

Bimal Kumar Chandra and ors. Vs. the State and ors.

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Court : Kolkata

Decided On : Jun-23-1976

Reported in : 1976CriLJ1864

Judge : P.K. Chanda and ;S. Basu, JJ.

Appellant : Bimal Kumar Chandra and ors.

Respondent : The State and ors.

Judgement :

P.K. Chanda, J.

1. The Rule, in Criminal Revision No. 531 of 1975 has been issued at the instance of four petitioners, namely, Bimal, Swapan, Shyamal and Nimai to show cause why the order No. 1 dated 8-5-75 by the learned Additional Sessions Judge, Alipore, fifth court in sessions trial No. 3 of May, 1975 and order dated February 10, 1975 by the learned Magistrate, Alipore, in G. R. Case No. 3155 of 1971 should not be set aside.

2. Apart from the controversy raised in this revisional application another revisional application has been filed by Biswanath Mondal alias Bishu and that has given rise to Criminal Revision No. 908 of 1975 against the self-same orders. Additional ground taken in this application is that the learned Additional Sessions Judge acted illegally in appointing a lawyer of his own choice for the petitioner's defence

at the State expenses. Both the revisional applications were filed after the Criminal Procedure Code, 1973 came into operation.

3. By the order dated 10-2-75, the learned Magistrate has committed the petitioners before us to stand their trial under Sections 148, 302/149 and 307/149, I.P.C. It is alleged by the petitioners that the learned Magistrate acted illegally and wrongfully in committing the petitioners to the court of session under Section 209 of the New Criminal Procedure Code without recording any evidence. In developing this contention the endeavour of Mr. Mukherjee appearing on behalf of the petitioners was to impress upon us that the proviso to Section 484(2) of the Criminal Procedure Code of 1973 (Act II of 1974) could not take away the petitioners' right and privilege under the old Act to the effect that the prosecution witnesses of the alleged occurrence were to be examined before the petitioners' commitment to the Court of Session. It appears that Mr. Mukherjee while raising this contention had in his mind Kirpal Singh's case reported in : 1965 CriLJ636 where the Supreme Court observed that in inquiries of serious offence like murder, normally the Magistrate should insist upon examination of the principal witness to the actual commission of offence. The Supreme Court did not rest there. It added that failure to examine such witness may be justified in exceptional cases. Mr. Mukherjee has further urged that his clients had also the right of discharge in the court of the Magistrate under the old Criminal Procedure Code and this right being a valued right could not be taken away by the plea of procedural amendment. In other words, his contention is that where rights and procedures are dealt with together, the procedural amendment affects rights also. There was no scope on the part of Mr. Mukherjee to challenge the constitutionality of the proviso to Section 484(2) of the said Code under Article 14 in view of the fact that the operation of Article 14 of the Constitution has been suspended.

4. The first information report on the basis of which investigation started was lodged on August 10, 1971. In other words, investigation commenced and charge-sheet was submitted when the old Act was in force but the commitment procedure was neither adopted nor completed under that Act. After the new Act came into force the learned Magistrate in view of the proviso to Section 484(2) of the new Code committed the petitioners to the court of session without recording evidence

and framing charge. The proviso to Section 484(2) of the said Code lays down:

Provided that every inquiry under Chapter 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.

5. It is a trite proposition that unlike changes in the substantive law as to vested rights which are only prospective, an amendment in the law of procedure operates retrospectively unless such amending Act gives the amendment as to procedure prospective effect only. None has a vested right in any matter of procedure; he has only a right to such procedure as is for the time being in force.

6. Mr. Mukherjee has referred to us a decision of the Division Bench of this Court *Sardar v. State* reported in : AIR1961 Cal181 . In that case this Court held that Section 173 of the old Code which was imperative in its terms contemplated a report of investigation held under Chapter XIV. This means that the materials collected as the foundation of the report, must have been obtained in pursuance of power exercised under Chapter XIV. The court further held that investigation could not be piecemeal. It was a continuous process which began with the collection of evidence obtained in exercise of power under Section 156 and ended with the submission of a report under Section 173 (old Act). Thereafter, the Court held, where a part of the investigation was conducted under other laws that is, Calcutta Police Act and a part under the Code (old) as a result of the extension of Section 156 to the police in the town of Calcutta, the entire investigation not having been held after the extension of Section 156, the report was not a report within the meaning of Section 173. Consequently Section 207-A (old) could not apply to such a proceeding. This case has no semblance of resemblance with the one in hand and it turned on its own facts. In the instant case, no inquiry was held by the learned Magistrate under the provisions of the old Act. Even in the case referred to by Mr. Mukherjee the Court held:

It is an accepted rule of construction that no statute is to be construed as having retrospective operation unless such a construction appears to be clearly indicated by the terms of the statute itself or unless such interpretation is suggested by necessary implication.

