaned by Police, Khaki, to the Court of Lala Jaswant Narain, First Class Magistrates, Nagaur, on a charge under Section 302/109, M. P. C. The prosecution examined 13 witnesses. The accused stated that he had been falsely impleaded, pleaded alibi, and examined three witnesses in support of his version.

The learned Magistrate was of opinion that no case had been made out and submitted the record to the learned Sessions Judge with a recommendation for discharge of the accused as required under the then Marwar Oriminal Procedure Code. The learned Sessions Judge, however, came to the conclusion that the evidence was sufficient for the framing of a, charge under Section 302/109, M. P. C. and on 10th February 49 directed the learned Magistrate to commit the accused to the Court of Session for trial. By the time the case was received by the lower Court, there was a change in the personnel, and the case was laid before Mr. Moolsingh, Sub-Divisional Magistrate. The accused prayed for a de novo inquiry under proviso (a), Section 350, Sub-section (1), Criminal P. C. Mr. Moolsingh, Sub-Divisional Magistrate, allowed the application, whereupon the Public Prosecutor filed a revision to the Court of Session. The learned Sessions Judge was of opinion that the proceedings before the Magistrate were only in the nature of an inquiry, and therefore, the proviso (a) to Sub-section (1) of Section 350, Criminal P. C., which only applied to trials, was not applicable. He was also of opinion that after an order of commitment had been made by the Court of Session under Section 437, Criminal P. C., the Magistrate was not authorised to record the evidence over again, but he should have framed a charge, explained it to the accused, and enquired of him to give a list of the witnesses and after examining them, if he thought fit, he should hare finally made a formal order of commitment as directed. The learned Sessions Judge has made a reference for setting aside the order of the learned Sub-Divisional Magistrate directing re-inquiry, and for further directing the Magistrate to proceed according to the observation made by the learned Sessions Judge.

2. The case originally came up before a single Judge, who directed it to be laid before a Division Bench, as the opinion of the Indian High Courts was decided on the question whether the word 'trial' referred to in Section 350 (1) (a) included proceedings before the framing of the charge.

3. The relevant portion of Section 350 is as under:

'(1) Whenever a Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, 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 2nd Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard;

(b) The High Court, or in cases tried by Magistrates 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.'

4. According to the language of the section, a distinction has been made between an 'inquiry' and a 'trial.' An inquiry has been defined under Section 4 (k) of the Code. "Inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court.' The term 'trial' is not defined in the Code.

5. There are certain proceedings under the Code which are clearly inquiries but not trials and there is no difficulty about them e. g., proceedings under Section 146, Criminal P. C. The difficulty arises in cases where the person proceeded against is an accused and the case ends in discharge, conviction or acquittal. There is some difference of opinion in regard to warrant cases as to whether the proceedings before the framing of the charge amount only to an inquiry or are included within the meaning of the term trial referred to in Section 350, Criminal P. C. According to the Bombay High Court, the word 'trial' includes the proceedings before the charge is framed, and the same view has been taken by the Lahore High Court and the Sind Judicial Commissioner's Court vide *Ramchandra v. Emperor*, A. I. R. (31) 1914 Bom. 14 : (45 Cr. L. J. 287), *Sahib Din v. Emperor*, A. I. R. (9) 1922 Lah, 49 : (23 Cr. L. J. 330) and *Labh Singh v. Emperor*, A. I. R. (21) 1934 Sind 106 : (35 Cr. L. J. 1261). The opposite view namely that proceedings in warrant cases before a charge is framed only amount to as inquiry has been held

by the Madras and Nagpur High Courts, vide *In re Ramnathan Chettiar*, A. I. R. (10) 1933 Mad. 660 : (24 Cr. L. J. 192), *In re Harichandra Reddi*, A. I. R. (25) 1938 Mad. 742 : (39 Cr. L. J. 828) and *Emperor v. Ganpat*, A. I. R. (23) 1936 Nag. 220 : (38 Cr. L. J. 15). In view of the difference of opinion among the various High Courts, it is necessary to go into some detail as this is perhaps the first case in Rajasthan in which this question has come up for decision.

6. In the Bombay case his Lordship Beaumont C. J. only purported to follow an earlier decision of that Court, *Dagdu v. Punja*, (A. I. R. (21) 1937 Bom. 55), observing:

'Whatever view we might have taken and the case been free from authority, I think we ought to follow *Dagdu v. Punja*, A. I. R. (24) 1937 Bom. 55 : (38 Cr. L. J. 250).'

The decision in *Dagdu v. Punja*, A. I. R. (24) 1937 Bom. 65 : (38 Cr. L. J. 250) is, however, not based on any discussion of the provisions of the Code of Criminal Procedure, as will be clear from the following observations of Broomfield J.:

'But, according to my experience of the administration of criminal justice in this presidency, which is not inconsiderable, the Courts here have always accepted the definition of 'trial' as being understood to mean the proceedings which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, present in Court for hearing of the case.'

The cases reported in *Sahib Din v. Emperor*, A. I. R. (9) 1922 Lah. 49 : (23 Cr. L. J. 330), *Labh Singh v. Emperor*, A. I. R. (21) 1934 Sind 106 : (35 Cr. L. J. 1261), and *Gomer Sirda v. Queen Empress*, 25 Cal. 863 : (2 C. W. N. 465), were relied on in support of the view taken.

