

Abani Chowdhury Vs. the State

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Court : Kolkata

Decided On : Dec-07-1979

Reported in : 1980CriLJ614

Judge : P.C. Borooah and ;B.N. Maitra, JJ.

Appellant : Abani Chowdhury

Respondent : The State

Judgement :

B.N. Maitra, J.

1. One Haradhan Banerjee, an ex-employee of the Union Co-operative Insurance Society Ltd., gave an information to the police. On 7-10-1969, the police recorded an F. I. R. Investigation was taken up and then on 11-2-1976, charge-sheet was submitted against one P. K. Roy Chowdhury, the then Claims Officer of that Company, in respect of offences under Sections 120B, 409, 467, 471, 477/109 I. P. C. before the Chief Metropolitan Magistrate. He made a confession before the Presidency Magistrate, Calcutta. P. K. Roy Chowdhury applied for tendering him pardon and also for being examined as an approver. The defence raised an objection. On 28-8-1976, the learned Additional Chief Metropolitan Magistrate granted him pardon and directed his examination under Section 306(4) Cr. P. C., 1973. He was examined and cross-examined before the Chief Metropolitan Magistrate. Then on 14-2-1979, he was committed to sessions by rejecting the

defence contention that no such commitment could be made. When the matter came up before the learned Judge of the City Sessions Court, Calcutta, various objections were raised by the defence against the commitment. The learned Judge turned down the objection and stated that_ in view of the decision of the case of State v. Dilip Kumar Das in 1979 (1) Cal H N 240. the order of commitment had been made to the Court of Session according to the provisions of Section 306(5)(a)(i) of the Code. That order was final and he had no option but try the case. Hence this re-visional application by the accused.

2. Mr. N. C. Banerjee, learned Advocate appearing on behalf of the petitioner, has contended that the decision of the learned single Judge in the case of State v. Dilip Kumar Das is not correct. Though Section 306(5)(a)(i) of the Criminal Procedure Code says that in such a case the Chief Judicial Magistrate can commit to sessions if cognizance had been taken by him, in fact, he has no such power of commitment because that section does not say that such a commitment would be made according to the provisions of Section 209 of the Code. Section 323 of the Code says that if in an enquiry into an offence or a trial before the Magistrate, it appears that the case is one which ought, to be tried by the Court of Session, the Magistrate shall commit it to that Court. By an amendment made in 1978, it has been added at the end of that section that 'thereupon the provisions of Chap. XVIII shall apply to the commitment so made'. But no such words have been added to Section 306 by any amendment. Since Section 209 alone deals with the provisions for commitment and inasmuch as those words are missing from Section 306, the Magistrate has no power of commitment.

3. Mr. B. Mitter, learned Public Prosecutor, has contended that the case of State v. Dilip Kumar Das was wrongly decided. Investigation was commenced in this case according to the provisions of the old Cr. P. C. But in view of the saving provisions contained in Section 484(2) of the New Code, this case would be governed by the provisions of the old Code. He has referred to Sub-section (2), which says that notwithstanding the repeal of the old Cr. P. C., if there is any appeal, application, trial, enquiry or investigation pending, then the same shall be disposed of, continued, held or made, as the case may be, according to the provisions of the old Code. The proviso to Sub-section (2) says that 'provided that every enquiry

under Chap. XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code.'

4. Mr. P. C. Ghosh appeared as *amicus curiae*. He also has contended that he cannot support the decision of the case of *State v. Dilip Kumar Das*. There is no conflict between the provisions of Sections 228(1)(a) and of 306(5)(a)(i). Though in Section 306, it has not been stated that regarding such commitment made by the Chief Judicial Magistrate the provisions of Chap. XVIII of the Code will apply,' but by evaluation the court will think that, in fact, it is a commitment authorised by the provisions of the Criminal Procedure Code. Section 228 is not controlled by Section 306. Such commitment was made under Section 306(5)(a)(i) read with Section 209.

5. We shall first deal with the question whether the case will be dealt with according to the provisions of the old Cr. P., C. or by the new Cr. P. C. Two Bench decisions of this Court reported in 1976 Cal H. N. 569 (*State v. Abdul Rashid*) and in (1977) 81 Cal WN 249 (*Durgapada's case*) are against this view. Mr. Banerjee has referred to the latest Supreme Court decision of *Superintendent and L.R. v. Ashutosh Ghosh* in : (1979)4SCC381 . In that case no enquiry was pending when the new Cr. P. C. came into force. Only proceedings were initiated against the accused on the basis of a charge-sheet submitted by the police after completing the investigation. High Court quashed the proceedings in 1970, On an interpretation of the provisions of Section 484(2)(a) of the Cr. P. C. the Supreme Court has stated that in view of the clear language enshrined in the proviso, the new Code will apply to -the proceedings before the Committing Magistrate. That court will not take any evidence, but has only to see whether the case is exclusively triable by the Court of Session and the Magistrate will commit the case to sessions. When the enquiry was conducted into that case by the Committing Magistrate, the new Cr. P. C. would be applicable.

