

Mohima Ranjan Roy and ors. Vs. the State

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Court : Kolkata

Decided On : May-30-1966

Reported in : AIR1967Cal42,1967CriLJ45

Judge : K.C. Sen and ;A.C. Gupta, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 206, 207, 347, 347(1) and 537

Appeal No. : Criminal Revn. No. 406 of 1966

Appellant : Mohima Ranjan Roy and ors.

Respondent : The State

Advocate for Def. : Priti Bhusan Burman and ;Balai Chandra Roy, Adv.

Advocate for Pet/Ap. : N.C. Banerjee and ;Jnanendra Mohan De, Adv.

Judgement :

Sen, J.

1. This Rule is directed against the order of Sri M.S. Banerjee, Magistrate, First Class, Burdwan dated 19-1-66 whereby he directed that the trial which was being proceeded against the accused petitioners should be switched on to an enquiry under Chapter XVIII of the Code of Criminal Procedure.

2. The facts are that the opposite party complainant filed a petition before Sri S. Sarkar, First Class Magistrate, Burdwan against the accused petitioners alleging that they had committed offence under Sections 147, 148, 447, 379, 504 and 342 of the Indian Penal Code. It was alleged inter alia that the accused persons along with a number of men formed into an unlawful assembly and entered the house of the complainant being armed with deadly weapons and one of them tied his hands and feet with a gamcha and the petitioners carried away some paddy from the house of the complainant. This petition of complainant was sent by the learned Magistrate to the Officer-in-Charge of Bhatar Police Station with a direction that it should be treated as a First Information Report and it was also directed that the matter should be investigated. Ultimately the police submitted a final report and it was followed by a naraji petition before the court of the learned Magistrate on 7-6-65 and a judicial enquiry was held and the petitioners were ultimately summoned to stand trial under Section 382 of the Indian Penal Code. Thereafter the case was transferred to the file of Sri M. S. Banerjee, Magistrate First Class, Burdwan who examined some witnesses. On the 15th December 1965 a petition was filed before him by the prosecution stating that the evidence really disclosed a case under Section 395 of the Indian Penal Code and therefore an enquiry should be made for committal under Chapter XVIII of the Code. Thereafter on the 19th January 1966 a direction was given that the case would proceed accordingly.

3. In this Rule we are concerned with two orders passed by the learned Magistrate. On 15-12-66 the learned Magistrate examined four of the prosecution witnesses in chief. At that stage a petition was filed on behalf of the prosecution stating that there were ingredients of offence under Section 395, I. P. C. and the case should proceed under Chapter XVIII of the Code of Criminal Procedure. This matter was adjourned till 19-1-66 as stated before and on this date the learned Magistrate came to a decision after hearing both the sides that the case would be proceeded under Chapter XVIII of the Code of Criminal Procedure. As such he directed that on 23rd February 1966, the witnesses for the prosecution who were examined in chief and partly cross examined should further be cross examined by the defence. He also directed that the remaining prosecution witnesses should also be examined, presumably under the procedure as laid down in Chapter XVIII of the Code.

4. Mr. Nalin Banerjee in support of this Rule has submitted that the said order passed by the learned Magistrate was not in accordance with law inasmuch as firstly, he was in error in thinking that if really any theft was committed by members of the unlawful assembly, the evidence already on record was sufficient for a conclusion that the proceeding should be switched on to an enquiry under Chapter XVIII for an offence alleged to have been committed under Section 395 of the Indian Penal Code. His second point is that the learned Magistrate as soon as he decides that an enquiry should be embarked upon under Chapter XVIII of the Criminal Procedure Code, it was his duty to examine the prosecution witnesses who were examined before, *de novo*. The main reason is that in so far as the proceeding initially started was concerned, it was nothing but a trial of an offence under the warrant procedure as envisaged in Chapter XXI of the Code. The procedure according to Mr. Banerjee being entirely different, the switching on to the enquiry procedure, without giving the accused persons the advantages as provided for in Chapter XVIII was an illegality.

