

The State Vs. Birda and anr.

The State Vs. Birda and anr.

SooperKanoon Citation : sooperkanoon.com/756301

Court : Rajasthan

Decided On : Mar-07-1957

Reported in : AIR1957Raj318; 1957CriLJ1184

Judge : Wanchoo, C.J. and; Modi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 207A(4), 207A(6) and 207A(7); [Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Criminal Ref. No. 2 of 1957

Appellant : The State

Respondent : Birda and anr.

Advocate for Def. : Rainarain, Adv.

Advocate for Pet/Ap. : Kansingh, Dy. Govt. Adv.

Disposition : Reference accepted

Judgement :

Modi, J.

1. This is a reference by the Sessions Judge, Jodhpur, and raised an important question as to the interpretation of Sub-section. (4) of Section 207-A of the Code of Criminal Procedure. This section has been recently introduced into the Code of

Criminal Procedure by the Criminal Procedure Amendment Act (No. XXVI) of 1955.

2. The facts leading up to this reference, may be shortly stated as follows. The prosecution case is that the deceased Jawandan met his death by foul means on or about the 29th April, 1956. He had left his village on the 27th April 1956 to collect some of his debts with his account books and certain other papers. Badridan son of the deceased made a first information report to the Additional Superintendent office, Jodhpur, on the 22nd May, 1956, to the effect that his father was missing and that he suspected that he had been killed, and he also named the two accused Birda and Likhma among others who might have killed the deceased.

A case was eventually registered on the 3rd September, 1956, at police station Jhamvar against both of them. The police took up the investigation. The police were not able to discover any witness to the actual commission of the offence alleged. They, however, collected some circumstantial evidence which in their opinion goes to connect the two accused with the crime. It is not necessary for the purposes of this reference to mention the details of this circumstantial evidence.

Eventually the police presented a challan against the accused Birda and Likhma in the court of the First Class Magistrate No. 2, Jodhpur. The Magistrate went through the documents produced by the police under Section 173 Cr. P. C. and examined the accused and heard the prosecution and the accused, but did not record any evidence and committed both the accused to the court of the learned Sessions Judge, Jodhpur, having framed a charge against them under S. 302 I P. C.

3. The learned Sessions Judge has consequently made this reference with a recommendation that the Magistrate had committed a serious error of law in not having recorded any evidence whatever under Sub-section (4) of Section 207-A, and so the commitment be quashed and the case be sent back to the committing court for a proper compliance with the provisions of Section 207-A (4) Cr. P. C.

4. The question which in these circumstances arises is what is the proper interpretation of Sub-section (4) of Section 207-A. This sub-section is in these terms :--

'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 interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.'

It is plain that this sub-section makes it obligatory for the Magistrate to take the evidence of all such persons as may be produced by the prosecution as witnesses to the actual commission of the offence alleged. There is no option left to the Magistrate so far as this is concerned, and a positive duty has been laid upon him that he should examine all eye-witnesses to the offence such as may be produced by the prosecution before him. The expression 'if any' occurring after 'persons' in the first part of this sub-section really refers to 'witnesses to the actual commission of the offence alleged'.

The learned Sessions Judge seems to think that the words 'if any' refer to such eye-witnesses, who may be present in court and who are intended to be produced by the prosecution as witnesses to the actual commission of the offence alleged. We are of opinion that this is not the correct meaning to be put upon the language of the section. The words 'if any' in the context in which, they appear have a reference in one word to the eye-witnesses if any. A question may arise whether the prosecution should produce all the eyewitness or it may produce some of them before the committing magistrate. This question does not strictly arise so far as the present reference is concerned, and we propose to revert to it later as the point was argued before us at some length.

5. The more important question, and this is the one which has been raised by the present reference, is where there are no eye-witnesses whether the Magistrate should still record evidence of any one or more of the other witnesses for the prosecution before he may make a committal order or it is enough for him to peruse the police papers and examine the accused and hear both the prosecution

and the accused and make an order of commitment merely on such material (See Sub-sections 6 and 7 of Section 207-A in this connection).

6. The sub-section as it is worded clearly lays down that where the Magistrate is of opinion that such evidence should be recorded in the interests of justice, he may take such evidence also. Now two classes of cases may arise in this connection. The first is where there is evidence of eye-witnesses and there is also other evidence say of a circumstantial nature. The other class of cases is where there are no eyewitnesses at all and the case rests merely on circumstantial evidence.

