Premraj Vs. the State

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Court : Rajasthan

Decided On : Apr-24-1950

Reported in : AIR1952Raj55

Judge : Trilochan Dutt, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 252(2), 254, 256 and 256(1)

Appeal No. : Criminal Revision No. 29 of 1950

Appellant : Premraj

Respondent : The State

Advocate for Def. : Laxminarain, Adv. for;Govt. Adv.

Advocate for Pet/Ap. : Manakmal, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

Trilochan Dutt, J.

1. The case, out of which this revision petition has arisen, is pending in the Court of the Sub-divisional Magistrate, Banner. A criminal case under Sections 379. 414

and 409 was registered on 20th of October 1948 in the Court of the said Magistrate against the two petitioners, Premraj, Ramanlal and one Bhagirath, on a Police report.A list of 36 prosecution witnesses was attached to this Police report under Section 173 of the Criminal Procedure Code. Out of these 36 witnesses, the prosecution was able to examine 27 upto 4th of August 1949, i.e., within 10 months . On 8th of June 1949, the Prosecuting Inspector presented an application before the Magistrate requesting him to issue summons in the name of 14 witnesses. All these witnesses were included in the list of 36 witnesses mentioned above. This application of the Prosecuting Inspector for Issuing summons in the name of 14 witnesses was rejected by the Magistrate on 29th of June 1949 but time was granted to the prosecution to bring these 14 witnesses in the Court on their own responsibility and examine them on the next hearing. Out of these 14 witnesses, 11 were examined till 4th of August 1949 and 3 were given up by the Prosecuting inspector and on this date, the Magistrate was again requested by the Prosecuting Inspector to grant time for the examination of a few more witnesses which request was disallowed and the case was kept for framing the charge-sheet. On 6th of August 1949, the charge-sheet was framed and on the refusal of the accused to plead guilty, the case was adjourned for the next date. On the next date, the accused expressed their desire to further cross-examine all the prosecution witnesses. This cross-examination of the prosecution witnesses was finished on 7th of November 1949, and the order which was passed by the Magistrate on this date carries with it a special significance as far as the decision of the present petition before me is concerned. The learned Magistrate passed orders calling upon the prosecution to examine the remaining witnesses, on which the prosecuting Inspector put in a list of sis witnesses and requested the Magistrate to issue summons in their names. In this list, three witnesses, Mana, Dhura and Rugnath were entirely new, while the other three, Baluram, Kunjraj and Mahadan were the witnesses whose names were included in the list of 36 witnesses given under Section 173 of the Criminal procedure Code. The accused objected to the right of the prosecution to examine these witnesses at this stage and the case was adjourned for the next day for giving decision on the application of the Prosecuting Inspector. On the next day, i.e., on 8th of November 1949, the learned Magistrate refused to issue summons in the name of any witness, but

allowed the prosecution to examine 3 witnesses, who were entirely new, provided they could bring them to the Court on their own accord, and refused permission to examine the other three whose names were included in the list tendered under section 173, Criminal Procedure Code, on the ground that the application of the prosecution to summon & examine these witnesses had once been rejected by him, and hence, these witnesses do not fall within the category of the remaining witnesses, as provided in Section 256 of the Code of Criminal Procedure. The accused were not satisfied with this order of the Magistrate and hence they preferred a revision petition in the Court of the Sessions Judge, Balotra. The learned Sessions Judge dismissed this petition on 19th of December 1949 upholding the order of the Sub-divisional Magistrate, Barmer. The decision of the learned Sessions Judge on the revision petition of the accused was given in the following words:

'The Section 256, Criminal Procedure Code, clearly enables the Crown to examine witnesses who have not been examined or whose names have not been disclosed. The expression 'remaining witnesses for the prosecution' in Section 256, Criminal P. C. presumably means the remaining witnesses that the prosecution wishes to examine. The prosecution is at liberty to examine whomsoever it pleases until the prosecution case has been closed. The prosecution is not closed until the defence begins.'

2. The accused were not again satisfied with this order of the learned Sessions Judge and hence they have given the present petition in this Court, with the prayer, that the order of the Sub-divisional Magistrate, dated 8th of November 1948, giving the prosecution an opportunity to examine, entirely new witnesses, after the framing of a charge-sheet, should be set aside, as the view of both the lower Courts that these witnesses fall within the category of 'remaining witnesses for the prosecution' is wrong.

3. Shortly put, the whole question in this case hinges upon the interpretation of the expression 'remaining witnesses for the prosecution' occurring in Section 256 of Criminal Procedure Code. Section 256 of the Criminal Procedure runs as follows:

'256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and! produce his evidence.'

4. The case in which the question has arisen is a warrant case and the procedure to be adopted in warrant cases is set forth in Sections 251 to 259 of the Criminal Procedure Code. The relevant sections which need consideration in the present case are Sections 173 (1) (a), 251, 252 (1) and (2), 253 (1), 254 and 256 (1). In order to understand the question fully, it is bettter to set out these Sections in the exact context. Section 256 (1) has been given above. The other sections run as follows:

'173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall: (a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the (Provincial Government), setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and.