5. Before dealing with the first point as urged by him we are required to see in the first instance as to whether a *de novo* enquiry under Chapter XVIII ought to have been made by the learned Magistrate. In support of his contention Mr. Banerjee has referred us to a decision of our Court reported in *Santi Jiban Bose v. Broja Nath*, 60 Cal WN 82. The facts in this case are that the accused persons were being prosecuted before a Magistrate at Raiganj for offences alleged to have been committed under Sections 477 and 420 of the Indian Penal Code. After examination of some of the witnesses under the warrant procedure, the Magistrate made up his mind that the offences which the accused persons appeared to have committed were offences triable by the Court of Session and in that view he decided to commit the accused persons to the Court of Session. As soon as such a decision was communicated to the accused persons, they prayed to the learned Magistrate for giving them an opportunity to cross-examine the prosecution witnesses, The Magistrate ultimately refused their prayer for cross-examining the witnesses at the stage reached in the proceeding, on the ground that after having once made up his mind to commit the accused persons to the Court of Session, there was no provision in law under which he could permit cross-examination of the prosecution witnesses. From the facts of this case it appears that the prayer of

the accused persons was only to give them facility to cross-examine the witnesses who had already been examined in chief in the trial commenced under the warrant procedure as envisaged in Chapter XXI. It will not appear from the facts that the accused persons really prayed before the learned Magistrate that a de novo enquiry under Chapter XVIII should be embarked upon. On these facts Mr. Justice Debabrata Mookerjee held that the provisions in Chapter XXI and Chapter XVIII being entirely different the proceedings in the enquiry should be started de novo. His Lordship observed as follows in the judgment at p. 85. :

'I therefore cannot agree that if in the midst of a trial which is being held under Chap. XXI, the Magistrate decides to commit the accused, the evidence that has already been before him, will be good and sufficient evidence for the purpose of commitment. That will, I think, involve an element of injustice and unfairness to the accused persons, apart from the question that it will entail a departure from the procedure prescribed by the legislature under Chapter XVIII of the Code. I think, therefore, that when a Magistrate decides in the course of a trial in which the warrant case procedure is being followed that the case is such that the accused ought to be committed to the Court of Session, the duty of the Magistrate is to hear the evidence once again under the provisions of Chapter XVIII and not allow the evidence already on the record to do duty for that which is receivable in accordance with the procedure prescribed under Chapter XVIII.'

6. We have already indicated the facts that no prayer for de novo trial was made but by the order of the Court as quoted before, a de novo enquiry was directed to be made. In the concluding portion of the judgment his Lordship however said that the learned Magistrate should proceed in accordance with law by following the provisions of Chapter XVIII of the Code of Criminal Procedure. In any event, this Single Bench decision clearly goes to show that a principle of law has been laid down to the effect that de novo enquiry should be started in cases which are dealt with by the Magistrate under Section 347 of the Code. Now we have to examine whether in view of this Court's decision we are required, in the present Rule to direct the learned Magistrate that his order for cross-examination of the witnesses as passed on 19-1-66 should be set aside and he be directed to embark upon a fresh and de novo enquiry. Mr. Justice Debabrata Mookerjee appears to have

followed a Calcutta decision in the case of G.V. Raman v. Emperor : AIR1929 Cal593 . Their Lordships made an observation as follows in that decision:

'It is possible and it generally so happens that the Magistrate starts a case before him with a view to try it himself; but in the midst of the trial, when certain facts have been disclosed, he makes up his mind to commit the accused to the Sessions. When the trial was commenced before him, he treated it as one of a warrant case and the accused exercised the right to reserve cross-examination after charge. If in the midst of the trial or immediately after finishing the evidence for the prosecution the Magistrate decides to commit the accused to the Sessions, it does not seem just to the accused that he should at that stage, because the Magistrate has come to a certain decision, lose the right which he had before such decision. In such a case, Section 347 should not be held as compelling the Magistrate to refuse to allow the accused to cross-examine the witnesses and to commit at once the case to the Sessions.'

7-8. From this observation we however do not consider that it purported to mean that a de novo enquiry should be made when a Magistrate decides to commit under Section 347 Criminal Procedure Code and the evidence already recorded in a trial under Chapter XXI should be rendered nugatory. It is clear from the above quotation that the accused persons had the right to cross-examine those witnesses under the provisions of Chapter XVIII who were examined in a trial conducted under the provisions of Chapter XXI. The facts in this reported decision are that from the very beginning a Presidency Magistrate of Calcutta apprised the accused that it was his decision to commit them to the Sessions and in doing so all facilities for cross-examining the witnesses under Section 208 of the Code were given to the accused, but although such a direction was given, the accused persons did not take advantage of the same and only declined cross-examination. The question therefore arose before this Court whether in such circumstances the accused persons should be given the opportunity of further cross-examining the witnesses when it appeared clearly that they refused to cross-examine, the witnesses under the provisions of Section 208 of the Code.