Reading the language of this sub-section in its plain tenor, it would appear that the matter has been left to the discretion of the Magistrate in either case. But this discretion has, like all discretion in judicial matters, to be exercised judiciously and not in a capricious manner. Having given our very careful and anxious consideration to the matter, we are disposed to hold that where a case depends partly on the testimony of eye-witnesses and partly on other evidence, a Magistrate may omit to record such other evidence on the ground that¹ he does not consider it necessary in the interests of justice to record such evidence, and no fault can indeed be found with such exercise of discretion, though he should like to add that if the Magistrate thinks it necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, that is, other than eye-witnesses, he should record such evidence also.

The more difficult question is what should be done in those cases where the prosecution has no eye-witnesses to produce, and relies for proof on other evidence only of a circumstantial character, and whether in such a case the Magistrate may dispense with the recording of any evidence whatsoever on the ground that he did not consider it necessary in the interests of justice to take the evidence of witnesses other than eyewitnesses, and that Sub-section (4) of Section 207-A leaves him a discretion whether to examine such witnesses or not.

7. In this connection we should like to observe that the principle behind a committal proceeding is more or less two fold. On the one hand, the object is that the accused may have ample notice of the matter for which he is going to be prosecuted, and of the main evidence by which the prosecutor would seek to

prove his case so that he may be fully enabled to prepare his defence and to meet the case for the prosecution.

The other object which is not far less important is that a Court of Session (or for that matter a High Court) where the case may have to be committed may not be unnecessarily burdened with the task of conducting trials into serious offences where there may be really no reasonable grounds for the conviction of the accused for such offences and in such cases it is the duty of the Magistrate to discharge the accused after recording his reasons, or, where he comes to the conclusion that such person should be tried before himself or some other Magistrate for a lesser offence, he is required to take necessary action accordingly.

We are also fully conscious that it has been the aim of the legislature to simplify the procedure for commitment as a result of the various amendment which have been made by the Criminal Procedure Amendment Act of 1955. Be all this as it may, we are clearly of opinion that so long as the procedure of commitment has been preserved by our Code of Criminal Procedure for trial into certain classes of offences, the main objective 'behind a commitment proceeding cannot and should not be lost sight of, and that is that the accused must have ample notice of the case for which he is going to be prosecuted and the evidence which has been collected by the prosecutor and by which he would seek to prove the case against him.

It is true that under the amended procedure it has been provided that the prosecution must hand over all the documents referred to in Section 173 of the Code to the accused before the preliminary inquiry begins, and the Magistrate has been enjoined to see if such copies have not already been supplied that they are supplied, and this, to a certain extent, would enable the accused to have an idea of the material which has been collected against him.

Obviously, however, this by itself has not been considered to be sufficient notice to the accused of the case for which he is going to be prosecuted, and that explains why a provision, even in cases instituted on a police report, has been retained for the recording of the evidence under Sub-section (4) in cases exclusively triable by

a Court of Session. According to this provision, where there are eye-witnesses and such witnesses are produced by the prosecution before the Magistrate, it is his duty to examine them, and, further where he considers it necessary in the interests of justice to record other evidence as well, apart from the evidence of the eye-witnesses, a discretion has been given to him to record such evidence also.

Having recorded such evidence and considered the documents referred to in Section 173, the Magistrate may if he thinks it necessary, examine the accused so as to enable him to explain any circumstances appearing against him and hear the prosecution and the accused, either come to the conclusion that the accused should be committed for trial in which case he shall frame a charge; or, he may come to the conclusion that such evidence and documents disclose no grounds for committing the accused for a trial and in such a case he will record his reasons and discharge him.

Now, it would be difficult for a Magistrate to perform the duties so laid upon him by Sub-sections (6) and (7) of Section 207-A unless he records some evidence in the case himself. We also think that where a case rests on evidence other than the evidence of persons who witnessed the actual commission of the crime, a proper exercise of the Magistrate's powers under Section 207-A (6) can be ensured only if he takes the evidence of any one or more of the other witnesses for the prosecution -himself. It will of course not be necessary for him to record the evidence of merely formal witnesses; but if he were to exercise his discretion judicially in such cases, it will certainly be necessary in the interests of justice for him to take the evidence of such witnesses who prima facie establish the connection of the accused with the crime alleged against him.

It will be only in this manner that the accused could have a proper opportunity of knowing the case against him and also testing it for which provision has been clearly made within the section itself. (See Sub-section 5). We are thus persuaded to hold that where a case depends not upon the direct testimony of certain persons who may have witnessed the actual commission of the crime but it rests on circumstantial evidence, the only proper manner in which the Magistrate could and should exercise his discretion to record the other evidence or not would be to

hold that it is necessary in the interests of justice to take the evidence of the other witnesses connecting the accused with the crime, and that being so he must record such evidence also.

