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Court : Rajasthan

Decided On : Aug-23-1960

Reported in : AIR1961Raj139; 1961CriLJ853

Judge : L.N. Chhangani, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 207A, 207A(4), 532 and 537

Appeal No. : Criminal Revn. No. 197 of 1960

Appellant : Ajit Singh

Respondent : State

Advocate for Def. : Kan Singh, Govt. Adv.

Advocate for Pet/Ap. : M.C. Bhandari, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

L.N. Chhangani, J.

1. This is a revision by the petitioner Ajit Singh requesting that the order of the Sub-Divisional Magistrate, Bhinmal dated 24-10-1959 committing the petitioner to

the Court of Sessions for trial under Sections 326 and 307, Indian Penal Code be quashed.

2. The relevant facts are these:

Ajit Singh was challaned in the Court of the Sub-Divisional Magistrate. Bhinmal on 9-12-59 for offences under Sections 307, 324 and 326 I. P. C. In the calendar of witnesses Mohansingh, Narpatsingh, Ayub Singh and Kundansingh were cited as eyewitnesses of the occurrence. The case originally was fixed for 23.12.59. On that day one witness Mohansingh was present but as the Sub Divisional Magistrate was out on duty the case was adjourned to 24-12-59. On that date one eye-witness was examined. The remaining three eye witnesses were not present.

The Advocate for the accused conceded that the accused should be committed for trial under Section 307 I.P.C. The learned Magistrate consequently, on 28-12-59, framed charges under Sections 307 and 326 I.P.C. and also recorded a Committal order committing the accused for trial. In the committal order it was recorded by the learned Magistrate that the remaining eye-witnesses were not examined as the accused's counsel conceded for framing of the charge and commitment. After the receipt of the case in the Court of the Additional Sessions Judge, Jalore it could not be taken up for a few hearings for one reason or the other.

On 28th June, 1960 when, the trial was about to begin the counsel for the accused submitted an application to the Additional Sessions Judge praying that recommendations may be made to the High Court for quashing the commitment. The main ground on which the application was made was that the Magistrate had committed a serious illegality in committing the accused to the Court of Sessions for trial without examining all the eyewitnesses. Reliance was placed on Ghisa v. State, AIR 1959 Raj 294 : (ILR (1959) 9 Raj 944). The learned Judge rejected the petitioner's application. The petitioner has, therefore, filed the present revision application.

3. The learned Government Advocate in opposing the revision contended that the decision of this Court in A.I.R. 1959 Raj. 294 : I.L.R. (1959) 9 Raj. 944 recognizes a discretion on the part of the Magistrate in the matter of examination of eye

witnesses. In a proper case Magistrate could pass an order of commitment without examining all the eye witnesses. He pointed out that Bhandari J. in his judgment at p. 954 of (ILR Raj); (at p. 298 of A.I.R.) quoted an extract from the Select Committee's report in which it was stated

'that persons who have witnessed the commission of the alleged offence, should be produced before the Magistrate and he should record their statements.'

He emphasised the word 'should' as used in the Select Committee's report and contended that the use of the word 'should' be properly interpreted to leave discretion for the Magistrate and Bhandari J. having relied upon these observations has recognised the discretion on the part of the Magistrate. He further referred to the observations of Modi J. appearing at page 967 (of ILR Raj) : (at p. 304 of AIR),

'This rule is of course subject to the exception that it would be open to the prosecution not to produce witnesses at the committing stage who may not be available during the enquiry for reasons for sickness or want of knowledge of their whereabouts or for like causes in which case it would be legitimate for the prosecution to produce such witnesses at trial under Section 540 Cr. P. C.'

My attention was also invited to the penultimate paragraph of Modi J.'s judgment summing up the position in the following words :

'In this view of the whole matter, I agree though for somewhat different reasons, with the conclusion to which my learned brother Bhandari J. has come, namely, that the true requirements of Section 207-A is that the prosecution should, as a general rule, produce all the eye witnesses of the offence alleged before the committing Magistrate whom they intend to produce at the trial and that the Magistrate should examine all such witnesses.'

In these observations also the emphasis was laid upon the use of the word 'should'. After very carefully going through the judgment I find it difficult to accept the contention of the learned Government Advocate. I may in this connection point out that Bhandari J. at page 952 (of ILR Raj.) :(at p. 298 of A.IR.) very

categorically stated:

'This amounts to this that the Magistrate is bound to record the evidence of all the eye witnesses who have appeared before him and whom the prosecution intends to produce at the trial in support of its case.'

The reference by Bhandari J. to an extract from the Select Committee's report and the use of the word 'should' in the report does not, in my opinion, warrant an inference that Bhandari, J. was recognizing a discretion on the part of the Magistrate. This has to be read along with other parts of the judgment. Dealing with the judgment of Modi, J., I may point out that Modi, J. clearly recognized a statutory duty on the part of the Magistrate to examine all the eye witnesses. Just prior, to the observations relied upon by the learned Government Advocate appear the following observations:--

'It is the duty of the Magistrate to examine all eye witnesses, whom the prosecusion selected to produce at the trial and whose names have, therefore, been mentioned in the police report under Section 173, Cr. P. Code and, therefore, it should equally be the duty of the prosecution to produce such witnesses for examination before him otherwise the duty imposed on the Magistrate would be bereft of all meaning.'

