

Ananta Kumar Karan Vs. the State

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Court : Kolkata

Decided On : Jan-24-1962

Reported in : AIR1962Cal428

Judge : P.B. Mukharji and ;N.K. Sen, JJ.

Acts : Code of Criminal Procedure (CrPC) (Amendment) Act, 1955 - Section 116; ;
[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 4, 207A, 208 to 213, 374,
512 and 532; ;Indian Penal Code (IPC) - Section 302

Appeal No. : Ref. No. 7 of 1961 with Appeal No. 438 of 1961

Appellant : Ananta Kumar Karan

Respondent : The State

Advocate for Def. : J.M. Banerjee and ;Birendra Nath Banerjee, Adv.

Advocate for Pet/Ap. : Ajit Kumar Dutta and ;Jyotirmoyee Nag, Adv.

Judgement :

N.K. Sen, J.

1. Ananta Kumar Karan was tried by the Additional Sessions Judge, 24 Parganas and a jury on a charge under Section 302 of the Indian Penal Code. The jury unanimously found him guilty and the learned Judge agreeing with and accepting

the said verdict convicted him of the charge and sentenced him to death. The present Reference is under Section 374 of the Code of Criminal Procedure for confirmation of the sentence of death by this Court and the appeal is by the convicted person against the order of his conviction and sentence. Both the Reference and the Appeal are being heard together.

2. The prosecution case is a simple one. The deceased, Nemai alias Ajit Chatterjee a young man of about 20 years of age was a resident of Malancha Mahinagar and was the brother's son of P. W. 3 Nanda Gopal Chatterjee. On the 23rd November, 1954 the deceased went to Baruipur Kutchery Bazar by train and came back by bus at about 3-30 p.m. after purchasing some goods for his household and also some others for one Nanda Babu. He brought some pan for P. W. 11 Puspalata Show arid went to her place to hand them Over personally to her shortly after his return from the bazar. He found the lady outside her house, made over the pan to her and proceeded towards his own, house followed by P. W. 8 Madhabilata, the daughter of Puspalata about 7 years old then. After he had gone but a little distance he was hit by the accused with a brickbat covered in a paper packet in consequence of which he fell down. Immediately thereafter the accused ran up to him and started striking him with a short sword or sword-like weapon causing severe incised wounds on the victim. Thereafter on seeing that P. W. 1 Phani Bala Dasi and P. W. 2 Panchu Gopal Das both residents in the neighbourhood of the place of occurrence and P. W. 6 Anathnath Mukherjee and P. W. 7 Manindra Nath Chatterjee, the two young men of Mahinagar who were coming that way from Mallikpore Railway Station were running towards the site of the assault, the accused fled away towards his own house with the blood-stained instrument in hand. The injured was carried by P. W. 2 Panchu Gopal Das, P. W. 6 Anathnath Mukherjee and P. W. 7 Manindra Nath Chatterjee to the house of P. W. 23 Mrigendra Lal Sarkar where many people gradually gathered. To them Nemai named the appellant as his assailant and said that the appellant had caused the injuries on him with a sword.

3. Nemai was then given Erst aid by two doctors P. W. 9 Dr. Sushil Kumar Bhattacharjee and P. W. 15 Dr. Haraprosad Bhattacharjee. On their advice Nemai was removed to Nil Ratan Sarkar Hospital in a taxi where he was admitted as an

indoor patient. In the meantime P. W. 3 Nandagopal Chatterjee and p. W. 24 Ajit Kumar Bhattacharjee went to Sonapur Police station where Nanda Gopal lodged the first information, report at 9 a.m. The police thereupon proceeded to the place of occurrence, took some preliminary steps and seized certain alamats. P. W. 26 Haripada Brahma, Sub-Inspector of Police went to the house of the appellant at about midnight when the appellant was found absent from home. In that house the Sub-Inspector seized a wet blood stained cloth which was then spread out for drying. The police thereafter went to Nil Ratan Sarkar Hospital at about 4-30 p.m. on the 24th November 1954. At the hospital P. W. 21 Saroj Kumar Dutta, Sub-Inspector of Police of Entaily Police station recorded the dying declaration of the injured Nemai in the presence of P. W. 20 Dr. Subimal Sarkar, Medical Officer of the Hospital. Nemai, however died on the 28th November, 1954 at 12-45 p.m.'

4. The appellant could not be traced till the 20th of January, 1961 when P. W. 18 Shyama Prosad Majumdar apprehended him in a moving tram car at Dharamtolla street and handed him over to the police constable on duty.

5. During the long absence of the appellant, it appears that warrant of arrest, proclamation and attachment were issued and a charge-sheet against him was submitted on the 24th December, 1954 showing him as absconding. Evidence of witnesses was recorded by a Magistrate under Section 512 of the Code of Criminal procedure and the case against him was 'filed sine die', on the 29th July, 1955.