It is only when he does so that he would be enabled properly to exercise the powers of commitment or discharge which are vested in him under Sub-sections (6) and (7) of this very section. If, on the other hand, the recording of any evidence at all may be dispensed with by the Magistrate in cases not depending upon the testimony of eyewitness, then we fail to see how a Magistrate would be properly enabled to order the discharge of the accused in a given case, for, it is only when circumstantial evidence has been recorded by him and subjected to cross-examination by the accused that he can formulate a proper opinion that such evidence and documents as have been placed before him disclose no ground for committing the accused person for trial.

If this is not done, a discharge in a preliminary inquiry would be a practical impossibility, and all that the Magistrate could do would be to pass a routine order of commitment based mainly on the police papers presented to him, and it appears to us that the provision of Sub-section (6) in such cases would be more or less rendered nugatory.

8. Our attention was drawn in this connection to State v. Ramratan AIR 1957 Madh B 7 (A) which is the decision of a learned single Judge of the Madhya Bharat High Court as it then was, and also to a Bench decision in State v. Govindan Thampi AIR 1957 Trav,-Co.. 29 (B) of the Thavancore-Cochin High' court. Much of thereasoning in these two cases appears to have centered round the use of the word 'may' in Sub-section (4) and the learned Judges came to the conclusion that the word 'may' means 'must' in this context.

Now we are quite aware that 'may'" in the English language sometimes means 'must' and where indeed a compulsive meaning is rendered necessary, it has to be given to it. See Maxwell on the Interpretation of Statutes (Tenth Edition), pages 239 to 244. With great respect, however, we wish to point out that the correct interpretation of Sub-section (4) does not turn on the question whether the word 'may' must be assigned a compulsive force within the framework of Section 207-A;

but on the other hand, it rests upon the general principles of the law underlying a committal proceeding and the objectives sought to be achieved by it.

We, therefore, wish to steer clear of this aspect of the controversy for the proper interpretation of the sub-section in question. The learned Judges in the Travancore-Cochin case apparently held that in cases depending entirely upon circumstantial evidence, the prosecution was not bound to produce the witnesses seeking to connect the accused with the crime and that it was open to the Magistrate to pass an order of commitment without examining them at all; although the learned Judges recognised that whenever a committal court thinks that interests of justice demanded the examination of any witness, it was enabled to do so by the language of Sub-section (4).

For the reasons which we have already stated above, we think that this view does not take sufficient notice as to how the discretion which the Magistrate undoubtedly has under the sub-section should be or could be judicially exercised in such cases. On our view, the only proper way in which the Magistrate in a case of this character could exercise his discretion judicially would be to hold that the interests of justice require that the evidence other than that of eye-witnesses must be recorded to establish the connection of the accused with the crime, and that being so, he must proceed to record such evidence and thereafter exercise the powers vested in him under Sub-sections (6) and (7) of Section 207-A Cr. P. C.

8a. It must follow from what we have stated above that a commitment made by a Magistrate without recording any evidence under Sub-section (4) in cases of the kind we have before us is in proper and cannot be sustained.

9. Reverting to the other question for a moment, namely, whether the prosecution should produce all the persons who are witnesses to the actual commission of the offence alleged or they may produce only a few of them before the committing Magistrate, we think (though we do not wish to express a firm opinion in this matter as the point is not directly raised by the present reference) that the prosecution should not hold back eye-witnesses to the actual commission of the offence alleged at their sweet will and pleasure, and in any case, they would be running a grave risk if they later produce such witnesses at the trial whom they

have not produced before the committing Magistrate. We are inclined to the view that the prosecution should produce all such witnesses as it intends to produce at the trial.

It is only in this manner that the object of a commitment proceeding would be best sorted. Of course there may be exceptional cases, for instance, of a witness who may not be available during the course of the preliminary inquiry, and in such a case the provisions of Section 540 Cr. P. C. could certainly be availed of. But such cases apart, the better and the safer course for the prosecution, in our opinion, would always be to produce before the committing Magistrate the evidence of all such persons who have witnessed the actual commission of the crime alleged and whom the prosecution intends to produce at the trial.

10. For the foregoing reasons, we accept this reference and hold that the committing Magistrate had acted with material irregularity in committing the accused without recording any evidence whatever connecting them with the crime, and consequently, we quash the commitment and send the case back to the Magistrate with a direction that he shall record all such evidence which is necessary in the interests of justice to record on our finding given above, and thereafter make a fresh order of commitment or of discharge according to law, as the case may be.