

State Vs. K.P.S. Jayachandran

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Court : Chennai

Decided On : Jul-02-2008

Reported in : 2008CriLJ4501

Judge : T. Sudanthiram, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201, 203, 218, 302, 364, 411, 414, 465 and 471; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 202, 161(3), 173, 208, 209, 218, 219, 223, 319 and 482; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 207, 207A, 207A(4), 207A(5), 207A(6) and 207A(7)

Appeal No. : Cri. R.C. No. 731 of 2006 and M.P. No. 1 of 2006

Appellant : State

Respondent : K.P.S. Jayachandran

Advocate for Def. : R. Shanmughasundaram, Sr. Counsel for ;L. Baskaran, Adv.

Advocate for Pet/Ap. : P. Kumaresan, Addl. Public Prosecutor

Judgement :

ORDER

T. Sudanthiram, J.

1. The revision petitioner herein filed a final report before the learned Judicial Magistrate-I, Erode, against five accused in which the respondent herein is the fifth accused, for offences under Sections 364, 302 r/w 34, 201, 203, 218, 465 and 471 IPC. The 5th accused /respondent herein filed a petition under Section 218 and 223(d) Cr.P.C before the learned Magistrate in Crl.M.P. No. 415 of 2006 praying for discharge and the said petition was allowed on 28.04.2006 and subsequently the case was ordered to be committed to the Sessions in respect of only the accused 1 to 4. Aggrieved by the order of the learned Magistrate for not committing the 5th accused along with the other accused to the Sessions Court, this revision petition has been preferred.

2. The final report was filed against accused 1 to 3 for the alleged offences under Sections 364 and 302 r/w 34 and 201 IPC and against the 4th accused for the alleged offence under Section 203 IPC and against the 5th accused/respondent herein for the alleged offence under Sections 218, 465 and 471 IPC.

3. The learned Magistrate discharged the 5th accused stating that the 5th accused cannot be tried along with the other accused 1 to 4 and also directed the police to file a separate final report against the 5th accused after the trial in respect of accused 1 to 4 comes to an end.

4. The case of the prosecution is that A. 1 and A.2 decided to murder the deceased with the help of A.3 and brought the deceased near a well and A.3 caught hold of the neck of the deceased, A.2 put a rope around the neck and strangled him and pushed him down and A.1 caught hold of the legs of the deceased and A.3 stabbed on his neck indiscriminately with the knife, then A. 1 to A.3 knowing that the offence of murder have been committed to cause disappearance of the evidence, tied a stone on the dead body with a rope and threw the body into the well. The case against the 4th accused is that during the course of investigation, the 4th accused gave a false information to the investigation officer and before the learned Magistrate.

5. The case against the 5th accused/respondent herein is that he being an Inspector of Police, Erode North Police Station, during the course of investigation prepared the statement under 161(3) Cr.P.C of some of the witnesses in a manner

which he knows to be incorrect, in order to save the real accused from legal punishment and he also prepared observation mahazar of the scene of occurrence with the forged signature of one Nagaraj.

6. Mr. P. Kumaresan, learned Additional Public Prosecutor further submitted that the 5th accused falsely implicated three innocent persons as the accused in the murder case leaving the real accused and he put up a stock witness and fabricated the evidence against the innocent persons and the signature of the witnesses in the observation mahazar were forged one and as such, the discharge of the 5th accused is against law.

7. The learned Additional Public Prosecutor further submitted that the Magistrate has erroneously discharged the 5th accused by going to the merits of the case for which he had no power.

8. The learned Additional Public Prosecutor further submitted that the learned Magistrate has no authority to split the case and he ought to have committed the 5th accused also to the Sessions Court along with the other accused. He relied on the decision of the Honourable Supreme Court reported in (Amrit Nahata v. Union of India), wherein it is stated as follows:

3. Secondly, it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully, if inter-pretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, if the offence is plainly one under Section 201 IPC, the Magistrate has simply to commit for trial before the Court of Session.

9. Mr. R. Shanmughasundaram, learned Senior Counsel appearing for the respondent submitted that the police had filed the final report by clubbing different offences committed in different transactions which is illegal and hit by misjoinder of charges and misjoinder of persons. Joint trial of the 5th accused along with the other accused would cause prejudice to him. The learned Senior Counsel further submitted that the allegation made against the 5th accused would come into picture only when the trial against the other accused concluded in the Sessions Court and as far as the charges levelled against the 5th accused are only triable by Magistrate, whereas the charges levelled against the other accused in a different transaction are exclusively triable by the Sessions Court.