251. The following procedure shall be observed by Magistrates in the trial of warrant cases;

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution : Provided that the

Magistrate shall not be boundto hear any person as complainant in any casein which the complaint has been made by aCourt.

(2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the factsof the case and to be able to give evidence for the prosecution, and shall summon to give before himself such of them as he thinks necessary.

253. (1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him,

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.'

5. According to Section 173

(1) (a), it is imperative on the Police Officer to set forth in the report forwarded to the Magistrate empowered to take cognizance of the offence on a police report the names of the persons acquainted with the circumstances of the case. In the present case, the names of 36 witnesses were set forth in the report presented to the Sub-divisional Magistrate, Banner. According to Section 251, it is imperative on a Magistrate trying a warrant case to follow the procedure laid down in Sections 252 to

256. The provisions of this section are mandatory. There are two Sub-sections of Section

252. According to Subsection

(1) the Magistrate is bound to take, when the accused appears or is brought before him, all such evidence as may be produced in support of the prosecution. This evidence can be no other evidence but that the list of which was given by the prosecution in challan cases under Section 173

(1) (a), or any evidence which a complainant himself produces at the very first instance, if the cognizance of the offence was taken on a complaint. Subsection

(2) of Section 252 is very important for the purposes of the present case before me. This Sub-section is peculiar to the trial of warrant cases, and perhaps is one to which a large majority of the Magistrates trying warrant cases in this Province pay little heed. It will not be wrong to say that there are very few magistrates who care to read and understand Section 252 of the Criminal Procedure Code. According to Sub-section

(2) of this section, it is obligatory on a Magistrate trying a warrant case, to ascertain from the complainant or from the officer conducting the prosecution, if the cognizance of the case was taken on a police report the names of any persons likely to be acquainted with the facts of the case and after ascertaining, to issue summons in the names of such of them, as he thinks necessary, to appear before him and give evidence. Prom the perusal of Section 252, it will appear that there are two obligations enjoined upon a Magistrate trying a warrant case. He is, by reason of Sub-section

(1) of this section, bound to take all evidence that may be produced by the Prosecutor in support of the prosecution and by reason of Sub-section

(2) he is further bound to ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case, and to be able to give evidence for the prosecution, and then to summon to give evidence before himself such of them as he thinks necessary. This point came up for consideration before a Full Bench of the Lahore High Court in 'HEMAN RAM v. EMPEROR', AIR

(32) 1945 Lah

201. On page 204, Monir, J., observed as follows:

'The provision requiring the Magistrate to proceed in this manner (manner prescribed by Section 252 (2)) is mandatory, and it seems to be clear that before the stage of Section 254 is reached, i.e., before the accused is discharged or charged, the Magistrate must, in the manner laid down in Section 252 (2) ascertain the names of all the persons who may be able to give evidence for the prosecution. In cases where the offence is taken cognizance of on a police report, the police in submitting their report under Section 173 of the Code are required by the form which is prescribed in this Province for that report to give a list of all the witnesses for the prosecution. The mere existence of this list, however, does not relieve the Magistrate of the duty to ascertain, the names of the witnesses under Section 252 (2) and he is bound to question the complainant or the officer in charge of the prosecution about the matter.'

6. According to Section 253 (1), a Magistrate is bound to take all the evidence referred to in Section 252, i.e., the evidence cited by the prosecution under Section 173, and the evidence ascertained by the Magistrate under Section 252 (2). Under Section 254, the Magistrate, if he is of opinion that there is ground for presuming that the accused has committed an offence, shall frame a charge-sheet either after tailing all the evidence referred to in Section 252 or at any previous stage of the case, i.e., at any time before the finishing of the evidence referred to in Section 252. Under Section 256, the accused will be provided with an opportunity of further cross-examining the prosecution witnesses who were examined before the framing of the charge-sheet and then an opportunity will be given to the prosecution to examine the remaining prosecution witnesses.

7. The words 'remaining witnesses for the prosecution' are the subject of discussion in the present suit. In 'CROWN PROSECUTOR, MADRAS v. RAMANJULU NAIDU', AIR (31) 1944 Mad 169. a very wide interpretation was put on this expression. It was held in that case that:

'the expression 'remaining witnesses for the prosecution' in Section 256 (1) presumbly means the remaining witnesses that the prosecution wishes to examine. The prosecution is at liberty to examine whomsoever it pleases, until the prosecution case has been closed. The prosecution case does not end with the

framing of the charge. The prosecution is not closed until the defence begins.'

