

Amba Lal and anr. Vs. State

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Court : Rajasthan

Decided On : Sep-22-1970

Reported in : 1971CriLJ1207

Judge : Kan Singh, J.

Appellant : Amba Lal and anr.

Respondent : State

Judgement :

ORDER

Kan Singh, J.

1. The revision application before me raises a question of procedure. The gravamen of the matter is whether in a proceeding for commitment Under Section 207-A, Criminal P.C. when the Magistrate, after recording the evidence, is of opinion that there are no grounds for committing the accused person for trial, but, on the other hand, he thinks that the case should be tried before him- self he is required to proceed to record the evidence de novo or he can act on the evidence already recorded by him and proceed further in the matter. At this point I may briefly narrate the events.

2. The accused petitioners Amba Lal and Sharwar Lai were proceeded against for offences Under Sections 307, 325, 379 and 323 read with Section 34, Indian

Penal Code in accordance with Section 207-A, Criminal P.C. on a challan presented by the Station House Officer, Padu. During the committal proceedings the prosecution examined two doctors P.W. 1, Dr. S.C. Mathur and P.W. 3 Dr. Hargovind and one witness P.W. 2, Ram Singh. After considering this evidence and the documents produced by the police along with the challan the learned Additional Munsif Magistrate, Merta City was of the opinion that the case was not fit to be committed and in his opinion offences Under Sections 325 and 323 were disclosed against the accused. Accordingly the learned Magistrate framed the charges. The plea of the accused was recorded and the prosecution witnesses examined during the committal proceedings were recalled for cross-examination and then the remaining evidence of the prosecution was examined. The learned Magistrate then recorded the statement of the accused Under Section 342, Criminal P.C. and thereafter recorded the evidence for the defence. The learned Magistrate acquitted the accused for the charge Under Section 325, Indian Penal Code, but he convicted them on charges Under Section 323, Indian Penal Code and the accused were sentenced to a fine of Rs. 500/- in each case, in default 3 months simple imprisonment.

3. The accused went up in appeal to the court of the learned Sessions Judge at Merta. The learned Sessions Judge was of the opinion that the Magistrate was in error in acting on the evidence recorded during committal proceedings. According to the learned Judge, the Magistrate was required to proceed de novo from the stage of the proceedings Under Section 251-A, Criminal P.C., that is, the learned Magistrate should have first framed a charge then recorded the evidence of the four witnesses de novo and then he could have recorded the other evidence in the case. The essentials of the judgment of the learned Judge will be clear from the following passage:

The evidence in cases where the Code provides Under Section 251-A, Criminal P.C. is evidence that is recorded after the framing of the charge. Section 251-A, Criminal P.C. does not permit of recording of any evidence before framing of the charge, much less admitting any such evidence as relevant, though it has been recorded in the proceedings under committal enquiry. The evidence recorded for the purposes of committal enquiry is one thing and evidence recorded for purpose

of trial is completely a different thing. The question of inconvenience and injustice should not arise when the law is clear that in cases where procedure provided Under Section 251-A, Criminal P.C. is adopted, the evidence admissible would be only that which is produced after framing of the charge. So many considerations arise in the matter. The defence may not think fit at all to cross examine the prosecution witnesses at the stage of the committal proceeding. The purpose behind the two namely (i) an enquiry committal Under Section 207-A, Criminal P.C. and (ii) trial Under Section 251-A, Criminal P.C. have got different purposes and so also approaches. Therefore, I do not think I should adhere to the opinion expressed in Manipur case that offering of the witness for further cross-examination is a sufficient compliance of the provisions of Section 251-A, Criminal P.C.; the cross-examination cannot be a good and sufficient substitute for the examination of the witnesses.

4. It will be observed from the above passage that the learned Judge thought that Section 251-A, Cr.PC does not permit the recording of any evidence before framing of charge and much less admitting any such evidence as relevant, though it has been recorded in the proceedings under committal enquiry. According to the learned Judge, the evidence recorded for the purpose of committal enquiry is one thing and evidence recorded for the purpose of trial is completely a different thing and a question of inconvenience and injustice shall not arise when the law is clear.

5. I am afraid, the problem has been over simplified by the learned Judge. It will be convenient to read the relevant provisions of Section 207-A, Criminal P.C. :

Chapter XVIII of the Cr.PC lays down the procedure of inquiry into cases triable by the court of Session. In a proceeding instituted on a police report the procedure specified in Section 207-A, Criminal P.C. has to be followed and in any other proceeding the procedure laid down in the other-provisions of the Chapter has to be followed (vide Section 207). Section 207-A provides that in a proceeding instituted on a police report the Magistrate on receiving the report Under Section 173, shall fix a date. He shall then see that the documents referred to in Section 173 have been furnished to the accused. The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution

as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any one or more of the other witnesses. for the prosecution, he may take such evidence also (vide Sub-section (4)). The words to be noted in this sub-section are that what the learned Magistrate is doing is that he is recording the evidence- of the witnesses to the actual commission of the offence and of such other persons whom the Magistrate considers necessary to examine in the interest of justice. Sub-section (5) provides that the accused shall be at liberty to ..cross-examine the witnesses examined under Sub-section (4) and in such cases the prosecutor may re-examine them. Then comes Sub-section (6) and I may read that sub-section in full:When the evidence referred to in Sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him. unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

