

Sasadhar Sarkar Vs. State

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Court : Kolkata

Decided On : Apr-03-1952

Reported in : AIR1952Cal627,56CWN485

Judge : Harries, C.J. and ; S.R. Das Gupta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 350(1) and 350(3)

Appeal No. : Criminal Revn. No. 99 of 1952

Appellant : Sasadhar Sarkar

Respondent : State

Advocate for Def. : N.C. Sen, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee and ; Kishore Mokerjee, Advs.

Disposition : Petition allowed

Judgement :

S.R. Das Gupta, J.

1. This is an application for revision of an order of the Additional Sessions Judge, 24-Parganas, affirming an order of a Magistrate, 1st Class, Alipore, convicting the petitioner under Section 408, Penal Code and sentencing him to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000/-, in default to rigorous

imprisonment for a further period of one year.

2. The prosecution case shortly stated is as follows. The petitioner was an employee of the complainant, Manibhusan Pal who had a goldsmith shop at No. 20, Orphangunge Market, Kidderpore. The petitioner, was entrusted with silver ornaments weighing 4108 bharis and odd annas to be sold at different places outside Calcutta. The petitioner along with his co-employee, one San'tosh Pal, went outside Calcutta and sold some of those ornaments and on return to the shop did not see the complainant or wait for him. He left the unsold ornaments in the shop but went home with the sum of Rs. 2796-9-6 being the sale proceeds of the remaining ornaments. The complainant waited for two days, but as the petitioner did not turn up he lodged information at the thana. Thereafter, a charge sheet was submitted by the police and the petitioner, was tried under Section 408, Penal Code, and convicted and sentenced as mentioned.

3. The case was first tried by another Magistrate and. on such trial the petitioner was convicted. Against that conviction he preferred an appeal. The learned Additional Sessions Judge on hearing the appeal held that there was no proper charge and, therefore, no proper trial and he sent back the case for a fresh trial by some other Magistrate with a direction that the case has to be retried after framing a proper charge on the prosecution evidence that was already on the record and allowing the accused an opportunity to cross-examine the witness and adduce evidence, if so' desired. Thereafter another Magistrate tried the present case and in accordance with the said direction of the Additional Sessions Judge proceeded to try it from the point when the charge had to be framed. He did not hear the evidence of the witnesses for the prosecution which was given before the previous Magistrate.

After such trial, he found the petitioner guilty of the offence with which he was charged and convicted him, as aforesaid. Against that conviction the petitioner preferred an appeal to the Additional Sessions Judge and one of the points urged before him was that the trial. by the Magistrate should have been a de novo trial. In other words, it was contended that he could not start the case from the stage when the charge had to be framed. That contention of the petitioner was negatived

by the learned Additional Sessions Judge who took the view that the case was covered by section 350 of the Code of Criminal Procedure; and as the accused, who had the right to have the witness recalled and reheard, did not exercise that right, the question as to the application of proviso (a) of Section 350 did not arise.

The learned Additional Sessions Judge further held that an order had already been passed previously by the then Additional Sessions Judge before whom the appeal against the previous conviction had been heard, and as there was no appeal against the said order of the Additional Sessions Judge and as the trial took place in accordance with the directions contained in the said order, the said contention could not now be raised by the petitioner.

4. He also came to the conclusion that on the evidence the guilt of the accused had been established and he upheld the conviction of the petitioner. Against the said order of the Additional Sessions Judge the present application has been made.

5. In my opinion, the view of the learned Additional Sessions Judge namely that the present case was governed by the provisions of the said Section 350 was entirely erroneous.

6. Section 350, Criminal P. C. inter alia provides as follows:

'(1) Whenever any Magistrate; after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the inquiry or trial.'

7. Proviso (a) of the said section reads as follows:

'In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard.'

8. We are not concerned in this case with the remaining provisions of Section 350 except subsection(3) which provides as follows:

'When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section (1).'