6. After the production of the appellant in court Sri A.K. Mukherjee, Magistrate, proceeded with the enquiry, examined five witnesses and ultimately committed him to the court of Session with the result mentioned above.

7. The appellant pleaded not guilty to the charge and asserted that he had been falsely implicated out of enmity and litigation. He also stated that he left the village on the night of the date of occurrence for fear of assault by the police. He stated further that there was ill-feeling between one Ananta Chatterjee and the deceased Nemai over affairs: relating to woman.

8. Mr. Ajit Kumar Dutta appearing on behalf of the appellant has in the first place taken a preliminary objection. He contends that the cognizance taken by the Additional Sessions Judge being on an illegal and invalid commitment the relative trial was entirely bad. He points out that the recording of evidence under Sec. 512 of the Code of Criminal Procedure started on the 23rd February, 1955 by Shri M.L. Chatterjee, Magistrate at a time when the amended Criminal Procedure Code had not come into existence Section 116 Criminal Procedure Code (Amendment) Act of 1955 (Act XXVI of 1955) provides certain savings. Section 116 (c) reads:

'The provisions of clause (w) of Section 4 or Section 207 A or Section 251 A or Section 260 of the principal Act as amended by this Act, shall not apply to, or affect any inquiry or trial before a Magistrate in which the Magistrate has begun to record evidence prior to the date of such commencement and which is pending on that date, and every such inquiry or trial shall be continued and disposed of as if this Act had not been passed'.

9. On behalf of the State it is contended that the enquiry or trial referred to in Section 116(c) of the amending Act has reference only to those sections mentioned earlier therein, namely, Clause (w) of Section 4 or Section 207A or Section 251A or Section 260 of the principal Act. In that view of the matter the recording of the deposition under Section 512, Criminal Procedure Code, during the absence of the accused cannot be treated as the record of evidence in course of an enquiry under Chapter XVIII of the Code. It is also significant to note that Chapter XVIII nowhere contemplates the recording of any evidence in the absence of the accused.

10. Our attention has been drawn to an unreported decision of this Court in the case of Durgadas Gupta v. State, Criminal Appeal No. 6 of 1958, D7- 28-9-1961 (Cal) decided by the Chief Justice and Mr. Justice Debabrata Mookerjee on appeal from a conviction on a trial held under the Sessions Division of this Court

11. It must be pointed out that neither in the course of appeal submitted from jail nor in the grounds of appeal as drawn up in the memorandum of appeal, there is any mention of this ground now canvassed before us. It is significant also that no objection was at all taken at the time of the trial before the court of Session. We

have heard both Mr. Dutta for the appellant and Mr. Banerjee for the State at length on this point as it was submitted before us that it goes to the very root of jurisdiction and makes the whole trial void. Mr. Dutta's argument is that the learned Judge should have proceeded with the enquiry in accordance with the provisions contained in Sections 208 to 213 of the Code and the learned Judge not having done so has deprived the appellant of some of his valuable rights--such as to examine witnesses on his behalf and his right to cross-examine the prosecution witnesses. Mr. Dutta argues that this denial of his rights has seriously prejudiced his client.

12. This preliminary objection may be disposed of first. The decision in the case of Criminal Appeal No. 6 of 1958 (Cal) cited and relied upon by Mr. Dutta is in my view, practically of no assistance to his client. In that case the offence charged was under Section 471/466 of the Indian Penal Code which was a non-cognizable offence. It was investigated into by the Special Police Establishment after obtaining the permission of the Chief Presidency Magistrate of Calcutta. Charge-sheet was submitted in this case in June, 1956 and the provisions of Sec. 156 of the Code of Criminal Procedure were not extended to the Calcutta Police until 1958. In effect the charge sheet that was submitted was not the result of an investigation under Chapter XIV and was not the police report within the meaning of Section 173 of the Code of Criminal Procedure. Indeed at that relevant time a Presidency Magistrate had no power to proceed under Section 207A of the Code. Their Lordships held that the proceedings in question were not validly commenced before the committing Magistrate and hence he could not possibly have taken cognizance of the offence. Their Lordships in course of their judgment pointed out that the Magistrate "surely had power to commit under Section 206, Criminal Procedure Code_ but it can never be said that he had power to commit in the way he did, even though he had not power to take cognizance."

13. With very great respect to their Lordships it is not understood how a Magistrate who had no power to take cognizance could commit the accused in any manner at all. Taking cognizance is a condition requisite for initiation of the proceeding, Unless this requisite condition is fulfilled I do not see how there could be any enquiry under Chapter XVIII irrespective of any question as to procedure. In that

view of the matter I do not think that this decision helps the appellant at all.

