

In Re: Ummal Hasanath

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SooperKanoon Citation : sooperkanoon.com/778703

Court : Chennai

Decided On : Jun-10-1947

Reported in : AIR1947Mad433; (1947)2MLJ142

Appellant : In Re: Ummal Hasanath

Judgement :

ORDER

Rajamannar, J.

1. This case raises a point on which there is no direct authority. The petitioner is the first accused in P. R. C. No. 11 of 1947 in the Court of the Sub-Magistrate, Karur. She was arrested without a warrant by the police and remanded in a sub-jail for a period of 13 days. The offence was one under Section 302 of the Indian Penal Code. An application was made to the Magistrate, purporting to be under Section 205 of the Code of Criminal Procedure, to dispense with her personal attendance and to permit her to appear by her advocate. The grounds on which the application was made were that the petitioner was a purdah Muslim lady belonging to a respectable family and that she was a woman of poor health and frequently falling ill. The Sub-Magistrate rejected the application for two reasons : (i) that he had no jurisdiction to grant the application ; and (2) that the accused might be required for identification purposes. The petitioner seeks to have this order of the Magistrate revised by this Court.

2. The second reason does not appear to be tenable. It has been represented to me that the petitioner is a gosha lady and that none of the witnesses is likely to have seen her personally. It has also to be mentioned that most of the witnesses have since been, examined and no necessity arose for identification ; but assuming that an occasion arose for identification it would always be open to the Magistrate to direct her personal attendance.

3. The other reason raises an important question. The application was made under Section 205 of the Code of Criminal Procedure and Sub-section (1) of that section runs as follows:

whenever ,a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him, to appear by his pleader.

It is clear from the language of this sub-section that the power conferred upon a Magistrate to dispense with the personal attendance of the accused can be exercised! only when he issues a summons. It may be that the case itself is a warrant case ; but nevertheless the Magistrate might have issued a summons in the first instance in exercise of his discretion under Section 204 of the Code of Criminal Procedure. Even then the Magistrate would have power under this provision vide, *Basumoti Adhikarini v. Budram Kalita* I.L.R.(1893) Cal. 588. In the present case admittedly the Magistrate never issued a summons. The petitioner was arrested without a warrant. It was held in *Abdul Hamid v. King-Emperor* I.L.R.(1923) Pat. 793 by a Division Bench of the Patna High Court that Section 205 of the Code of Criminal Procedure applies only to cases in which the Magistrate has issued a summons in the first instance and not where the accused has been arrested without, or after the issue of a warrant. This conclusion appears to be inevitable from the language of the section. I have come across .only one case in which though the Magistrate issued a warrant vet it was held that the Magistrate could grant an application under Section 205 but the circumstances were very peculiar. In that case *Narapana Aiyar, In re* : AIR1947 Mad66 , it was found that though the procedure to be followed was as in a summons case the Magistrate happened to issue aailable warrant by mistake. Having made that mistake the

Magistrate refused the application under Section 205 for exemption from personal attendance on the ground that a warrant had been issued. The learned Judge, Kuppuswami Ayyar, J., held that the Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application. I do not think that this decision helps me in any way.

4. The question then remains whether the Magistrate has the power to dispense with the personal attendance of the accused under any other provisions of the Code. The learned advocate for the petitioner conceded that there was no other express provision. There is only a reference to exemption from personal attendance in Section 353 of the Code of Criminal Procedure which runs as follows:

Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Courts have held that a power could be implied under this section to dispense with the attendance of an accused during his trial before the criminal sessions of the High Court or before the Mofussil Court of Session. In *Emperor v. C.W. Ring* : (1912)14BOMLR236 , it was held that the High Court had power under the provisions of Section 353 to dispense with the attendance of an accused person during his trial before it in the Sessions on the ground of his ill-health. Devar, J., observes as follows:

Section 205 of the Code of Criminal Procedure empowers a Magistrate to dispense with the attendance of the accused in cases where issues a summons and it seems to me that it could not have been the policy of the Legislature that the High Court should not have similar power in all proper cases.

In *In re Kandamani Devi* : (1922)42MLJ337 , Kumaraswami Sastri, J., held that a Sessions Judge had power to dispense with the personal attendance of an accused and allow him to appear by a pleader during the Sessions trial.

5. I am inclined to take the view that Section 353 by necessary implication confers power on the presiding officer whether he is a Magistrate or a Sessions Judge or a Judge of the High Court to dispense with the personal attendance of an accused person. Chapter XVIII would cover an enquiry before the Committing Magistrate also. There appears to be a difference between the stage contemplated by Section 205 and that contemplated by Section 353. Section 205 deals with the initial appearance of the accused person before the Magistrate whereas Section 353 deals with the presence of the accused during the trial of the case or during enquiry. I therefore hold that the Magistrate had the power to entertain the application of the petitioner.

6. In any event I think that the language of Section 561-A is wide enough to confer such power on this Court.

7. This appears to be a case in which having regard to the fact that the petitioner is a gosha Muslim lady and alleged to be in poor health it would be in the interests of justice to dispense with the personal attendance of the petitioner. The Magistrate will of course have the power to direct the personal attendance of the petitioner whenever he thinks it becomes necessary.

8. The petition is therefore allowed.