9. In my opinion, the present case is not, governed by Section 350, Criminal P. C. In other' words, the learned Additional Sessions Judge who heard the previous appeal could not direct the case to be tried by some other Magistrate from the stage when the charge had to be framed and on the prosecution evidence that was already on the record. Section 350 applies to a case where the previous Magistrate after having heard and recorded the whole or any part of the evidence ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction and it is then that the new Magistrate may act on the evidence so recorded by his predecessor. But, in the present case, the order of the previous Additional Sessions Judge directed the new Magistrate to proceed with the trial on the evidence already on the record irrespective of the fact as to whether or not the previous Magistrate could continue the said trial. Section 350, Criminal P. C. could not apply to such a case.

10. In the case of 'QUEEN v. RUGHOO-NATH DAS', 23 W R Cr 59, 'it has been held that it is a general principle that judgment must be delivered by the Judge who has heard the evidence. In the case of 'HARDWAR SINGH v. KHEGA OJHA', 20 Cal 870, it has been held that an Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case.

In delivering judgment in the said case their Lordships held as follows:

'There is no doubt that, apart from any statutory provision, the only persons who can decide a case are those who heard the evidence and the arguments. The question remains whether the Code of Criminal Procedure permits this to be done in this case. The only section of the Criminal Procedure Code which expressly empowers one Magistrate to act upon the evidence recorded by another is section

350, which clearly has no application to the present case. That applies only to a case where a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate who has and exercises such jurisdiction. It does not appear that Mr. H. E. Crowdy at any time ceased to exercise jurisdiction in this case. This section is obviously intended to meet the case of transfer of Magistrates from one district to another, and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer.'

11. These observations of their Lordships to my mind make the position quite clear. The general rule is that the only person who can decide a case is the person who heard the evidence and the arguments. Section 350 is an exception to that rule. It permits, only in cases where, because of transfer or for other reasons, the Magistrate who had been trying the case could not proceed with the case any further, the succeeding Magistrate to take up the case from the point where the previous) Magistrate had left it. Section 350, Cr. P. Code, cannot apply to a case where, as at present, the Appellate Court makes an order directing a case to be tried-afresh by a new Magistrate irrespective of the fact as to whether or not the previous Magistrate had ceased to exercise jurisdiction.

12. The learned Advocate appearing for the opposite party drew our attention to the case of 'RAMANATHAN CHETTIAR v. EMPEROR', 46 Mad 719. In that case, all that has been laid down is that in warrant cases all proceedings before the charge is framed are only 'enquiry' and not 'trial' and hence if there is a change of Magistrates before a charge is framed then, in such cases, the accused is not entitled to a fresh examination of witnesses as provided in Section 350(1) (a), Criminal P. C. The only question which their Lordships in that case were considering was whether or not the proviso (a) to Section 350(1) would apply to a case where the charge had not been framed and the matter was still at the stage of enquiry, because, the word used in proviso (a) of Section 350 (1) is 'trial' and not 'enquiry' whereas the words used in Section 350(1) are 'inquiry or trial.'

In this case we are to consider whether or not Section 350 at all applies to the present case and whether the order made by the Additional Sessions Judge could be made under the said section. Apart from this, the view taken by their Lordships

in that case runs contrary to the views taken in this High Court and in the High Courts of Bombay, Lahore and Nagpur. I do not think that this case helps the learned Advocate in his contention.

13. Mr. Sen then cited before us a decision of the Madras High Court in the case of 'LAKSHMIREDDY v. MUNI REDDY', 54 Mad 512. That was a decision of a single judge. What, happened in that case was that the Sessions Judge of Chittor acting under Section 436, Criminal P. C. directed further enquiry and returned the case to the original court. Meanwhile, there had been a change of Magistrates, and the new Magistrate, after posting the case for enquiry, framed a charge without re-examining the witnesses already examined. Thereupon, the accused petitioned the District Magistrate of Chittor, who transferred the case, holding that the procedure adopted by the Sub-Magistrate was illegal and diametrically opposed to the authoritative rulings. That matter came up before the High Court of Madras and the learned Public Prosecutor wanted to draw a distinction between cases where there had been a change of Magistrate in the course of the enquiry in the original court, and where the enquiry had been closed by one Magistrate in the original court and then reopened by the Sessions Judge when another Magistrate has succeeded.