14. Reference was also made to the case of Anant Gopal Sheorey v. State of Bombay decided by the Supreme Court and reported in : 1958 CriLJ1429 . In that case the effect of Section 116 (c) of the amending Act upon the newly enacted Section 342-A was considered. Their Lordships held that a change in the law of procedure operates retrospectively and On the plain construction of Section 118 of the amending Act Section 342-A was applicable to the criminal proceedings pending before a Magistrate and in which the recording of evidence had commenced. In this decision the point now argued before us did not arise at all.

15. Mr. Banerjee on behalf of the State has contended that the appellant cannot be allowed to agitate this point at this stage of the case and in any view of the matter the point raised by Mr. Dutta is of no substance. He had drawn our attention to a Division Bench decision of this Court in the case of State v. Abdul Rahaman Mandal : AIR1953 Cal792 .

16. Having heard the learned counsel on both sides I am of the view that it is impossible; in the present case to contend that the recording of evidence under Sec. 512 of the Code of Criminal Procedure by Sri M.L. Chatterjee up to the 29th of July 1955 when the case was ordered to be filed sine die had anything to do with the inquiry under Chapter XVIII which inquiry could only start on the production or appearance of the accused in court. It will be seen that the accused was produced on the 24th March 1961 when he was given copies of the documents referred to under Section 173 of the Code. Thereafter on two dates five witnesses, who, it appears had also been examined by Sri M.L. Chatterjee later on, were examined and ultimately on the 29th April, 1961 the accused was committed to the Court of Session for trial. In my view inasmuch as upon the evidence recorded under Section 512 of the Criminal Procedure Code the accused could not have been committed to the Court of Session, the inquiry under Chapter XVIII really started when evidence was taken in his presence. In the case of the Queen v. Bocha Chowkeedar reported in 22 Suth WR CrL 33 it was held that where an accused was committed to sessions merely on the depositions of the witnesses recorded in the absence of the accused the commitment was held to be illegal.

17. If we notice the provisions contained in Section 532 of the Code, namely,

'If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.'

It is to be seen that in view of the provisions contained in section 532 of the Criminal Procedure Code, the present order of commitment cannot now be challenged at this stage. The order of Sri A. Mukherjee, Magistrate, who passed the order of commitment was purported to be in exercise of the powers duly conferred upon him to proceed under the provisions of Section 207-A although it may be that he had only authority in this case to proceed under Sections 208 to 213 of the Code cannot now be called into question after the trial is over.

18. It is not in my view necessary to deal with the question whether or not Section 532 Cr. P. C. has any application inasmuch as I consider that the inquiry in this case really started on the appearance of the accused in court.

19. As to the supposed prejudice to the accused in this case, a comparison of section 207-A with the provisions contained in the various sections, namely, Sections 208 to 213, would show that there could hardly be any real prejudice to the accused when he is tried in a Court of Session as a result of commitment made in accordance with the provisions of Section 207-A instead of being committed under Section 213. The right to cross-examine the witnesses is guaranteed by Sub-section (5) of Section 207-A.

20. The real question then is even if it be assumed that the inquiry in this case under Chapter XVIII of the Code started when evidence was recorded in the absence of the accused, was there any real prejudice caused to him by this order of commitment. Prejudice is a question, of fact and must be inferred from the conduct of the accused and the facts proved in the case.

21. As to any prejudice being, caused, we find that there could be none. In the case of Willie (William) Slaney v. State of Madhya Pradesh : 1956 CriLJ291 their Lordships of the Supreme Court pointed out at page 201 of the reports (of SCA) : (at p. 127 of AIR):-

'It is the substance of the provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent'.

We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms and that it must all be explained to him so that he really understands. At page 204 (of SCA) : (at p. 128 of AIR) their Lordships further said :-

'If on a careful consideration of all the facts prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection * * * * was taken at an early stage'.

Their Lordships of the Supreme Court took the same view in the case of K.C. Mathew v. State of Travancore Cochin : 1956 CriLJ444 . In another case Gurbachan Singh v. State of Punjab : 1957 CriLJ1009 their Lordships following the above: two decisions came to the conclusion on the question of prejudice that:-

"Courts must act with a broad vision and look to the substance and not to technicalities and their main concern should be to see whether the, accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.'

22. In the Division Bench decision : AIR1953 Cal792 , their Lordships Guha Ray and Debabrata Mookerjee JJ. held that:

'the disregard of the provisions while it will certainly entitle the aggrieved party to have a commitment quashed on the ground of such contravention, will not entitle the aggrieved person to challenge the final order of conviction unless that has

occasioned a failure of justice'.