6. There is a difference between investigation and inquiry. Inquiry has been defined in Section 2(g) and investigation in Section 2(h) of the Code. Inquiry means every enquiry, other than a trial, conducted under this Code by a

Magistrate or court. A Police Officer is not empowered to conduct an inquiry or trial. Here, no enquiry envisaged by the proviso to Sub-section (2) of Section 484 of the new Cr. P. C. was pending when the new Code came into force on the 1st April, 1974. Only, an investigation was then pending. That investigation was completed after the new Code came into force. Since no enquiry envisaged by the provisions of Chap. XVIII was then pending, we are of opinion that the matter will be governed by the provisions of the new Code, not of the old one.

7. Then about the question whether the learned single Judge rightly decided the case of State v. Dilip Kumar Das. In that case, the learned single Judge has stated that there is a conflict between the provisions of Sections 228 and 306 of the new Cr. P. C. The former is a general provision and the latter a special one. The special or particular section will prevail over the general one. Since the Section 306(5)(a)(i) statutorily enjoins on the Chief Judicial Magistrate to commit such a case to sessions, such order is binding on the Sessions Judge. In such a case, after the commitment, the Sessions Court cannot, according to the provisions of Section 228(1)(a), transfer the case to a Magistrate. It has been further held that the provisions of Section 228(1)(a) of the Code must give way and yield to the special provisions embodied in Section 306(5)(a)(i) of the Code.

8. In that case, the Sessions Judge transferred the case for trial to the Chief Metropolitan Magistrate according to the provisions of Section 228(1)(a) of the Code. The Chief Metropolitan Magistrate disagreed and made a reference to the High Court. In that case, the offence was triable under Section 326 of the Code. Hence, according to the provisions of the Schedule of the new Code, the same is triable by a 1st Class Magistrate.

9. The result of the decision is that though according to Section 19 of the Cr. P. C., the Chief Metropolitan Magistrate is subordinate to the Sessions Court, the latter's order of transfer under Section 228(1)(a) does not become binding on the Chief Metropolitan Magistrate. But the Chief Metropolitan Magistrate's order of commitment under Section 306(5)(a)(i) of the Code is final and binding on the Sessions Court,

10. If there is really any conflict, the Court should try to make a harmonious construction. The relevant provisions of Cls : (a) and (b) of Sub-section (2) of Section 306 show that they apply to any offence triable exclusively by the Court of Session or by the Special Judge and to any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

11. Section 228(1) is divided into two parts. Sub-section (1) is not in conflict with the provisions of Section 306(5)(a)(i) of the Code. It has already been indicated that Sub-section (2) (a) of Section 306 says that the section applies to any offence triable exclusively by the Court of Session or by the Special Court. Section 228(1)(b) says that if after such consideration and hearing, the Judge is of opinion that there is a ground for presuming that the accused has committed an offence which is exclusively triable by the Court, he shall frame in writing a charge against the accused. Here, the Sessions Judge has no option of transfer because the case is exclusively triable by that Court.

12. Sub-section (5) (a) (i) of Section 306 says that where a person has accepted a tender of pardon made under Sub-section (1) and has been examined under Sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further enquiry into the case, commit it for trial to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate. Section 306(2)(b) applies to an offence punishable with imprisonment which may extend to seven years or more. It has already been indicated that in a case triable exclusively by the Court of Session, that Court cannot transfer the case to a Magistrate. But when the Chief Judicial Magistrate takes cognizance of an offence under Section 325 of the I. P. C., where the punishment is up to seven years, then according to the provisions of the Schedule to the new Criminal Procedure Code, the matter is triable by any Magistrate, So, that offence is not exclusively triable by the Court of Session.

13. Here, we can refer to the provisions of Clause (a) of Sub-section (1) of Section 228 which says that if after such consideration and hearing, the learned Judge is of opinion that the offence is not exclusively triable by the Court of Session, he may frame a charge against the accused and by order transfer the case for trial to

the Chief Judicial Magistrate and thereupon the latter shall try such offence. Of course, an amendment of this clause has been made in the State of West Bengal. But such amendment is not germane for the purpose of the present Rule. Any way, when the offence is not exclusively triable by the Court of Session, the Sessions Judge clearly has an option because he may frame a charge against the accused and transfer the case for trial. Such indication has been clearly given by the Legislature by using the word 'may' in Clause (a) and 'shall' in Clause (b) of Sub-section (1) of Section 228 of the Code.