10. The learned Senior Counsel further pointed out that from the final report in which it is stated that 'during the course of the investigation in this case from 26-9-2003 to 19-6-2004, A.5 being a public servant entrusted with the work of investigation as Inspector of Police, Erode North Police Station, prepared the statements under Section 161(3) Cr. P.C of 1) Shajahan.... in a manner which he knew to be incorrect with the intention that those statements could save the real accused from legal punishment....' By pointing out this, the learned Senior Counsel submitted that even according to the final report, the alleged act of the 5th accused is independent to the act and occurrence of murder.

11. Reliance was also placed in the decision of the Honourable Supreme Court reported in (The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Md. Samsuddin and Ors.), wherein it has been observed as follows:

8. Looking at the plain language of these two sub-sections it is patent that the Magistrate conducting the inquiry proceedings can discharge the accused only if he is of the opinion that the evidence produced before him and the documents referred to in Section 173 of the Code 'disclose no grounds for committing the accused person for trial'. The jurisdiction of the inquiring magistrate is thus of a limited character. He has, undoubtedly, got to sift and weigh the evidence but that exercise is solely directed to finding whether the prosecution has made out a prima facie case. So long as there is evidence which, if believed, would sustain the conviction of the accused, it is the duty of the magistrate to commit the accused to

the Court of Sessions, unless he comes to the conclusion that the offence disclosed by the evidence is such as may be tried by himself or by some other magistrate. This limitation stems from the fact that a magistrate acting under Chapter XVIII of the Code does not try the accused but merely inquires into the case against him. Sifting and weighing evidence to determine the guilt is the function and privilege of the Court which tries the accused. That explains why this Court held in *Thakur Ram v. State of Bihar* : 1966 CriLJ700 that where two views of the evidence are possible, it is not for the committing Court 'to evaluate the evidence and strike a balance' before deciding whether or not to commit the accused to the Court of Session. An order of discharge can be passed by the committing Magistrate only if there is no evidence at all on which to base the conviction. In *Bipat Gope v. State of Bihar*, the order of discharge was held to be in excess of jurisdiction because the Magistrate, instead of finding whether the evidence is believed would establish a prima facie case, went further to disbelieve the evidence by an elaborate and painstaking process of examination of evidence in aid of which he brought to bear his own appraisal by considering inconsistencies and improbabilities.

9. The Magistrate in the discharge of his function under Sub-sections (6) and (7) of Section 207-A, cannot certainly act as a mere automaton. He has a judicial, not a ministerial, duty to perform and therefore he cannot act as a post-office for onward transmission of the case. He must apply his mind to the evidence in order to determine whether that evidence makes out a prima facie case against the accused. Thus, the committal proceedings go before the Sessions Court not in a virgin form but with the judicial imprimatur of the magistrate that prima facie evidence is such as may justify the conviction of the accused.

12. This Court considered the submission made by both parties and perused the copy of the final report.

13. As far as the 5th accused/respondent herein is concerned, he is said to have committed an offence while investigating the case as an investigating officer. In the main occurrence of murder and with regard to the causing disappearance of evidence of murder he is not involved. Only in the process of investigation, 5th

accused is said to have prepared the false document. The question arises is that if that be the case, whether the 5th accused also should be tried along with other accused in the same trial or he may be tried separately for the alleged offence committed.

14. Section 223 of the Code of Criminal Procedure reads as follows:

223. What persons may be charged jointly: The following persons may be charged and tried together, namely:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of Section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under Sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to

commit any such offence; and the provisions contained in the former part of this Chapter, so far as may be, apply to all such charges: Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

15. As per the above Section, with regard to the facts of this case, it is not possible to say 5th accused has committed the same offence or he abetted or attempted to commit such offence, or committed the offence in the course of the same transaction. Prima facie it appears that the 5th accused cannot be tried along with the other accused in this case. This Court also feels that if the 5th accused is tried along with other accused, there is a possibility of prejudice being caused either to prosecution or the defence.

16. Considering with regard to the power of the learned Magistrate whether he was proper in splitting up the case and discharging the accused. The decision cited by the learned Senior Counsel appearing for the respondent herein/5th accused, it is case wherein committal proceedings was taken as per the procedure of the old Code under Section 207-A Cr.P.C., 1898 (old Code).