7. Their Lordships made it perfectly clear that they were not concerned with the question of retrospective operation of a statute .but they were concerned with the question of retrospective operation of a notification issued in pursuance of power given by a statute, Mookerjee, J. observed:

The notification itself does not by its own terms, make its operation retrospective, and it would, in our judgment, be extravagant to claim that by necessary implication it has retrospective operation.

His Lordship made it perfectly clear when he said:

It is true, however, that no one has a vested right in procedure

Says Maxwell:

The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode.

8. Regarding the availability of an order of discharge from the Magistrate's court the petitioners could not claim it as of right even if the Magistrate took up any inquiry in accordance with the provisions of the old Act. Under the new Act the right to get an order of discharge has not been taken away. Before framing charge the court of session can discharge any accused committed to that court. Even when the rights and procedures are dealt with together, as Maxwell in his Interpretation of Statutes, Tenth Edition, Page 228, has said:

The intention of the Legislature may well be that the old rights are to be determined by the old procedure, and that only the new rights under the substituted section are to be dealt with by the new procedure.

9. By incorporating the proviso to Sub-section (2) of Section 484 of the new Code the Legislature made it perfectly clear that even in pending cases the commitment is to be made in accordance with the provisions of the new Act. Times without number the Supreme Court has said that as a general rule the amended law relating to procedure operates retrospectively. In this connection reference may be made to the cases of Nani Gopal Mitra v. State of Bihar : 1970 CriLJ1396 ; Anant Gopal Sheorey v. State of Bombay : 1958 CriLJ1429 ; Dayabati v. Inderjit : [1966]3SCR275 . In the case of Jindas Oil Mills v. Godhra Electricity Co. Ltd. : [1969]3SCR836 , the Supreme Court held that when controversy relating to the procedure to be adopted does not touch any vested right the procedure in question must necessarily be regulated by the law in force at the time and not according to the old law. Proviso to Section 484(2) of the new Act is plainly mandatory because it makes obligatory for a Magistrate 'that every inquiry under Chapter 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.' It is clearly retrospective. No disability or obligation has been created by the proviso to Section 484(2), Cr. P.C. We find no substance in the contention raised by Mr. Mukherjee in this respect.

10. The order of commitment by the learned Magistrate is an interlocutory order in pending proceedings. (Please refer to the decision of this Court in B.N. Agarwala v. State, reported in (1976) 80 Cal WN 141 and of the Supreme Court in Jamuna Singh v. Bhadai Shah : 1964 CriLJ468 . In view of the provisions of Section 397(2), Cr. P.C. and the order of commitment being an interlocutory one revisional applications are not maintainable, We are not persuaded to say that the order of commitment has resulted in any gross miscarriage of justice or undue harassment amounting to abuse of process of the court calling for the exercise of inherent power of this Court.

11. In paragraph 11 of the application that gave rise to Criminal Revision No. 908 of 1975 it has been alleged that the petitioner prayed before the learned Additional Sessions Judge for engaging one Basudeo Majumdar, a learned Advocate practising at Alipore Criminal Courts, for his defence at the expense of the State as the petitioner was not represented by any pleader and as he had not sufficient

means to engage a pleader. It is submitted in paragraph 12 that the learned Additional Sessions Judge rejected the prayer as the name of Sri Majumdar was not in the panel prepared under Section 304, Cr. P.C. (new). Mr. Mukherjee does not press this point in view of the fact that Sri Majumdar, the learned Advocate sought for by the petitioner, has ceased to be a member of the Bar.

12. In view of what has been stated above, the revisional applications are rejected and the Rules stand discharged.

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