

The State Vs. Suraj

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Court : Rajasthan

Decided On : Sep-05-1979

Reported in : 1979WLN580

Judge : M.B. Sharma, J.

Appeal No. : S.B. Criminal Reference No. 10 of 1979

Appellant : The State

Respondent : Suraj

Disposition : Reference Allowed

Judgement :

M.B. Sharma, J.

1. The learned Addl. Sessions Judge, Gangapur City has made a reference to this Court under Section 395(2), Cr PC recommending that the order of commitment be quashed. This reference arises in the following circumstances.

2. A report Under Section 173, Cr PC was filed against many persons in the Court of learned Munsif and Judicial Magistrate, Hindaun in FIR No. 76/78, P.S. Mandawar. During the investigation of the case, one of the co-accused Prahlad Singh son of Shamshersingh was tendered pardon Under Section 306(I), Cr.P.C. by the learned C.J. M. Sawai Madhopur. In the charge sheet filed against the

accused persons, the said Prahlad was shown as a witness for the prosecution at No. 6-A. The learned Magistrate committed the accused persons to the court of Addl. Sessions Judge, Gangapur City, without complying with the provisions of Section 306(4)(A), Cr.P.C. An application was filed before the learned Addl. Sessions Judge on behalf of the accused persons that the commitment without examining the approver by the learned Magistrate is not in accordance with law & will vitiate the trial, if any is held. The learned Addl. Sessions Judge agreeing with the objection has made the reference.

3. At the very outset, it may be observed that it is a settled position of law that when an accomplice is tendered pardon Under Section 305(1), Cr.P.C. he must be examined as a witness in the committing court as well as the trial court, and the Magistrate cannot commit the accused persons without examining the approver. If the accused persons are committed without complying with the provisions of 306(4)(A), Cr.P.C. then the trial, if held, is vitiated. The learned Addl. Sessions Judge, therefore should not have made the reference Under Section 395(2), Cr.P.C., more so when the point of law settled by the reported decision of their Lordships of the Supreme Court in *Sardar Iqbal Singh v. State Delhi Administration and Ors.* 1977 Cr.L.R. S.C. 508, wherein it has been laid down as follows:

From these provisions it would appear that where a person has accepted a tender of pardon under Sub-Section 1977 Cr.L.R. S.C. 508, of Section 337, at the stage of investigation in a case involving any of the offences specified in Sub-section (2)(B) the prosecution can file a charge sheet either in the court of a competent Magistrate or before the Special Judge

It follows that if the Magistrate takes cognizance of the offence, the approver will have to be examined as a witness twice, once in the Court of the Magistrate and again in the court of the Special Judge to whom the Magistrate has to send the case for trial. But, if the charge sheet is filed directly in the Court of the Special Judge, he can be examined only once before the Special Judge.

4. The learned Addl Sessions Judge, therefore, could have, in exercise of the powers vested in him Under Section 397, Cr PC, quashed the commitment himself

and could have directed the Magistrate to comply with Section 306(4)(A), Cr.P.C. before committing the case to his Court. Only if such a point of law arises in the court of learned Magistrate or in a court of Sessions, which has not been decided by this Court or by the Supreme Court, the question of making a reference Under Section 395(2), Cr.P.C. will arise. But, as the reference has been made and as the commitment of the case without complying with the provisions of Section 306(4)(A), Cr.P.C. is not in accordance with law. it is illegal and if any trial is held on such commitment, the same will be vitiated, the reference is worth accepting. Besides the above authority of the Supreme Court, it will be useful to a refer to a Full Bench Authority of Gujarat High Court in Kalu Khoda and Ors. v. The State A.I.R. 1962 Guj. 183, where speaking for the Full Court, Justice J.M. Shelat, as his Lordship then was, held that the committal proceedings and the order made Under Section 207(a), Cr.P.C. (1898) would be illegal, if in breach of Section 327(2), Cr.P.C. the committing Magistrate commits as accused to the Court of Sessions without the prosecution examining the person who has been tendered pardon and who has accepted the same.

5. It can, therefore, be said that the commitment in violation of Section 306(4)(A), Cr.P.C. is illegal and will vitiate the trial, if any is held.

6. The reference is therefore accepted and the order of commitment of the case by the learned munsif and Judicial Magistrate, Hindaun dated 30-3-79 is set aside and the case is sent back to the learned Magistrate with a direction to comply with the provisions of Section 306(4-A), Cr.P.C. and thereafter, if necessary, commit the case in accordance with law. The file be sent to the learned Magistrate immediately.