23. Even in the case of H.N. Rishbud v. State of Delhi. : 1955 CriLJ526 , cited by Mr. Dutta, to support his contention that in the present case the violation of the mandatory provision of Section 116(c) of the amending Act would be an incurable irregularity, it will be noticed that their Lordships of the Supreme Court pointed out in that case that although the trial in that particular case was proceeded by taking a cognizance in violation of mandatory provisions of the Code, it did not necessarily follow that it would nullify the cognizance or the trial based thereon and that the result of the trial that followed could not be set aside unless such illegality could be shown to have brought about a miscarriage, of justice.

24. Considering all the facts and circumstances of the case we are of the view that there was no prejudice caused to the accused even if it be assumed that he was committed to trial by a Magistrate following the procedure which he should not have followed.

25. The summing up by the learned Sessions Judge has been criticised by Mr. Dutta on the ground that the learned Judge in various places quoted Supreme Court decisions to the jury with the result that they were confused, Again Mr. Dutta has pointed out that the learned Judge definitely misled the jury by telling them that there was a presumption of truth in favour of the witnesses because they had given their evidence on oath. Mr. Dutta further pointed out that in dealing with the defence case at page 105 of the paper book, the learned Judge told the jury that as a result* of cross-examination of P. W. 1 certain points rather favourable to the prosecution were elicited and those seem to fit in admirably with the facts relied upon by the prosecution.

26. Mr. Bannerjee appearing for the State has not seriously contended that these are not misdirections. But since in the reference under Section 374 of the Code we are to examine the entire evidence to satisfy ourselves if the order of conviction of the appellant and the sentence passed upon him were justified, we propose to examine the records for that purpose.

27-33. (After discussion of evidence His Lordship proceeded.) We have carefully considered the statement of the appellant under Section 342 of the Criminal Procedure Code. He said that he had been to the hospital before the occurrence and had an operation performed on his abdomen. He left for his sister's house on the night of the occurrence for fear of assault by the police. After having given our anxious consideration to his statement we find that there is nothing in it which can take away the solid facts proved against him by witnesses whose testimony cannot but be accepted as substantially correct. The nature of the injuries, the vital parts of the body on which they were caused, the instrument used to cause them--all but indicate the intention of the assailant. It cannot be doubted that his intention was to cause death and in any event, the assailant must have had the knowledge as to the consequence of such injuries when caused on the vital parts of the body. That being the position, the order of conviction, under section 302 of the Indian penal Code must be maintained.

34. The next question to be considered is the question of sentence. We have already said that a large number of incised injuries were inflicted on the deceased by a cutting weapon which is a sword. That the assault was of a brutal nature admits of no doubt. Mr. 'Dutta has pleaded: that in the present case the extreme penalty should not be passed on the appellant. He has in this connection asked us to take into our consideration that there has been a considerable lapse of time after the crime was committed and, at any rate, the prosecution could not suggest the motive of the crime. It is further pointed out that the appellant is of rather advanced age at the present moment and that he has his wife and a number of female children living.

35. The question to be considered is whether the extreme sentence is to be passed on the appellant in the facts of this case or whether there are reasons for abstaining from doing so. We are not unmindful of the fact that the Court has power and! no doubt must consider where there. Has Been inordinate delay, to allow the appeal so far as the death sentence is concerned and substitute a sentence for imprisonment for life on account of the time factor alone. But in a case of murder in which the extreme penalty of law is called for the circumstances that the murderer absconded for a number of years before he was brought to trial,

is not by itself a ground for reducing the sentence of death to one for life imprisonment. We have also taken into our consideration the reason which weighed with the learned Judge in inflicting the sentence of death passed on the appellant

36. Although the assault was of a brutal nature, the fact remains that the prosecution did not even try to prove a motive for such a murderous and brutal assault. The question for our consideration now is whether this fact or the other points which Mr. Dutta has advanced in mitigation of the sentence of death are really grounds for not inflicting the sentence of death which the learned Sessions Judge thought fit to impose on the accused. We have considered the matter with great care and in our opinion, the fact that the accused is of advanced age having his wife and children living, constitutes an extenuation of an offence which at first strikes one as brutal beyond words and we think that in the circumstances of this case we shall be justified in imposing the lesser sentence in preference to the extreme penalty of the law.

37. The sentence of death accordingly, is commuted to a sentence for imprisonment for life.

38. The result is that the reference under section 374 of the Criminal Procedure Code is rejected. The appeal of Ananta Kumar Karan is dismissed and the conviction of the appellant under section 302 of the Indian Penal Code is upheld subject to the modification that the sentence of death passed on him is commuted to one for imprisonment for life.