His Lordship held that latter circumstances did not carry the case out of the purview of Section 350. The question which came up for the consideration of his Lordship in that case was whether there was any distinction between cases where there has been change of Magistrates in the course of the enquiry in the original court, and where the enquiry has been closed by one Magistrate in the original court by an order of discharge and then reopened by the Sessions Judge when another Magistrate has succeeded. But the question as to what would happen-whether the case would still be within the purview of Section 350 - where the matter has been sent back by the Sessions Judge for retrial by another Magistrate, irrespective of the question as to whether or not the Magistrate who originally tried the case was available, did not come up for his Lordship's consideration.

14 The next case which needs consideration is the case of 'GOMER SIRDA v. QUEEN EMPRESS', 25 Cal. 863. What happened in that case was that the

petitioners were convicted of rioting and they appealed to the Sessions Judge, who upheld the conviction. An application was then made to this Court to have the conviction set aside, upon the ground that the Magistrate had not exercised a proper judicial discretion, in refusing to allow certain witnesses whom the accused desired to call, to be called. That application was successful and this Court set aside the conviction and sentence and sent the case back for retrial, the Magistrate commencing the investigation from the point at which it was left on March 15 before he delivered judgment. It appears, however, that that Magistrate had left the District, and another Magistrate had taken his place and the new Magistrate proceeded to take up the case from the point where the previous Magistrate had left it.

When the case started, the accused demanded that the witnesses who had been previously examined before the other Magistrate should be resummoned and reheard. The second Magistrate did not hear any of the evidence. The Magistrate refused to accede to that demand. Against that decision, the matter was brought to the High Court. Their Lordships came to the conclusion that the question involved turned upon the construction of proviso (a) to Section 350, Criminal P. C, and their Lordships further held that that proviso being applicable the petitioner was within his right to demand that the witnesses be recalled. It appears that in that case, to use the words of Maclean, C. J., 'the Judges of this Court in making that order directing that the Magistrate should rehear the case from the point at which it was left before he had delivered judgment were under the impression that the same Magistrate would continue to hear the case', but as that Magistrate, had left the District and another Magistrate had taken his place, the case had to be heard by the new Magistrate and he proceeded to complete the said trial. That is a situation where, in my opinion, Section 350 would apply.

That is not the position here. In this case, the direction by the Court of Sessions v/as that some other Magistrate should continue the hearing, but from a certain stage. That order was made irrespective of the fact whether or not the previous Magistrate was available and could continue the said trial. In the said case of 'GOMER SIRDA v. QUEEN EMPRESS', the second Magistrate continued the trial because the first Magistrate had ceased to exercise jurisdiction as contemplated in

Section 350, Criminal P. C. But in the case before us it cannot be said that the Second Magistrate continued the trial because the first Magistrate had ceased to exercise jurisdiction as contemplated in the said section.

In the case of 'GOMER SIRDA' the intention of the Judges of this Court in making the direction was that the original Magistrate would continue the trial from the point at which it was left before he delivered judgment. It was only because that Magistrate ceased to exercise jurisdiction, he having been transferred, that the second Magistrate had to try the case. In such a case, as I have said, Section 350 would be applicable, but it would not be applicable to the present case which, as I have said, stands on a different position.

15. In the premises, I am of the opinion that the present case is not governed by, and does not come within the purview of Section 350, Criminal P. C. The said section has no application to the present case.

16. It was then argued before us that in view of the provisions of Sub-Section (3) of Section 350, Criminal P. C. the present case comes within the purview of Section 350. Sub-Section (3) of Section 350 provides:

'When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1)'.