The exceptions mentioned by Modi, J. do not at all suggest that he was inclined to recognise discretion on the part of the Magistrate to examine or hot all the eye witnesses. On a proper, and true interpretation of Modi, J.'s observaions, I am not inclined to hold that he was contemplating those cases where on account of the non-availability of the witnesses the Magistrate is unable to examine all eye witnesses.

In such cases, according to him, the Magistrate is competent to commit the accused for trial without examining all the eye witnesses. But a reference to Section 540 Cr. P.C. in his judgment, shows that he was contemplating that the eye witnesses not examined before the Magistrate on account of non-availability should be treated as abandoned and the prosecution cannot claim to produce them at the trial as a matter of right. The prosecution, according to him, can only

move the Magistrate to call them as court-witnesses under Section 540 Cr. P. C.

In my opinion, it is hardly proper to spell out from Modi, J.'s observations that he was recognising discretion on the part of the Magistrate in the matter of examination of eye witnesses. With regard to his latter observations, I need only say that the word 'should' was not used to give discretion to the Magistrates and should not be permitted to be unduly emphasised. On a proper interpretation, Ghisa's case, AIR 1959 Raj. 294 : ILR (1959) 9 Raj. 944 categorically denies a discretion to the Magistrate in the matter of examination of eye witnesses.

4. Next it was contended by the Government Advocate that non-compliance with the provisions of Section 207-A by a Magistrate cannot by itself he considered sufficient to vitiate the commitment apart from the consideration of prejudice to the accused. In this connection, he relied upon Willie (William) Slaney v. State of Madhya Pradesh, (S) AIR 1956 SC 116. In that case Bose, J. considered the development of law on the question of distinguishing between non-compliance of the provisions which will vitiate the trial and those which will not vitiate the trial. He pointed out that originally the provisions of the Code about the mode of the trial were treated vital and any departure therefrom was treated as an illegality and was not permitted to be cured. Later on the trials were vitiated in those cases only where there was express prohibition and prejudices. The correct position was then summed up as follows :

'Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.'

The learned Government Advocate emphasised these observations and argued that the non-compliance of Section 207-A, should be judged in the light of the above observations and after consideration of the question of prejudice to the accused. He pointed out that in Ghisa's case, AIR 1959 Raj 294 : I.L.R. (1959) 9 Raj. 944, the question of a prejudice was not raised and the commitment was

quashed without an examination of that question. In the present case, according to him, the accused himself having conceded that commitment should be ordered without examining all the eye witnesses, the accused cannot have any complaint or grievance. The Government Advocate also referred to the explanation to Section 537 Cr. P. C. which provides that the proceedings.'

'In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in He contended that the Magistrate originally decided not to examine all the eye witnesses on 24-12-59 on a clear concession having been made by the Advocate for the accused. The charges against the accused were framed on 28-12-59.

During this interval the accused raised no objection to the non-examination of the remaining eyewitnesses. The accused did not resile from his previous concession and did not insist on examination of witnesses.

After the commitment also he did not avail of the earliest opportunity of raising an objection. He kept silence for about six months. The accused thus having had an opportunity to raise an objection and having omitted to raise an objection cannot be said to have suffered prejudice. In answer to this Mr. Bhandari submitted that it was never conceded on behalf of the accused that the remaining eye witnesses need not be examined and that the case should be committed.

He emphasised the absence of any written statement either of the accused or the defence Advocate. Amplifying the position further he observed that the Advocate of the accused was simply told that if Mohansingh's evidence is accepted what objection can he have against the commitment of the case and the defence Advocate had to make a concession in these conditions and circumstances. According to him, it will not be proper and safe to accept what the Magistrate recorded in the proceedings as an admission on behalf of the accused.

The possibilities of an ambiguous statement having been made under misconception of facts and of the Magistrate, having not correctly followed it cannot be reasonably eliminated. The first crucial question which emerges for

consideration is whether a non-compliance with the provisions of Section 207-A is so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice that it must vitiate commitment order irrespective of the question of prejudice.

In my opinion, the question cannot be answered in the affirmative and I proceed to state the reasons below. It cannot be denied that there is an obvious distinction between inquiry under Chapter 18 known as committal proceedings and trial and it will be hardly proper and fair to equate it with trial. A fair trial is indispensable according to our notions of natural justice but committal proceedings are not so indispensable.

For cases not exclusively triable by a Court of Sessions the Criminal Procedure Code does not provide for such proceedings. Even for cases exclusively triable by a Court of Session it is permissible to dispense with committal proceedings by permitting Section 30 Magistrates to try them as warrant cases. There have been some state legislations prescribing special procedure for cases triable by Session Court dispensing with committal proceedings.

Under the amended law there are prescribed different procedures for inquiries in cases instituted on police report and in cases on private complaints and there are fundamental points of distinction in the two procedures. In this background it will not be proper to treat the provisions relating to these inquiries so vital as some of the provisions relating to trial.