P. B. Mukharji, J.

39. I agree. The order of commitment in this case has been challenged On behalf of the appellant as being totally bad and illegal and therefore void. Accordingly it is argued that the whole trial based on such an illegal order of commitment is itself illegal and without jurisdiction.

40. This argument is based On three major facts. The first is that the evidence in this case started on the 23rd February, 1955, and the order for commitment was

made on the 29th April, 1961. The second is that between the 23rd February, 1955, and the 29th April 1961, the Criminal Procedure Code (Amendment) Act of 1955, (Act XXVI of 1955) came into force on the 1st January, 1956. The third is that the Magistrate made the commitment under the new procedure under section 207-A of the Code of Criminal Procedure to this pending case which is said to be expressly excluded by Section 166 (c) of the amended Act of 1955

41. As an order of commitment, liable to be quashed in law, going to the very root of the matter, is ordinarily challenged at the earliest opportunity and in any event before and not after the trial is concluded, it was argued by the appellant in this case that the application of the new procedure has led to a grave failure of justice or miscarriage of justice, and therefore the appellant should even now that the whose trial is over and verdict given, be allowed to assail the order of commitment, although the point was never urged earlier and is not even in the grounds of appeal. The failure of justice is said to occur because of three main reasons: (1) right of the appellant to cross-examine before charge under the old procedure was not available under the new procedure (2) right under the old procedure to Sections 211 to 213 of the Code of Criminal Procedure and particularly the right to have the charge cancelled before the order of commitment under Section 213 (2) of the Code of Criminal procedure was not available under the new procedure and (3) right under the old procedure to proceed on evidence only and not also on police papers as done in this case under the new procedure. On these three grounds Mr. Dutt has contended that his client, the appellant, has been greatly prejudiced. He describes the first two grounds as procedural and the third substantive.

42. A little closer analysis of this last argument will show that there has really been no miscarriage of justice. The point is of great importance, because failure of justice or miscarriage of it, is the very essence of the reason for quashing an order of commitment which has no longer remained at that stage but has taken the full swing of the whole procedure by having a trial and a conviction thereunder. At no stage of the proceeding was this particular point of illegality of the order of commitment was taken on behalf of the appellant. The reasons why I consider that there has been no miscarriage of justice will be plain from a broad comparison

between the rights under the old procedure and the rights under the new procedure.

43. The first point on behalf of the appellant is that there is no right to cross-examine before charge under the new procedure. That was a right, it is contended, available only under the old procedure. Therefore it is said that the Magistrate in acting under the new procedure to make the order of commitment gravely prejudiced the appellant. Let Us examine this contention with reference to the actual language of the section concerned. Under Section 208 (2) of the Criminal Procedure Code it is expressly provided that the accused shall be at liberty to cross-examine the witnesses for the prosecution and in such case the prosecutor may re-examine them no doubt it is a very valuable right. But the question is that under section 207-A of the new procedure this right has not been denied. The accused has not been robbed of this right under the new procedure. Sub-section (5) of Section 207-A of the Code of Criminal Procedure as amended expressly provides that the accused shall be at liberty to cross-examine the witnesses examined under Sub-section (4) and in such case the prosecutor will re-examine them. Sub-section (4) of Section 207-A of this newly amended Criminal Code provides that the Magistrate shall proceed to take the evidence of such person, if any, as may be produced by the prosecution as witness to the actual commission of the offence alleged and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution he may take such evidence also. Speaking for myself I do not see on this comparison any difference, which can be said to prejudice the accused under the new procedure.

44. Secondly Mr. Dutt's contention has been that as the Magistrate had followed the new procedure his client has lost the right to have the charge cancelled before the order of commitment under Section 213 (2) of the Code of Criminal Procedure. That again seems to be an argument unsound on its merits. But here again there is also no material difference. Section 213 (2) of the Code of Criminal Procedure says that if the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused. The new procedure does not make any real

difference on this point. The new procedure on this point is contained in Sub-section (6) of Section 207-A of the Code of Criminal Procedure. It provides that when the evidence referred to in Sub-section (4) of the amended Act has been taken and the Magistrate has considered all the documents referred to in Section 173, and has if necessary examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such, evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. That to my mind is a clear provision recognising the right comparable to the right available under Section 213 (2) of the Code of Criminal Procedure.

