(1973) 04 GAU CK 0001

Gauhati High Court

Case No: None

Oliullah Laskar and Others		APPELLANT
	Vs	
Sukhamoy Das (Complainant) and Another		RESPONDENT

Date of Decision: April 12, 1973

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 202, 208, 209, 237, 439
- Penal Code, 1860 (IPC) - Section 436

Citation: (1973) CriLJ 1517

Hon'ble Judges: Baharul Islam, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Baharul Islam, J.
This application u/s 439 of the Code of Criminal Procedure by the six petitioners is directed against the order dated 19-11-1972 passed by the Sessions Judge, Cachar, directing further enquiry into the case.

2. The facts of the case briefly are as follows:

On 24-4-1967 the opposite party No. 1, Sukhamoy Das, filed an ejahar at the Kati-gorah police station against the petitioners with the allegations that the latter trespassed ino his homestead and set fire to two of his houses and caused loss to the extent of Rs. 3,000/-. On receipt of the ejahar, polica registered a case but after investigation submitted final report on 16th July, 1967. Opposite Party No. 1 then filed a naraji petition in the Criminal Court at Silchar and the Magistrate, after an enquiry u/s 202 of the Code of Criminal Procedure, issued summonses against the petitioners for an offence u/s 436 of the Penal Code. In course of the preliminary enquiry seven witnesses including the complainant were examined and

cross-examined by the prosecution. The police diary was also perused by the Magistrate. The learned Magistrate then by his order dated 13th July, 1971, discharged the petitioners u/s 209(2) of the Code of Criminal Procedure. The complainant then moved the Sessions Judge u/s 237 of the Code of Criminal Procedure. The learned Sessions Judge, after hearing, set aside the order of the learned Magistrate and directed further enquiry into the case as stated earlier.

3. Mr. M. A. Laskar, learned Counsel appearing for the petitioners, submits that the order passed by the learned Magistrate discharging the petitioners was a proper one, and the impugned order of the learned Sessions Judge is unjustified in law. The only point involved in the case is the determination of the extent of the powers of the Magistrate to discharge an accused u/s 209 of the Code of Criminal Procedure. Section 209 of the Code of Criminal Procedure may be quoted:

209(I) When the evidence referred to in Section 208, Sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused persons 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.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

4. The powers of the Magistrate either to commit the accused to the Court of Sessions under Sub-section (1), or to discharge the accused under Sub-section (1) or (2) of Section 209 of the Code of Criminal Procedure, have been examined and authoritatively set at rest by the Supreme Court. In the case of Rajpal Singh and Others Vs. Jai Singh and Another, the Supreme Court, after having examined its earlier decisions, has held as follows:

This Court added that in each case the Magistrate holding the preliminary enquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. Where, however, much can be said on both the sides, it would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its hands. In Almohan Das and Others Vs. State of West Bengal, commenting on Section 209 of the Code, this Court observed that though a Magistrate holding an inquiry under Chapter XVIII is not intended to act merely as a recording machine and is entitled to sift and weigh the materials on record, he is to do so only for the purpose of seeing whether there is sufficient evidence for commitment and not whether there is sufficient evidence for conviction. If there is no prinia facie evidence or the evidence is totally unworthy of

credit, it is his duty to discharge the accused. But, if there is some evidence on which a conviction may reasonably be based, he must commit the case. But the Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before him at that stage would be whether there is some credible evidence which would sustain a conviction.

It has been further held in the said decision:

Though, as pointed out earlier, the language of Section 209 differs from that in Section 207-A, it is well settled that under neither of them has the Magistrate the jurisdiction to assess and evaluate the evidence before him for the purpose of seeing whether there is sufficient evidence for conviction. The reason obviously is that if he were to do that he would be trying the case himself instead of leaving it to be done by the Sessions Court, which alone has under the Code the jurisdiction to try it.

5. In the instant case the learned Magistrate sifted the evidence of the witnesses and arrived at the following findings:

(i) P. W. 1, the complainant, is not an eye-witness;

(ii) The Daroga visited the place of occurrence 4 or 5 days after the date of occurrence but did not seize anything (to show that the occurrence of arson had taken place);

(iii) P. W. 3 also is not an eye-witness to the occurrence as she had been confined in her house, although she claimed herself to be such a witness;

(iv) P. W. 4 also is not an eye-witness as she had admitted in her cross-examination that she had been prevented from coming out of her house, although she claims to bo such a witness;

(v) P. W. 5, who claims to be an eyewitness is not an eye-witness as he did not state that fact to the Investigating Officer;

(vi) P. W. 6 is not an eye-witness; and

(vii) P. W. 7, though she claims herself to be an eye-witness, is not such a witness as she could not see the occurrence as the place of occurrence and her house was intervened by other houses.

Ultimately the learned Magistrate has held that the prosecution "has miserably failed ... to establish a prima facie case and accordingly no prima facie material of any offence is established against any of the accused persons," and he discharged the accused persons u/s 209(2) as stated above.

6. The learned Magistrate has examined and sifted the evidence before him to see if there is prima facie evidence or evidence worthy of credit to go to the Court of Sessions and has found that the witnesses are not, or cannot be, eye-witnesses, to

the actual act of alleged arson.

7. In this connection the statement in "Halsbury''s Laws of England", which has been quoted with approval by the Supreme Court in the case reported in Rajpal Singh and Others Vs. Jai Singh and Another, (supra) may be quoted:

When all the evidence has been heard, the examining justices then present who have heard all the evidence must decide whether the accused is or is not to be committed for trial. Before determining this matter they must take into consideration the evidence and any statement of the accused. If the justices are of opinion that there is sufficient evidence to put the accused upon trial by jury for any indictable offence they must commit him for trial in custody or on bail.

Under Section 209 the Magistrate is to find whether or not there are sufficient grounds for committing the accused to the Court of Session, and if he finds that there are no sufficient grounds for making the commitment, he shall discharge him. In order to come to the finding whether or not there are sufficient grounds, necessarily he is to sift and examine the evidence. But, when there are "two conflicting versions" and much can be said for and against each versipn it will not be for the Magistrate, but for the Sessions Judge, to decide which of the two versions is to be accepted. In the instant case the learned Magistrate did not find two such conflicting versions. He found, after sifting and examining the evidence before him, that there were no eye-witnesses to the occurrence, and discharged the accused, as according to him, there was no case to go to the Court of Sessions. In the circumstances, it cannot be said that the order of discharge passed by the learned Magistrate Was without jurisdiction. The learned Sessions Judge in his impugned order did not consider the decisions of the Supreme Court on the point and as such his order directing further enquiry was vitiated by a misconception of the law.

8. In the result the impugned order of the learned Sessions Judge is set aside, the revision is allowed and the Rule is made absolute.