9. Furthermore this decision which was sought to be applied to the instant case by Mr. Banerjee rather contradicts his argument, as their Lordships found that when the accused persons did not avail of the opportunity given to them for cross-examination in a case which was initially commenced under Chapter XVIII of the Code, they should not be given such an advantage in future and in doing so their Lordships observed that the witnesses who were examined in chief under a warrant procedure can and should under all circumstances be allowed to be cross-examined by the defence on their prayer. In this instant case we have already observed that the learned Magistrate has given such opportunity to the accused persons and as such following this decision it cannot be said that the procedure as adopted by the learned Magistrate was wrong.

10. Mr. Banerjee has referred us to another decision reported in *Jyotsna Nath Sikdar v. Emperor* : AIR1924 Cal780 . In this case also it has been held by their Lordships that the Magistrate had no discretion and was bound under the circumstances and having regard to the fact that the application to cross-examine was made before the charge was framed and before the Magistrate had decided to commit the accused to the Court of Session, to allow the accused persons to cross-examine the prosecution witnesses. From these two decisions on which reliance was placed by Mr. Banerjee, it does not appear that as soon as the Magistrate switches on to an enquiry procedure under Chapter XVIII of the Criminal P. C. he was required to start a case de novo and as such we shall succeed later to see whether the decision in (1956) 60 Cal WN 82 enunciated a correct proposition of law. Mr. Barman appearing for the State and Mr, Roy appearing for the complainant have also referred us to a number of Division Bench decisions including one Bench decision of the Lahore High Court in support of the proposition that on the facts as stated in the instant case no de novo enquiry should be made by the learned Magistrate.

11. In the case of *Empress of India v. Illahi Baksh*, (1878-80) ILR 2 All 910 their Lordships of the Allahabad High Court held that commitment is not vitiated because a Magistrate did not commence fresh enquiry and did not take evidence de novo. Direction in Section 347 does not mean that the Magistrate should commence enquiry from the beginning.

12. In *Fazal v. Emperor*, AIR 1940 Lah 389 it has also been held that there is nothing in Section 347 to suggest that where a Magistrate decides to commit under that section he should be required to commence proceedings de novo under Chapter XVIII. What is necessary is that as soon as a Magistrate acting under Section 347, has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by Sections 208 and 212 of offering defence witnesses as well as the formalities required by Section 213 of the Code are carefully observed, there is no reason why a Magistrate should be required to take proceedings de novo under Chapter XVIII of the Code or Criminal Procedure.

13. In another case *Ram Sevak v. Emperor* 15 Cri LJ 367: (AIR 1914 All 111) it has been held that Sessions Judges have power to commit under Section 437 even when he has been hearing an appeal against conviction exclusively triable by a Magistrate. Mr. Roy appearing for the complainant has laid great stress on this decision and has pointed out to us that even a Sessions Judge is within his power to commit an accused person to a Court of Session under Section 437 on the evidence placed before him in a warrant case, Accordingly he has argued before us that in such circumstances it is far from the intention of the Legislature that a de novo enquiry at the time of switching on to an enquiry procedure, should be commenced. We think that the point raised by Mr. Roy is of great substance and it supports the proposition of law that no de novo enquiry in cases like the instant one should be gone into.

14. Lastly we may refer to another decision of a Division Bench of the Allahabad High Court reported in : AIR1936 All134 (of Cri LJ) : (at pp. 136-137 of AIR) the learned Judges of the Allahabad High Court have held that it should not be deemed to hold that when a Magistrate proceeds to commit an accused under Section 347 to the Court of Session, while conducting a trial or holding an enquiry other than one under Chapter XVIII proceedings are to be commenced de novo. If the Magistrate has already completed the evidence of the complainant and his witnesses, it is not necessary for him to take that evidence of the prosecution witnesses de novo or afresh; all that is necessary is that in respect of the remaining proceedings, the provisions of Chapter XVIII should be followed and he

should not deprive the accused of any right which he might have exercised under Chapter XVIII, if the case had been treated as an enquiry under that Chapter from the outset.