45. Thirdly, Mr. Dutt's contention On this point is that the consideration of police papers has irretrievably vitiated the proceedings in this case. Here again the new procedure is not so prejudicial as suggested in the argument. The trial in this case did not proceed on police papers only or at all but on evidence which was legally given, tendered and admitted and duly cross-examined and tested on behalf of the appellant. The Magistrate could have proceeded on police papers only but he has not in fact done so in this case. He had taken both the evidence on record as well as the police papers into consideration. Irregularity, even if any in considering police papers under the old procedure, would not be an incurable irregularity which will vitiate the proceedings because of the express provision in Section 529 (e) of the Criminal Procedure Code when a Magistrate proceeds under section 119 (b) on a report in writing of facts made by any police officer. From this point of view this procedure on this point, far from being prejudicial to the appellant was in his favour. The order of the 29th April, 1961, as noted in the order-sheet of the Magistrate makes it quite clear that he considered not only the documents referred to in Section 173 of the Criminal Procedure Code but also the evidence on record and the statement of the accused person. He had the police papers available for him and it was not that anything was done behind his knowledge which could be said to have prejudiced him at all. By his earlier order dated the, 24th March, 1961, the Magistrate furnished all the documents referred to in Section 173, Cr. P. C. to

the accused. Besides, as indicated above the trial followed not on the police papers but on legally admitted and tendered evidence which was duly cross-examined on behalf of the appellant.

46. For these reasons I am unable to accept the argument of Mr. Dutt that there has been any failure or miscarriage of justice in this case or any prejudice to the accused.

47. Reliance was placed by Mr. Dutt on behalf of the appellant on the unreported decision in *Durgadas Gupta v. The State*, of a Division Bench of this Court in Criminal Appeal No. 6 of 1958, D/- 28-9-1961 (Cal), which has been exhaustively discussed by my learned brother. It is not necessary for us to express our dissent from the view expressed there. If we have felt that necessity, we would have certainly under the rules referred the matter to a Full Bench. But that course is not necessary, because the case of Cri Appeal No. 6 of 1958 D/-28-9-1961 (Cal) is distinguishable from the present case before us on two broad grounds. The first ground of distinction is that there cognizance of the offence was itself bad. Here the cognizance was taken rightly and legally on 29th December 1955. Cognizance being good, the question here unlike there, is if subsequent amendment of the Act after cognizance, pending the cases would make not the cognizance bad but the order of commitment bad. The second broad ground of distinction is that the case of Cri Appeal No. 6 of 1958, D/- 28-9-1961 (Cal) did not consider the relevant Supreme Court decisions on the point which now settle and lay down the law for India. A brief reference to these Supreme Court decisions therefore is necessary to explain the view that we have taken.

48. The first Supreme Court decision is : 1955 CriLJ526 . It is a decision which clearly lays down the principle that if cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, the result of the trial which follows cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. At pages 267 and 268 (of SCA) : (at pp. 203 and 204 of AIR) of that report Jagannadhadas, J. delivering judgment of the Supreme Court, analyses the basic scheme of the Criminal Procedure Code in respect of cognizable cases and state.,

that:

t does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon.'

At page 268 (of SCA) : (at p. 204 of AIR) the learned Judge makes the point which I have indicated above, expressly clear by the following observation:-

While no doubt in one sense, Clauses (a), (b) and (c) of Section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190 (1) (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial."

49. The second Supreme Court decision : 1956 CriLJ291 . The principle laid down in Slaney's case : 1956 CriLJ291 is that the distinction between an illegality and irregularity is one of degree rather than of kind. It is said therefore that the real question is not whether a provision is expressed positively or is stated in negative terms but whether the disregard of a particular provision amounts to substantial denial of trial as contemplated by the Criminal Procedure Code and understood by the comprehensive expression 'natural justice'. The test therefore is substantial denial of trial. We are satisfied that there has been no substantial or any denial in this case of a fair and proper trial not only under the Criminal Procedure Code but also according to all principles of natural justice as we know.

50. The third Supreme Court decision is : 1956 CriLJ444 . It is only relevant as being explanatory of what is prejudicial in a criminal trial.

51. The fourth Supreme Court decision to which reference should be made is : 1957 CriLJ1009 . The main principle laid down by the Supreme Court in that case is that:-

'In judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should

be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

Indeed this case actually considers Section 207-A of the Criminal Procedure Code. At page 668 of that report (SCA) : (at p. 638 of AIR) Govinda Menon, J. who delivered judgment of the Supreme Court observed as follows:-

'The inquiry was pending in the committal Court at the time the Act came into force. It was not possible to apply Section 207-A at a time when it was not on the statute book and, therefore, it is an impossibility to invoke that provision in the instant case but Mr. Sethi contends that Sub-clause (a) of Section 116 does not refer to Section 174, Sub-section (4) and therefore, there has been a violation. The short answer to this is that even this provision has not been made to have retrospective effect and the stage at which the report of the police to the Magistrate had to be sent had long ago passed. In these circumstances, we are of the opinion that no provisions of the amended Code relating to the supply of copies of statements recorded under Section 161 (3) can apply to the present case. But in view of the fact that even if they are applicable, we are satisfied that there is no prejudice caused to the accused, as smarted already, and we do not think it necessary to express any final opinion on this question.'