7. In the Lahore case *Sahib Din v. Emperor*, (A. I. R. (9) 1922 Lah 49 ; 23 Cr. L. J. 330), the conclusion that a trial cannot be said to commence only when a charge is framed was arrived at on a consideration of the fact that there are cases spoken of as trials in which no charge sheet is ever framed e. g., summary trials and trials of summons cases. It was observed that:

'If it be correct to say that in no case does a trial commence until a charge is framed, then it seems to me to follow that what is spoken of in the Code as trial of summons cases and summary trials are not really trials at all but only inquiries. But I feel sure that the right given to an accused person by the proviso to Section 350 was not intended to be exercised only in the trial warrant cases or in the trials before the Courts of Session or High Courts. The principle in all cases surely must be the same, viz., that an accused person has a right not to be convicted of a criminal offence by a Magistrate who has not himself heard the evidence. I would hold, therefore, that for the purpose of Section 350, a trial cannot be said to commence only when a charge is framed and that, though in an inquiry by a Magistrate into a case triable only by a Court of Session or High Court the accused has not the right to demand that the witnesses shall be re-summoned and re-heard in the event of changing of Magistrate, he has such a right not only in a warrant case but also in the case of summary trials and trials of summons.'

8. The conclusion was further supported by the observation that:

'If the trial does not commence till charge is framed and if the case has been transferred from one Magistrate Court to that of another before a charge has been framed, then apparently the proviso does not help the accused person at all. For if, when the new Magistrate commences the proceedings, the accused asks that the witnesses should be re-summoned, the answer will be that the proceedings are not yet a trial but only an inquiry ; whereas if he waits until a charge has been framed and then makes his demand, the answer will be that the time for making such a demand is when the second Magistrate commences his proceedings.'

It may be useful to refer to the facts of that case. The evidence of one Khwaja was recorded by Shekh Abdul Rehman, Magistrate, 1st Class, and the case was thereafter transferred to the Court of District Magistrate where Khwaja, on being re-called, retracted his former story entirely. The District Magistrate acting on the evidence of Khwaji recorded before Shekh Abdul Rehman convicted the accused, and the question was whether the evidence recorded by the former Magistrate even after the witness had been re-called latter, was admissible. Their Lordships, as observed above, held that the accused had a right to re call the witness and his

subsequent statement could only be acted upon while his former statement was inadmissible. The point under consideration in the present case did not really arise in that case for the witness had already been re-called by the succeeding Magistrate and examined. Obviously both the statements in the Court, viz., the one before the previous Magistrate and the other before the succeeding Magistrate were not evidence at one and the same time, and naturally the statement before the Magistrate, who decided the case, was the one which could be acted upon.

9. In the Calcutta case, *Gomer Sirda v. Queen-Empress*, 25 Cal. 863 the conviction of the accused for rioting was set aside by the High Court and the case set back for retrial. The former Magistrate had by that time left the District and new Magistrate succeeded him. Prior to the date of hearing, viz., 27th August 1897, the Mukhtar for the accused moved certain applications, and, when on 27th August 1897, the accused moved an application that the witness, who had been examined earlier, should be re-summoned, and reheard, the Magistrate refused the prayer on the ground that it was too-late. On revision their Lordships of the Calcutta High Court observed that the trial would be deemed to have begun only when the case was called with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and defence were present in the Court. The observations, though appropriate in that case, are not relevant to the point now under discussion.

10. In the Sind case, the provisions of Section 350, have no doubt been carefully examined, but with great respect I venture to submit that a few more aspects have been left out of account.

11. The word 'trial', in my opinion, has been used in different senses in different chapters of the Code. The trial begins in a case exclusively triable by a Court of Session only after the charge is framed by committing Magistrate. In a summons case, the trial may be said to begin when the accused is brought before the Magistrate. There does not seem to be any difficulty in these two cases. In warrant cases I am inclined to think that the trial can be said to begin only after the charge is framed. According to Section 256, which occurs in chapter on 'Trial of Warrant

Cases' ; it is only after the framing of the charge that the accused can claim to be tried. I also find support from the language of Clause (b), of Sub-section (1) of Section 350, wherein in cases tried by Magistrates subordinate to District Magistrate, the District Magistrate is empowered to set aside any conviction passed on evidence not wholly recorded by the Magistrate convicting the accused (in certain circumstances) and to order, a new inquiry or trial.

12. The cases tried by the Magistrates sub-ordinate to the District Magistrate could only be either summons cases or warrant cases. In a summons case, the entire proceeding would be a trial, and there can be no occasion for an inquiry. It is, therefore, only in a warrant case that there can be an inquiry or a trial.

13. Now, upto what a stage of the proceeding will it be an inquiry and from what stage it may become a trial? The answer is found in Section 256, referred to above, and it would be reasonable to hold that the trial of the accused commences from the time that the accused claims to be tried, i.e., after the charge has been framed. That a distinction has been made between an inquiry and a trial even in cases which can end in conviction leaves no room for doubt that the 'inquiry' occurring in this section is not restricted to proceedings which do not end in acquittal, conviction or discharge. With great respect I am, therefore, unable to agree with the view taken in Bombay, Lahore and Sind, as referred to earlier the other view prevails in Madras and Nagpur, and with great respect, I agree with it. It is unnecessary to refer to those cases in detail here.

14. In view of the above, the Magistrate was not bound to re-call the witnesses when he himself did not think it necessary to do so in his own discretion.

15. There is also another aspect of the matter in this particular case, namely, that the order of the Sessions Judge asking the Magistrate to commit the case was not intended to entail any fresh inquiry or trial. All that the Magistrate was required to do was to frame a charge and to proceed further in the matter of commitment, as observed earlier in cases triable exclusively by a Court of session, the trial Court begins only after the charge had been framed.

16. The reference is therefore, accepted, the learned Magistrate will proceed in accordance with the directions of the Sessions Judge in his order dated 10th February 1949 for committal of the accused in this case.

Gupta, J.

17. I agree.

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