14. Section 26(a)(ii) of the Code says that subject to the other provisions of this Code, any offence under the I. P. C. may be tried by the Court of Session. Section 199(2) says that in a prosecution for defamation, the Sessions Court may take cognizance of an offence without the accused being committed to it. Since in such a case there is no commitment, Section 237(1) provides for a trial of such case not in accordance with the provisions of Chapter XVIII, but according to the warrant procedure enjoined by Chapter XIX of the Code. Sections 323 and 306 speak of commitment. The unamended Section 323 showed that in a case contemplated by the provisions of that section, the Magistrate could commit it to Sessions 'under the provisions hereinbefore contained'. Obviously this expression referred to the provisions of Chapter XVIII of the Code regarding commitment. Hence, there is no manner of doubt that such amendment made at the end of that Section in 1978 is wholly redundant.

15. As soon as a statutory commitment is made to Sessions under Section 323 or 306, all the provisions of Chap. XVIII come into the picture. Consequently in such a case the Sessions Court can apply the provisions of Section 227 and (1) discharge the accused, (2) proceed according to Section 228(1)(a) and try the case after framing the charge, (3) or after framing the charge transfer it to a Magistrate, (4) That court can adopt the procedure envisaged by clause (b) of Sub-section (1) of Section 228 and frame the charge.

16. Mr. Banerjee has argued that Section 306(5)(a)(i) uses the word 'or'. There will some sense in making a commitment only if the court holds that instead of 'or' the word 'and' shall be read in that section. As stated before, clause (a) (i) says that in

such a case, the Magistrate shall make a commitment to sessions if the offence is exclusively triable by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate. If such submission is to be accepted, then we shall have to read the word 'and' for the word 'or' in that clause (a) (i) and that will offend against the well-established principles of interpretation of statutes. Again, if this argument is to prevail, then the provisions of Section 306 would become utterly useless because when a case is exclusively triable by Sessions Court, there is adequate provision in Section 209 to make a commitment. Then there was no necessity of enacting the provisions of Section 306 to deal with an eventuality when an offence, which is not exclusively triable by Sessions Court, can be committed to it because the punishment is seven years or more, say, under Section 325 of the Code, where the offence is not exclusively triable by the Sessions Court.

17. If the reasons given by the learned single Judge are to be accepted, then the entire scheme of the Cr. P. C. regarding the subordination of criminal courts and the powers wielded by the Sessions Court over the court of the Chief Judicial Magistrate or of the Chief Metropolitan Magistrate, as the case may be, will be rendered wholly nugatory

18. Section 337 of the old Cr. P. C. dealt with cases of tendering pardon. Sub-section (2A) says that in every case, where a person has accepted a pardon and been examined under Sub-section (2), the Magistrate shall commit him for trial to the Court of Session or to the High Court, as the case may be. Of course, such commitment was made regarding offences which were exclusively triable by the Court of Session or by the High Court. But the changes brought about in the corresponding Section 306 of the new Cr. P. C. have already been indicated and it is not necessary to repeat the same. Here all the sections, under which commitment was made, are not exclusively triable by Sessions Court.

19. We may state that Mr. Ghosh has pointed out that in Dilip Das's case a distinction was drawn between a case and an offence. Section 193 of the Cr. P. Code says that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed

to it by a Magistrate under this Code. Section 323 speaks of commitment of the case. Similarly, Section 306(5) also says that where a person has accepted a tender of pardon under Sub-section (1) and has been examined under Sub-section (4) the Magistrate taking cognizance of the offence shall, without making any further enquiry into the case, commit it for trial to sessions.

20. Thus, it appears that there is no conflict between the provisions of Sections 228(1)(a) and 306(5)(a)(i) of the Cr. P. C. By adopting the aforesaid interpretation, a harmonious construction of the provisions of Section 228(1)(a) and of Section 306(5)(a)(i) is possible. The learned Judge of the City Sessions Court fell into an error by saying that the order of commitment made by the learned Magistrate was binding on him. Hence, he declined to go into the merits of the objection taken. So, this order passed by him must be set aside.

21. Mr. Banerjee has stated that this will entail a circuitous process. Now, when the Legislature has made such provisions for transfer in Section 228(1)(a) of the Code, the circuitous procedure cannot be got rid of.

22. Hence, we do not agree with the views expressed in the case of *State v. Dilip Kumar Das* reported in 1979 (D Cal HN 240). By a legal fiction such commitment will be deemed to be made, under Section 306(5)(a)(i) read with Section 209 of the Code. We hold that Section 306(5)(a)(i) is not a special provision and it cannot prevail over the provisions of Section 228(1)(a) of the Code.

23. Thus, the matter will go back to the learned Judge, who will hear the objection on the merits, consider whether he will discharge the accused or frame the charge and retain the case in his file or frame the charge and transfer it to a competent Magistrate. Liberty is given to urge any other point which the petitioner might consider proper.

24. Subject to the aforesaid observations, the Rule is disposed of.

P.C. Borooah, J.

25. I agree.