Having regard to these decisions and observations of the Supreme Court which are binding, and applying the tests, laid down there, we are unable to accept Mr. Dutt's contention that the order of commitment in this case was totally bad or that the trial that followed has been incurably vitiated or that there has been any miscarriage or failure of justice.

52. The Division Bench in Cri. Appeal No. 6 of 1958, D/- 28-9-1961 (Cal) did not also consider another previous Division Bench decision in : AIR1953 Cal792 to which the same learned Judge who delivered judgment in Durgadas Gupta's case, Cri Appeal No- 6 of 1958, D/- 28-9-1961 (Cal) was a party. In that case of : AIR1953 Cal792 . it is distinctly laid down that:-

'The remedy for quashing a commitment is available to the aggrieved party only before a trial is over and not after the trial is over. The question of quashing a commitment cannot possibly arise after a trial is over because it is no use quashing a commitment unless the result of the trial itself is at the same time set aside and if the result is set aside, it will be unnecessary in most cases to quash the commitment.'

These observations appear at page 769 of the report. It is no doubt true that the decision in : AIR1953 Cal792 was given in 1953 and no question of the amended Criminal Procedure Code came up for consideration but the principle for quashing orders of commitment as expounded in that case is not affected thereby. The Division Bench in Durgadas Gupta's case, Cri. Appeal No. 6 of 1958, D/- 28-9-1961 (Cal) also did not consider the previous Full Bench decision of this Court in Girish Chandra v. Emperor : AIR1929 Cal756 where Rankin, C. J. delivering the Full Bench decision at pages 28-29 (of CWN) : (at p. 760 of AIR) made the following observations:-

"Section 532 in my opinion is directed to the case of commitments that, are bad by reason of a defect personal to the committing officer. It envisages a Magistrate purporting to exercise powers duly conferred upon him and this in my judgment is a reference to section 206. The case supposed is one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. In these circumstances Section 532 provides that if the Court of Session or High Court considers that the accused has not been injured by the irregularity, it may accept the commitment, provided however objection had not been made to the jurisdiction of the Magistrate before the order of commitment was made. This section in my opinion has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which, upon a true construction of the Code is not triable by a Court of Session or High Court. Section 532 has in my judgment, no application to the present case but it does remind us that an order of commitment has a double aspect, being at once an order of the committing Court and an order which is the foundation of the jurisdiction of the higher Court. For the limited purposes of the

section the Court of Session as well as the High Court has to make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. It is idle to argue from the provisions of this section that it assumes or implies that the High Court at a trial has no other authority to quash a commitment".

53. It is necessary to observe in this connection that this is not a case of defect personally to the committing officer at all. There was in fact no personal defect in the committing officer. The whole contention in this case was that the procedure applied was not the procedure; under the old Act under which this case should have been governed.

54. Lastly the interpretation of Section 116 (c) of the Code of Criminal Procedure (Amendment) Act. 1955 (XXVI of 1955) will make the position clearer still. It will not be necessary to discuss here the principles of retrospective operation of the statute and the principles on the question how far a person has a vested right to any particular procedure. They have been well settled by numerous decisions including the decisions of the Supreme Court and a recent Full Bench decision of this Court in *Ajit Kumar Palit v. The State* (Full Bench Ref. no. 1 of 1960) : AIR1961 Cal560 (FB). The language of Section 116 (c) of the amending Act to my mind gives a clear indication. I therefore propose to analyse that section.

55. Section 116 of the amending Act, is described as 'Savings'. In other words this Section 116 was introduced with the intention of protecting pending proceedings when the amending Act came into force. It shows that notwithstanding the provision of the amending Act the old Act was to apply to cases mentioned in Section 116 of the amending Act. The language of Section 116 (c) is crucial on this point. I shall repeat Section 116(c) of the amending Act for the purpose of my analysis. It reads as follows :

"Notwithstanding that all or any of the provisions of this Act have come into force in any state the provisions of Clause (w) of section 4 or Section 207A or Section 251A or Section 260 of the principal Act, as amended by this Act, shall not apply to, or affect any inquiry or trial before a Magistrate in which the Magistrate has begun

to record evidence prior to the date of such commencement and which is pending on that date, and every such inquiry or trial shall be continued and disposed of as if this Act had not been passed'. The main and only object is therefore to prevent application of Section 4(w), Section 207-A or Section 260 of the principal Act (i. e. Criminal Procedure Code), to 'any inquiry or trial', where the Magistrate had "begun to record evidence prior to the date of such commencement'. That is the first analysis of the section. The next analysis relates to the latter part of the section which provides that every 'such inquiry or trial shall be continued and disposed of as if this Act of amendment had not been passed'.