It seems that the learned Sessions Judge, Balotra gave his decision on the authority of this ruling although he did not cite the ruling in his judgment. I feel much difficulty in agreeing with the view taken in 'AIR (31) 1944 Mad 169.' In the first place, if this view is accepted, there will be no end to the production of prosecution witnesses and the case of the prosecution will have to be begun anew after the framing of the charge-sheet. When the law has given two opportunities to the prosecution, in warrant cases to put in the list of the prosecution witnesses, and has made it obligatory on the Magistrate to ascertain from the prosecution, the names of any other persons likely to be acquainted with the facts of the case and to summon them to appear and give evidence before him, there seems to be no reason to give, after the framing of a charge, such a wide rope to the prosecution as has been given by 'AIR (31) 1944 Mad 169.' The soundness of this view was not accepted by a Full Bench of the Lahore High Court in 'AIR (32) 1945 Lah 201', referred to above. In the Full Bench case, after considering all the authorities for and against on the point and aftergoing into the history of legislation on the point,the learned Judges held as below:

'Under Section 254 the Magistrate may examine all those witnesses whose names have been ascertained under Section 252 (2) and then frame a charge-sheet, or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list Who have not been examined, then those witnesses are the remaining witnesses under Section 256 (1) and the complainant has a right to produce them after the cross-examination of those witnesses who have previously been examined.'

8. In the Full Bench case, above referred to, reliance was placed on 'RAGHUBIR SAHAI v. WALI HUSAIN KHAN', AIR (24) 1937 All 189, in which it was held that:

'Under Section 252 (2) the complainant is required to give in a list of prosecution witnesses.Under Section 254 the Magistrate may examineall those witnesses and then frame a charge-sheet or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined, then those witnesses are the

remaining witnesses underSection 256 (1) and the complainant has a right to produce them. But if the Magistrate hasexamined all the witnesses for the prosecution in the list under Section 252 (2) and has then framed a charge-sheet, there are no witnesses remaining who would come under the description in Section 256 (1). Hence, after this stage, the complainant cannot claim to produce an entirely new witness.'

9. The view taken by the Allahabad and Lahore High Courts seems to be correct and reasonable and I respectfully agree with it. The learned Government Advocate 1ms not shown his opposition to this view but rather frankly admitted it. Hence, the propositions established are:

(1) A Magistrate trying a warrant case musttake all the evidence brought by the complainant along with him at the very firstinstance or the list of which was given by him along with his complaint and in cases registered on police report must take all the evidence, the list, of which was given by the prosecution under Section 173 of the Criminal Procedure Code:

(2) In addition to the recording of the evidence mentioned in (1), it is obligatory on the Magistrate to ascertain at any time before the framing of the charge-sheet from the complainant or from the Officer-in-Charge of the prosecution of otherwise the names of any persons likely to be acquainted with the facts of the case and then after ascertaining to summon such of them as he thinks necessary to appear and give evidence before himself;

(3) The Magistrate may frame a charge either after taking all the evidence mentioned above or after examining some of the witnesses if he is satisfied that a prima facie case has been established against the accused. If the Magistrate adopts the latter course and frames a charge-sheet, the prosecution will be entitled to examine all the witnesses which were not examined before the framing of the charge-sheet. These are the witnesses who fall under the category of 'remaining witnesses' as mentioned in Section 256 (1). If the Magistrate has adopted the former course, i.e., he framed a charge after examining all the witnesses, there is no witness left who may be called a 'remaining witness for the prosecution.'

10. Now coming to the case, out of which thepresent petition has arisen, the most glaringdefect that is visible on the face of the file is thatthe Sub-divisional Magistrate, Banner never caredto ascertain from the Prosecuting Inspector orotherwise the names of any persons likely to beacquainted with the facts of the case. He neveradopted the procedure laid down in Sub-section (2)of Section 252, and the Prosecuting Inspector alsonever put in a list of witnesses under Section 252(2). His application to summon 14 witnesses outof the list of 36 cannot be considered to be a newlist under Section 252 (2). The Prosecuting Inspector never closed his case but he had beenpressing all through that more witnesses for theprosecution should be examined. On the 4th ofAugust 1949 he clearly stated in Court that hewants to examine a few more witnesses and requested for an adjournment but the learned Magistrate refused to grant time and moreover, he didnot care to ascertain the names of those 'fewmore witnesses.' Who were these 'few morewitnesses', nobody knows. If the Magistrate hadasked the Prosecuting Inspector to put in a listof these 'few more witnesses', then this list wouldhave been a list under Section 252 (2) of theCriminal Procedure Code. It is just possible thatthe names of these three witnesses, Mana, Dhuraand Rugnath would have appeared in that list. In'AIR (32) 1945 Lah 201', also the names of thewitnesses were not ascertained by the Magistrateas directed under Section 252 (2) but in thatcase, the Prosecuting Officer gave a statement thatall the witnesses for the prosecution had beenexamined and there was none left. It is not soin the present case. The Prosecuting Inspectornever closed his evidence. The case was adjournedfor framing a charge-sheet when the ProsecutingInspector was pressing for examining a few morewitnesses and as the names of those witnesses werenot ascertained by the Magistrate, the Prosecutionis entitled to examine the witnesses for the prosecution for which the permission has beengiven by the Sub-divisional Magistrate. For thethe reasons given above, the revision petition failsand the order of the Sub-divisional Magistrate,dated 8th of November 1949 is not disturbed withthe remark that he should in future be more careful in adopting the procedure laid down in Section252, Criminal Procedure Code.