6. The learned Magistrate has to form his opinion in the light of the evidence that he has recorded and the documents as are referred in Section 173, Criminal P.C., copies whereof have been furnished to the accused as to whether they disclose no grounds for committing the accused person for trial. In that event after recording his reasons the Magistrate would discharge the accused, unless it appears to the Magistrate that such person should be tried before himself. In the latter case when the Magistrate thinks that such person should be tried before himself, he shall proceed accordingly. The words 'proceed according to law' are of wide import. The difficulty has arisen because the legislature has not enacted clearly as to how the Magistrate has to proceed to try the accused once he has formed the opinion that the accused be not committed, but instead be tried by himself. They cannot, however be construed to mean that the Magistrate can proceed in any manner he likes. It has always to be remembered that rules of procedure have been made with the object of administration of justice and, by and large, such rules

demonstrate how fair play is in action in proceedings before the Courts.

Now, the learned Magistrate has recorded the evidence of witnesses. The question is whether that evidence is ipso facto wiped out or erased once he thinks that the accused is triable by himself and he is to proceed accordingly. It has to be remembered that that evidence has been recorded in the presence of the accused and he had an opportunity of, cross-examining all the witnesses. I see one distinction between Section 251-A Criminal Procedure Code and Section 207-A. Criminal Procedure Code and it is that in the former the Magistrate acts only on the police record, but in the latter the Magistrate acts not on the police statements of witnesses regarding the actual commission of the offence but on what they had stated before him on oath. Section 251-A, Criminal Procedure Code will not in terms be applicable because the evidence recorded by the learned Magistrate to which he has already applied his mind is very much there and, in my opinion, in the absence of any express provision in the Code to eliminate such evidence, the same cannot be taken to have been wiped out. Therefore, the learned Magistrate has to look to the substance and such provisions of a warrant trial as can conveniently be applied in the circumstances will alone be followed by him and not that each and every provision irrespective of its applicability will be resorted to.

There is a clear distinction between an enquiry and a trial where charge is required to be framed or has been framed. The trial proceeds from the stage of the framing of a charge, but it is not the sine qua non of a trial that it is only when the evidence is recorded after the framing of a charge that the accused can be said to have been tried. For example, in complaint cases the prosecution witnesses may all be examined and then a charge be framed. In that event the trial will, no doubt, begin when the charge is framed and the plea of the accused is recorded. but the evidence recorded during the enquiry is not wiped out and it is enough if the prosecution witnesses are cross-examined by the accused after the charge. Recording the statements of the witnesses afresh from the stage of the examination-in-chief does not appear to be of the essence of the matter after the framing of the charge and if the witnesses are allowed to be cross-examined by the accused after the framing of the charge then that, in my view, meets the requirement of -justice as well.

7. Learned Sessions Judge has in support of his view, inter alia, relied on *Jhagru Tewari v. State of West Bengal* : AIR1959 Cal176 and *State v. L. L. Simte*, 1964 (1) Cri LJ 107 (Manipur J. C. C). The Calcutta case A.I.R. 1959 Cal 176 far from supporting the learned Judge cuts across his reasoning. I regret to have to say that the learned Judge does not seem to have even read this case otherwise his reaction would not have been what it was. The judgment of the Division Bench was delivered by K. C. Das Gupta, J. as he then was. This is what was observed:

Where a charge is being framed by a Magistrate because he is satisfied in an enquiry Under Section 207-A that there is no ground for committing the accused 'for trial, but it appears that he should be tried before himself or some other Magistrate and the Magistrate has not only examined the documents referred to in Sub-section (2) of Section 251-A but has in addition taken evidence referred to in Sub-section (4) of Section 207-A, it is absurd to suggest that he cannot frame a charge against the accused after deciding that the trial shall be before him merely because he has taken into consideration the evidence referred to in Sub-section (4) of Section 207-A. It is true that Section 251-A in its third sub-section does not permit the Magistrate to examine the witnesses before framing the charge but where the decision to try is made Under Section 207-A (6) the legislature by authorising the Magistrate 'to proceed accordingly' has authorised him to frame a charge for a suitable offence in such a case. The strict observance of Sub-section (3) in such a case would be impossible. Therefore, it cannot have been the intention of the legislature that in a case where the Magistrate has decided to proceed with the trial himself under Sub-section (6) of Section 207-A, the witnesses already examined should again be examined by the prosecution.

It was pointed out that a Court should avoid putting on the statute a construction which is inconvenient or unjust unless it is clear that this is the intention of the legislature.