5. An examination of the matter with reference to the objects of these inquiries also warrants a negative answer to the question posed above.

The twofold objects of the committal proceedings are:--(i) to save the time of the higher courts by preventing frivolous cases being sent to them. The Magistrate is required to hold inquiries to examine whether the case is fit one for trial before a higher court, (ii) to give notice to the accused of the evidence and materials that will appear against him during the trial.

6. The first object is of an administrative nature and the accused is not at all concerned with it. Dealing with the second object, it should be remembered that under the law as amended by Act XXVI of 1955, the accused is supplied copies of statements of witnesses recorded during investigation under Section 161 Cr. P. C. in accordance with the requirements of Section 173 Cr. P.C. Obviously he gets some notice of the evidence against him.

It may be that if the witnesses are examined by a Magistrate during the course of an inquiry in the presence of the accused and he is permitted to cross-examine the witnesses he gets better facilities but I do not see why the accused should not he treated competent to waive his privilege to a notice of the evidence during the course of an inquiry to avoid delay in trial. There are no adequate and pressing reasons to deny the competence of the accused in this behalf.

On a consideration of the nature of the committal proceedings as distinguished from trial, the objects of the proceedings and the propriety of the view recognising the right of the accused to waive his privilege in this connection I am clearly of the opinion that non-examination of all eyewitnesses and a consequent non-compliance with the provisions of Section 207-A should not by itself be sufficient to vitiate a commitment order.

Such a non-compliance does not fall within the categories indicated in the following observations of the Supreme Court in (S) A.I.R. 1956 S.C. 116:

'Some violations will be so obvious that they will speak for themselves as refusal to give the accused a hearing, a refusal to allow him to defend, a refusal to explain the nature of charge to him and so forth.'

The fact that the accused gets a chance of cross-examination of witness even before a trial and also a chance of discharge cannot be permitted to stand in the way of the accused waiving his right in order to secure a speedy trial as the accused does get all fair and reasonable opportunities of defending himself at the trial and remain under no serious handicaps in view of the receipt of copies of documents referred to in Section 173 Cr. P.C.

Non-compliance of this type, must in my opinion, be examined with reference to the question of prejudice to the accused, whether a commitment order should be quashed on this ground must be decided on the facts and circumstances of each case after considering the prejudice to be suffered by the accused. It needs also be mentioned that the recognition of exceptions by Modi, J. in Ghisa's case A.I.R. 1959 Raj. 294 : I.L.R. (1959) 9 Raj 944 though not capable of being interpreted to grant discretion to the Magistrate generally does lend support to the view formulated above.

Mr. Bhandari cited some cases to show that those defects in the mode of trial cannot be condoned on the ground of the consent of the accused. I have not considered it necessary to discuss them in detail for two reasons; (i) these cases relate to trials and cannot be of much assistance in dealing with provisions relating to committal proceedings; (ii) that the law on the subject has been fully thrashed out in the Supreme Court case referred to above and the correct position has been formulated. I consider that the proper mode of judging the consequences of non-compliance with the provisions of the Code is to apply the tests laid down in the Supreme Court case and that the admissions and conduct of the accused must be taken into consideration in determining the question of prejudice.

Now proceeding to examine the facts of the present case in the light of the above principles, I may at once observe that the decision of the case must hinge upon the determination of the question 'whether the accused waived his right to notice and therefore did not and cannot suffer any prejudice?' The record of the proceedings of the Magistrate clearly points out that the accused waived his right. The submissions of Mr. Bhandari that there was in fact no concession or admission on behalf of the accused and the Magistrate's record about oral admissions should not be accepted, do not appeal to me for the following reasons:

(i) In the first place there is no valid reasonor justification for doubting the correctness of theproceedings of the Court.

(ii) Omission on the part of the accused to question the correctness of the proceedings before the Magistrate is a serious obstacle in the way of accepting his contention. If the Magistrate had wrongly recorded the admission the accused

should have immediately taken steps to have the error rectified.

(iii) The commitment order was not challenged in time. Although there is no period of limitation prescribed for invoking revisional jurisdiction of superior Courts to correct errors and irregularities of the subordinate Courts, the higher Courts will be quite justified in refusing to exercise such jurisdiction if a prayer is unnecessarily or designedly delayed. In the present case the accused having kept silence for about six months in spite of appearing for several hearings in the Court of Additional Sessions Judge it will be hardly fair and proper to permit him to challenge the commitment order now at this stage on the ground of the incorrectness of the admission recorded in the proceedings of the Magistrate.

On a very careful consideration of the facts and the circumstances of the case I have no hesitation in coming to the conclusion (i) that the accused did concede before the Magistrate that he may be committed without examining all the eye witnesses; (ii) that it being within his competence to waive his right to notice of evidence by means of an inquiry, the committal of the accused without recording the evidence of all the eye witnesses did not result in any prejudice to the accused and (iii) in the second conclusion I am further supportedby the fact that the accused having had an opportunity to raise an objection did not do so in a reasonable time. The case has been pending for over six months and I am not prepared to quash the commitment of the accused in these circumstances.

7. There is no force in this revision and it ishereby dismissed.

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