56. The question here is what is the inquiry or trial mentioned in Section 116 (c) of this amending Act? No doubt under Section 4 (k) of the Criminal Procedure Code an inquiry includes every inquiry other than a trial conducted under this Code by a Magistrate or court. Obviously this wide definition of inquiry cannot apply to the inquiry that is mentioned in Section 116(c) of the amending Act. For it is the very inquiry or trial before the Magistrate that is intended to be affected by Section 116(c) of the amending Act. Therefore the word inquiry must have a limited meaning under Section 116(c) of the amending Act compared to the meaning given under Section 4 (k) of the Criminal Procedure Code. On a reading of section 116 of the amending Act I am of opinion that the word 'inquiry' there means an inquiry coming within the four types mentioned in the four specific sections quoted there, namely, (1) Section 4(w), (2) Section 207A, (3) Section 251A and (4) section 260 of the Criminal Procedure Code. Otherwise no question of their application to a pending proceeding would arise. It is only inquiries under these sections that were intended to be protected by the saving clause under Section 116 of the amending Act. There again the protection was intended to apply to the case where the Magistrate had 'begun to record evidence prior to the date of such commencement.' Now depositions that are taken when an accused is absconding is not 'evidence' at that stage at all. He at that stage is not recording 'evidence' as such but recording 'depositions' which would later under certain conditions become evidence. This is so because of the express provision of Section 512 of the Criminal Procedure Code under which some depositions were recorded in this case because the appellant was absconding from the 23rd November 1954, the date of the murder, until the 24th March 1961, a long period of about seven years.

Now section 512 of the Criminal procedure Code comes under Chapter XLI dealing with what are called 'Special Rules of Evidence'. This chapter deals with depositions of medical Witnesses, chemical examiners, evidence on affidavits proof of previous conviction or acquittal and recording of the evidence in the absence of the accused. 'Inquiries' contemplated in the Section 116 (c) of the amending Act contemplate inquiries where the accused is present and not where the accused is absent or is absconding. When the accused is absconding then Section 512 of the Criminal Procedure Code provides that the court competent to try or commit for trial of such person for the offence complained of may, in his absence, examine the witnesses produced on behalf of the prosecution and record their depositions. Any such deposition may, on 'the arrest of such person be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable. The significant words in Sec. 512, from this point of view are 'depositions', 'evidence' and 'inquiry into or trial for'. Apparently this section itself does not consider it to be inquiry while depositions are being recorded in the absence of the accused.

The language of Section 512 makes it clear that the inquiry begins after the arrest of the accused and when the deposition is given in evidence against him on the inquiry. If that view be taken then the Magistrate here was perfectly justified in applying the amending Act and the new procedure, because when the accused was arrested on the 24th March 1961 in this case, the amending Act had already come into force. In other words the inquiry mentioned in Section 116 (c) of the amending Act can only mean inquiry under Chapter XVIII of the Criminal Procedure Code in the presence of the accused and not in his absence when he is absconding.

57. For these reasons I am unable to accept Mr. Dutt's challenge that the order of commitment for trial is illegal or that the trial thereupon is illegal and a nullity.

58. I agree with my learned brother in upholding the conviction and in the sentence proposed. On the sentence I shall add a few words.

59. Mr. Dutt has relied on delay as a ground for commuting the death sentence to a sentence of life imprisonment. For this purpose he cited Avtar Singh v. Emperor 17 Cal WN 1213, and the Supreme Court decision in Kalwati v. State of Himachal Pradesh : 1953 CriLJ668 , and particularly the observation of Aiyar, J. therein at pages 671-72 (of SCA) : (at p. 135 of AIR) where it is said :

'But we substitute for the sentence of death the sentence of transportation for life, having regard to the time that has now elapsed since the occurrence and the probable motive of prevention of cruelty to a helpless woman.'

Delay as a ground affecting sentence is ordinarily delay due to the processes of law. It is laws' delays that are relevant consideration in this matter. But this principle cannot be extended where a criminal absconds and keeps absconding for seven years and thus himself is responsible for the delay. It is not then open to him to say that because he has successfully absconded and because has been a successful fugitive from justices therefore the sentence must be reduced on the ground that he has successfully kept at bay the processes of law and courts. Absconsion therefore cannot' be invoked for reduction of legitimate sentence. In this connection the decision of Khan v. The State : AIR1955 Cal146 may be referred to. I agree with my learned brother that on the ground of the present old age of the appellant and out of consideration for his family context and for the ground of absence of sufficiency of motive on record the proper sentence for the ends of justice will be imprisonment for life.

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