15. Now having regard to the decision of the Allahabad and Lahore High Court, it appears that they support the contention as raised by Mr. Barman and Mr. Roy. We would also like to observe that our Calcutta decisions as referred to before namely : AIR1924 Cal780 and : AIR1929 Cal593 do not in any way Contradict the decisions as aforesaid made by Lahore and Allahabad High Courts. Our High Court in these dicisions never contemplated that a de nove enquiry should be made in the circumstances like those as appearing in the instant case. This being the position, it is necessary to decide whether the Single Bench decision as reported in (1956) 60 Cal WN 82 should be considered good law on this subject for the guidance of the subordinate Courts, in view of the Supreme Court decision reported in : 1960 CriLJ145 Chhadamilal Jain v. State of Uttar Pradesh. We need not elaborately deal with the facts of this case. But in order to understand the law as decided by the Supreme Court, we may say briefly that the trial commenced before the learned Magistrate under Chapter XXI and in the midst of the trial the Magistrate proceeded to frame charge against some of the accused persons under Sections 409 and 465 read with Sections 471 and 477A of the I. P. C. and some of the accused persons were discharged. The charge showed that these offences were not exclusively triable by the Court of Session. In this case no de novo enquiry was started, nor was the procedure as enumerated in Chapter XVIII of the Code of Criminal Procedure followed by the learned Magistrate. When the matter ultimately came up before the Allahabad High Court, Chowdhury, J. was of opinion that though the Magistrate was competent to try the case as summonses had been issued under Section 406, I. P. C. it was open to him to hold an enquiry under Chapter XVIII from the very beginning in view of the provisions of Section 207, which empower a Magistrate to follow the procedure provided in Chapter XVIII, in cases exclusively triable by a Court of Session and also in cases which arc not exclusively triable by the Court of Session, but which in the opinion of the Magistrate ought to be tried by such Court. Although he was of such an opinion, he ultimately found that the defects were curable under Section 537 of the Code as no prejudice was caused. The Supreme Court dealt with the scope of Section

347 and decided how a Magistrate should proceed both under Chapter XVIII and Chapter XXI of the Code of Criminal Procedure. The Supreme Court observed at p, 43 as follows:

'It is true that it is open to a Magistrate to hold an enquiry from the beginning under Chapter XVIII in a case not exclusively triable by the Court of Session. But the mere fact that the Magistrate has such power does not necessarily indicate to the accused that he is holding an enquiry under Chapter XVIII rather than a trial before himself. Where the case is not exclusively triable by the Court of Session, the accused would naturally conclude that the proceedings before the Magistrate are in the nature of a trial and not an enquiry under Chapter XVIII. If the Magistrate intends to use his powers under Section 207 and hold an enquiry from the beginning in a case not exclusively triable by the Court of Session (as was the case in the reported decision), the only way in which the accused can know that he is holding an enquiry and not a trial is by the Magistrate informing the accused that he is holding an enquiry under Chapter XVIII and not a trial. If he fails to do so the accused can reasonably conclude that a trial is being held. In this case undoubtedly the Magistrate did not indicate to the accused from the beginning that his proceedings were in the nature of an enquiry under Chapter XVIII. Therefore the accused would naturally conclude that the proceedings before him were in the nature of a trial of warrant case as the summonses that they had received were under Section 406 of the Penal Code only. The fact that in the complaint Section 467, which is exclusively triable by a Court of Session, was mentioned is of no consequence for the summonses to the accused were only for a trial under Section 406 of the Penal Code. It must, therefore, be held that the proceedings before the Magistrate began as in the trial of a warrant case and if the Magistrate at a subsequent stage of the proceedings was of the view that the case should be committed to the Court of Session, he would have to act under Section 317(1) of the Code.'

Their Lordships next observation, which is very important for a decision in this Rule is being presently dealt with. Many decisions of various High Courts on this subject were placed before their Lordships but it was necessary for them to refer to those decisions for the words in Section 347 of the Code were quite clear. They

lay down that if the Magistrate comes to the conclusion that the accused ought to be committed to the trial, he should commit in accordance with the provisions contained in the earlier part of the Code, namely, in Chapter XVIII. This of course does not mean that the Magistrate must begin over again from the beginning. All that he has to do when he decides that the case ought to be committed, is to inform the accused and see that the provisions of Chapter XVIII are complied with, so far as they have not been complied with up to the stage at which he decides that there ought to be commitment. Further, their Lordships have repeated that it was not necessary that the Magistrate should begin from [the beginning again when he so makes up his mind to proceed with the enquiry under Chapter XVIII of the Code.