17. The transfer contemplated under the said sub-section is, in my opinion, a transfer in a pending trial. Chapter XLIV, Criminal P. C. deals with the question of transfer of criminal cases, as the heading of that Chapter indicates. Under Section 526, High Court may transfer a case or itself try it under certain conditions mentioned therein. Under Section 526A, The High Court may transfer for trial to itself certain cases. Under Section 527, the Provincial Government has the power to transfer cases and appeals. Under Section 528, a Sessions Judge may withdraw any case from, or recall any case which he has made over to any Assistant Sessions Judge; and the District and Sub-Divisional Magistrate have been given similar power under the said section. These are the sections in Criminal P. C. which deal with the question of transfer. But the present case does

not fall within any one of those sections. It is clearly a case of retrial and not a case of transfer under the provisions of this Code.

18. In the present case, the direction which had been given by the learned Additional Sessions Judge amounted to a direction for retrial. If, as in this case, a trial has been concluded and thereafter there has been an appeal against the final order made in the said trial and on appeal the order of the trial court has been set aside and the case sent back for a fresh trial to some other Magistrate, then it cannot be said that the case has been transferred under the provisions of this Code from one Magistrate to another as contemplated in subsection (3) of section 350.

19. In the premises, I am of opinion that, this case does not fall within the purview of Sub-Section 3 of Section 350, Criminal P. C.

20. Assuming Section 350 applies to the present case, even then the said order of the Additional Sessions Judge cannot be a valid order and the trial held in accordance with the directions contained therein cannot be said to be a valid trial. Under proviso (a) to section 350 (1), Criminal P. C, the accused may, when the second Magistrate commences the proceedings, demand that the witnesses or any of them be resummoned and reheard. That is a valuable right which has been conferred on the accused even under Section 350, Criminal P. C. But that right seems to have been taken away by the learned Additional Sessions Judge by his said order, because, the Additional Sessions Judge by his said order directed the other Magistrate to proceed with the case after framing a proper charge on the prosecution evidence that was already on the record; That was a direction which the Magistrate was bound to follow and he was bound to proceed to trial after framing a charge on the prosecution evidence that was already on the record.

That being so, there was no room for application of proviso (a) to Section 350 (1), Criminal P. C. In other words, the right which has been conferred on the accused by the said proviso to demand the witnesses to be resummoned and reheard was taken away by the said order of the Additional Sessions Judge. The accused could not, in view of the said direction of the Additional Sessions Judge, make any such application and if the accused did make such an application, the Magistrate, bound

as he is by the order of the Additional Sessions Judge, had to refuse the same. That being sp, the said order of the learned Additional Sessions Judge, in any view of the matter was clearly wrong and the trial held in accordance with the said order was bad, and the conviction and sentence passed therein should be set aside.

21. Lastly, it has been urged before us that no appeal having been preferred against the said order of the Additional Sessions Judge, the matter is concluded by the said order, and no objection can now be raised as to the validity of the trial which had taken place pursuant to the said order. I am unable to accept that contention. The fact that there was no appeal from the order of the Additional Sessions Judge does not, in my opinion, alter the position as to the validity of the trial. If the trial has been vitiated and is bad, because of the reasons mentioned, then a conviction made in the said trial is also bad and should be set aside. It does not matter even if the order in accordance with which the trial has taken place has not been appealed from. That would not make the trial a good trial. The trial is none the less a bad trial, it having taken place in a manner not warranted by law and the conviction made therein cannot therefore stand.

22. In the premises, the matter should be sent back for retrial. The retrial should take place before a Magistrate, different from those two Magistrates who have dealt with the matter, to be nominated by the District Magistrate, and he will try the whole case afresh.

23. The petitioner will continue on the same bail.

Harries, C.J.

24. I agree.

25. Even assuming that Section 350, Criminal P. C. can possibly apply to this case, nevertheless the trial is bad. As pointed out by my learned brother, the order of the learned Additional Sessions Judge took away the accused's right to demand that the witnesses be resummoned and reheard. That being so, even if the further hearing could be regarded as being under Section 350, the hearing was not in

accordance with law.

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