17. As per the procedure in the old Code, under Section 207-A(4), the Magistrate was empowered to take the evidence of the witness and by Sub-section (5), the accused was given liberty to cross examine the witness. Therefore, at that time, the committal proceeding was done only after taking evidence and not merely by referring to the documents referred under Section 173 of the Code.

18. The position now as per the new Code is entirely different. In the decision of the Honourable Supreme Court reported in (Raj Kishore Prasad v. State of Bihar and Anr.), it has been held as follows:

8... Proceedings before a Magistrate under Section 209 Cr.P.C are patently not trial proceedings and were never considered so at any point of time historically. There has never been any doubt on that account. Before the amendment of the

Code of Criminal Procedure in the present form, commitment proceedings had the essential attributes of an enquiry and were termed as such. How do they continue to be so is the core question to determine and spell out the powers of the Magistrate under Section 209 Cr.P.C. If proceedings under Section 209 Cr.P.C continue to be an inquiry, Section 319 Cr.P.C would be obviously attracted, subject of course to decide whether the material put forth by the investigation could be termed as evidence, as otherwise no evidence is recordable by a Magistrate in such proceedings.

9. While enacting the Code of Criminal Procedure, 1973, the prefatory note before Parliament containing Objects and Reasons gave out the chances proposed to be made with a view to speed up the disposal of criminal cases. Item (a) specially provided the preliminary inquiry which precedes the trial by a Court of Session, otherwise known as committal proceeding, is being abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences.

10. The Law Commission beforehand in its 41st Report while recommending change on the subject opined as follows:

17.11 Where the case (whether instituted on a police report on complaint) relates to an offence triable by the Court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we propose in regard to such offences, the provision in this respect can take a simple form and can be placed in this chapter as forming part of the commencement of proceedings before Magistrates. It will be convenient to refer to this process as commitment of the case to the Court of Session although the procedure is radically different from the commitment proceedings at present provided in Chapter 18.

(ii) 214. (Section 209) Preliminary inquiries by Magistrate in cases exclusively triable by the Court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of inquiry provided for by the amendments made in 1955 and contained in Section

207-A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems. Preliminary inquiries are, therefore, being dispensed within cases triable by a Court of Session. However, to perform certain preliminary functions like granting copies, preparing the records, notifying the public prosecutor, etc., provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit the case to the Court of Session. As regards private complaints in cases triable exclusively by a Court of Session the inquiry into the complaint by the Magistrate under the existing Section 202 will serve the purpose of a preliminary scrutiny. SOR Gaz. of India 10-12-1970, Pt.II, Section 2, Extra., p.1309 (1320).

11. The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as committal proceedings have been abolished in cases triable by a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the public prosecutor etc. are thus preliminary or ministerial in nature. It is of course true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of Session is in order, so that it can proceed straightway with the trial and that nothing is lacking in content, as per requirements of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of inquiry as defined in Section 2(g) of the Code of Criminal Procedure, which defines that inquiry means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court, because of the prelude of its being subject to the context otherwise requiring. As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry

to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209 Cr.P.C is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Session.

19. The decision of the Honourable Supreme Court reported in (The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Md. Samsuddin and Ors.) is not applicable to the cases coming under new Criminal Procedure Code, 1973. The contention of the learned Additional Public Prosecutor Mr. Kumaresan is to be held correct.

20. In view of the ratio laid down by the Honourable Supreme Court reported in and , the committal Court has no power to discharge the accused. The learned Magistrate has no power either to add any one as accused or to delete any one of the accused. Absolutely there is no provision for the accused to file any discharge application before the committal court and for the court to deal with it. It is only either for Sessions Court to discharge the accused or for High Court to quash the proceedings on merits.

21. In the above said circumstances, it is to be held that application filed by respondent/5th accused before the committal court was not maintainable and as such the order of discharge passed by the learned Magistrate is illegal. Therefore, the order passed by the learned Magistrate is liable to be set aside.

22. Though there is an illegality in the order passed by the learned Magistrate by discharging the accused, now this Court having taken the matter and going through records and considering the case on merit and as already held above in paragraph-15, that as per Section 223 Cr.P.C, the 5th accused/respondent herein cannot be charged jointly along with the other accused, this Court exercising its inherent power under Section 482 Cr.P.C as it becomes necessary at this stage in the interest of justice directs the police to file a separate final report against the 5th accused as early as possible and proceed against him according to law. With the above observations, the criminal revision petition stands disposed.