16. Mr. Banerjee has contended that the decision quoted above cannot have any application to the instant case because their Lordships were dealing with a case where an offence was made out as not exclusively triable by the Court of Session, but in the instant case the position is otherwise as the enquiry was sought to be started under Section 395, I. P. C. the offence being exclusively triable by the Court of Session. Accordingly the question is whether the decision applies *mutatis mutandis* to the cases exclusively triable by the Court of Session and not exclusively triable by such Court. Their Lordships have observed as follows in the concluding portion of paragraph 6 at p. 44 :--

'What we shall say hereafter must, therefore, be taken to apply only to a case which began as a proceeding in a warrant or summons case and in which the Magistrate at a later stage takes action under Section 347(1).'

From this observation it appears quite clear that their Lordships laid down a principle as to what procedure should be followed in respect of cases dealt with under Section 347, Cr. P. Code, by a Magistrate in warrant or summons cases irrespective of the question whether they are exclusively triable by the Court of Session or not. Furthermore, their Lordships have in clear terms held, as stated before, that the enquiry under Chapter XVIII should be commenced from the stage at which the learned Magistrate decided that there ought to be commitment. This decision in clear terms envisages that the evidence which was recorded under the

warrant procedure enumerated in Chapter XXI should not be knocked off and the Magistrate is required to give the accused all the facilities as provided for in Chapter XVIII from the stage when he decides under Section 347(1) that the enquiry procedure should be embarked upon. In such circumstances the Magistrate is not required to start examination of the very same witnesses once again but will be required to ask the accused to cross-examine the witnesses who were examined in chief in the trial under Chapter XXI and partly cross examined.

17. In this view of the matter, we are of the opinion that the Calcutta decision made by Debabrata Mookerjee, j. in (1956) 60 Cal WN 82 cannot any longer be (reared as good law.

18. Mr. Banerjee in the next place has invited our attention to Section 288 of the Code of Criminal Procedure. It provides that the evidence of the witnesses duly recorded in the presence of the accused under Chapter XVIII may be in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872. By quoting this section Mr. Banerjee urges that before the Court of Session the evidence given in the preliminary enquiry cannot be admissible unless the whole of it was recorded under the procedure laid down in Chapter XVIII of the Code of Criminal Procedure. His reason further is that the evidence which is recorded in part under the procedure laid down in Chapter XXI of the Code of Criminal Procedure cannot be engrafted into the evidence of the witness who is subsequently examined and cross-examined under Chapter XVIII of the Code. If this is done, an anomalous position will be created and such evidence tendered before the Court of Session under Section 288, Criminal Procedure Code cannot be treated as substantive evidence. Without going further into this matter we can at once refer to the decision in the case of AIR 1940 Lah 389, which we accept as correct. Their Lordships of the Lahore High Court have also observed that in such a case any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be evidence of the witnesses duly recorded under Chapter XVIII and may, therefore, be transferred and treated as substantive evidence under Section 288 in the trial before the Sessions Court and no prejudice could be said to have been caused by transfer of

the statement in question when he is duly informed that he has to be committed to the Sessions and has been given every opportunity to produce his defence both before and after the information. In view of this decision we do not think that the contention as raised by Mr. Banerjee is of any avail to the accused petitioners in the instant case.

19. In so far as Mr. Banerjee's first point is concerned, he has urged before us that we should look into the evidence recorded by the learned Magistrate as it would on the face of it warrant the conclusion that the learned Magistrate was wrong in exercising his discretion under Section 347(1) of the Criminal Procedure Code. Upon hearing the learned advocates of both the sides, we consider that at this stage it is not necessary for us to enter into the merits of the case for a decision whether the learned Magistrate correctly switched on to the warrant procedure or not.

20. In the result, the Rule must stand discharged. The Magistrate is directed to hold the enquiry under Chapter XVIII strictly in accordance with the law as provided for in Sections 208 to 213 of the Code and in terms of the observations made by us before. His order for recalling the witnesses for further cross-examination by the accused shall also stand.

21. Let the records be sent down at once.

A.C. Gupta, J.

22. I agree.