8. In the Manipur case 1964 (1) Cri LJ 107 (Manipur J. C. C), the committal enquiry was started against the accused for the offences Under Sections 19(f) and 22 of the Arms Act and Section 120B, Penal Code. The learned Magistrate saw no grounds for committing the accused for trial, but was of the opinion that the

accused should be tried before himself. After reading out the charge Under Section 19(f) the accused pleaded not guilty and claimed to be tried. The Magistrate, without examining any witnesses, simply called upon the accused person to enter on their defence, evidently treating the depositions of P. Ws. already examined previously before the framing of the charge and in the course of the enquiry under Chapter XVIII as evidence in the case against the accused. It was held that this was wrong. The relevant observations may be quoted:

The evidence given by the witnesses in respect of the conspiracy was totally unnecessary for the decision in respect of the charge Under Section 19(f). Arms Act. Thus, it was necessary that the witnesses for the prosecution who were to give evidence in respect of the charge framed Under Section 19(f) of the Arms Act should have been examined afresh. At least, such of those witnesses examined already on whose evidence the prosecution was relying for their case Under Section 19(f) should have been offered for further cross-examination by the accused persons as the earlier cross-examination of the said witnesses before the framing of the charge against them could not be said to have been completed or directed to the evidence relating to the specific charge.

This case too was not of any assistance to the learned Sessions Judge. On the other hand, it contemplated that if the witnesses already examined were offered for further cross-examination after the charge, that would be alright. The learned Judge also referred to a case of the Madhya Pradesh High Court reported as *Nazir v. State of Madhya Pradesh*. A.I.R. 1967 Madh Pra 49. This case, no doubt, supports the learned Judge. S. B. Sen. J. observed as follows:

Section 207-A does not lay down any procedure as to how a Magistrate should proceed, when he has come to the conclusion that there is no case for commitment and decided that he himself should proceed against the accused and framed charges. In such cases the trial is Under Section 251-A and the Magistrate should frame the charge as contemplated therein. The trial commences subsequent to the framing of the charge. If that be so, strictly speaking there is no legal evidence of the prosecution after the framing of the charge. Under Section 251-A, it is after the charge is framed that the oral evidence comes in. Whatever is

recorded before the framing of the charge cannot be legal evidence after the framing of the charge because Section 251-A does not contemplate any such evidence. It may be that the Magistrate, during commitment proceeding, has got an additional advantage of the evidence of certain witnesses, recorded on oath but that does not mean that the step which is subsequent to the framing of the charge contemplated Under Section 251-A has to be avoided. In other words, if the Magistrate Under Section 207-A decides to proceed himself against the accused, then he should adopt 'the procedure Under Section 251-A and. therefore, must examine the witnesses afresh.

With all respect, the dicta involves an assumption that there can be no trial after the framing of the charge, unless the witnesses are examined afresh. In my humble view, it is also assumed that the evidence already recorded cannot be used for the purposes of trial even with the opportunity of further cross-examination. The view taken in the Calcutta case : AIR1959 Cal176 with all respects, commends itself to me and I prefer to follow that. It has to be remembered that the rules of procedure are but instruments or tools for doing justice and cannot be so construed as to result in a good deal of hardship to a party. No particular purpose would be served if the evidence of the witnesses is recorded afresh and the opportunity of further cross-examination will, to my mind, meet the requirements of justice.

It is true, at an enquiry stage, be it an enquiry before the charge in a warrant case started on a complaint, the accused may not thoroughly cross-examine a witness under the belief that he would be having one more opportunity of cross-examining the witness and he may not thus play all his cards. Therefore, giving of a further opportunity to cross-examine the witnesses already examined during the committal proceedings will be absolutely necessary, but, in my view, taking down the examination-in-chief of the witnesses once again will not in any manner or at any rate in any substantial manner advance the purposes of doing justice. It may turn out in many cases that the agony of the accused may be prolonged under certain circumstances. There may be certain witnesses whom he may not, feel the necessity of further cross-examining, but if their statements are recorded de novo. then necessarily he will have to again take upon himself the task of cross-

examining them. The better course, to my mind, is that the evidence of the witnesses recorded during the committal proceedings should be there and the accused should be afforded the opportunity of further cross-examining them as Under Section 256, Criminal P.C. In making these observations I may, however, make a reservation that if in any case the evidence is recorded de novo, that may not impart illegality to the proceedings, but the failure to proceed in that manner will not as well impart any illegality to the proceedings provided the accused has been afforded further opportunity of cross-examining witnesses whose statements had already been recorded during the committal enquiry.

9. Apart from everything even if there was any breach of a rule of procedure, according to the learned Judge, then he should have considered the question of prejudice or mis-carriage of justice to the accused. It is noteworthy that in the present case it is the accused who is contending that the procedure adopted by the learned Magistrate was correct and the remand of the case was unjustified.

10. In the circumstances I allow this revision application, set aside the order of the learned Sessions Judge dated 15-10-1968 remanding the case for fresh trial and direct the learned Judge to re-hear the appeal on merits and dispose it of according to law.