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(1993) CriLJ 760

High Court Of Kerala

Case No: Criminal Reference 2 of 1992

In Re: Director General of Prosecution — APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 16, 1992

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 190, 190(2), 193, 220(1), 220(3)
- Penal Code, 1860 (IPC) - Section 321, 375, 376, 494
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14, 20, 3

Citation: (1993) CriLJ 760

Hon'ble Judges: L. Manoharan, J; K. Sreedharan, J

Bench: Division Bench

Advocate: M. Ratna Singh and T.R. Raman Pillai, for the Appellant;

Judgement

K. Sreedharan, J.
This reference u/s 395(2) of the Code of Criminal Procedure is at the instance of the Sessions Judge, Thalassery. He is the Special Court specified u/s 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to try offences under that Act. Questions referred by him are : -

(1) What is the correct procedure to be followed by a Special Court when it receives a final report disclosing offences punishable u/s 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as well as offences punishable under the Indian Penal Code and

(2) If the course followed by this Court in taking cognizance of offences punishable under the Indian Penal Code also along with offences punishable u/s 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act were (as it appears to be) wrong,

what further procedure is to be followed.

2. Section 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, hereinafter referred to as the Act, is in the following terms : -

"For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

Sessions Court, Thalassery is one of the Courts of Sessions specified to be a Special Court to try offences under the Act. The first question that is posed is one relating to the correct procedure to be followed by a Special Court when it receives a final report disclosing offences punishable under the Act.

3. Section 4 of the Code of Criminal Procedure, hereinafter referred to as the Code, provides for trial of offences under the Indian Penal Code and other laws. That section has two sub-sections. Sub-section (1) states that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in the Code. As per Sub-section (2), all offences under any other law shall be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The conjoint effect of these provisions is that in the absence of specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into tried and otherwise dealt with according to the provisions contained in the Code. The provisions of the Special Act would apply and prevail over the Code. When the special law does not prescribe any particular procedure, the provisions contained in the Code will govern the investigation, inquiry and trial of cases by criminal courts. In other words, the Code is the parent statute which provides for investigation, inquiry, trial or otherwise dealing with offences.

4. Section 5 of the Code states that nothing contained in the Code, shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. If an act creating an offence does not prescribe any special form of procedure, the provisions contained in the Code will be applicable for the trial for such offences.

5. Section 26 of the Code prescribes the criminal courts by which offences under the I.P.C. or other laws are triable. As per clause (a) of the Section, the High Court and the Court of Session have concurrent jurisdiction to try any offence under the Indian Penal Code. Judicial Magistrate of I Class and Judicial Magistrate of II Class have been

conferred jurisdiction to try such of the offences as are shown triable by them in the first schedule to the Code. There is no provision in the Code which bars the trial of a case by superior Magistrate, notwithstanding that it is competent for a Magistrate of a lower grade to entertain the case. A Court of Session has jurisdiction to try a case once it has properly come before it, that is, on a legal order of commitment.

6. The combined effect of the provisions of the Code referred to above is that all offences under the Indian Penal Code are to be investigated, inquired into tried and otherwise dealt with according to the provisions contained in the Code. In so far as offences under laws other than, I.P.C. are concerned, the provisions of the Code apply in their full force subject to the specific or contrary provision made by the law under which those offences are to be investigated or tried. Where an enactment provides special procedure only for some matter"s, such procedure must govern those matters and in regard to other matters on which that enactment is silent, the provisions of the Code must be applied.

7. The position of a Special Court was considered by a Full Bench of the five Judges of the Supreme Court in A.R. Antulay Vs. Ramdas Sriniwas Nayak and Another, . According to their Lordships, the Special Court in contra-distinction to the Sessions Court is a court of original jurisdiction. Whenever question arises as to what are its powers, according to their Lordships, that Court is to be considered as a Court of original jurisdiction undaunted by any designation claptrap. Their Lordships stated :-

"The entire argument inviting us to specifically decide whether a Court of a special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolve round a mistaken belief, that a special Judge has to be one or the other, and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the Court and must be eschewed. Shorn of all embellishment, the Court of a special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied."

From this it is clear that a Special Court is neither a Court of Session nor a Court of Magistrate. It is a Court of original criminal jurisdiction. The Act provides for specifying a Court of Session to be a Special Court to try the offence under the Act. When such a Court of Session is so specified as a Special Court, it ceases to be a Court of Session as envisaged in the Code and it becomes a Court of original criminal jurisdiction. When such a power is conferred on the Court of Session, which is a Special Court under the Act, that Court is clothed with all authority to proceed with the case. The power as a Special Court is conferred on a Court of Session which is one in the hierarchy of courts envisaged by the Code. When such a Court is seized of the dispute in so far as actual trial is

concerned, it should be governed by the ordinary rules of procedure applicable to it as provided in the Code. The procedure for trial to be followed can only be that prescribed in the Code since no special provision to that effect is made in the Act. In other words, so long as the Act does not make provision for the procedure to be followed by the Special Court, which is a Court of Session, its procedure regarding trial should be governed by the provisions contained in the Code. In the instant case, a Court of Session is constituted to be the Special Court. Court of Session is one established as per the provisions contained in the Code. That Court when constituted as Special Court and Act constituting it is silent regarding the procedure to be followed by it, the ordinary incidents of procedure for that court for the trial are to be followed. The Special Court is thus to take cognizance of the offence under the Act and proceed with the trial as provided under the Code. I hasten to add that Section 193 of the Code will not apply to the Special Court.

8. As seen from Section 14 of the Act, a Court of Session in each district is specified as a Special Court to try the offences under the Act. Question may arise as to what is meant by "to try" the offence under the Act. Is it concerned only with the actual trial or proceedings prior to it? Whether the word "try" has reference only to the stage of trial? In The State of Bihar Vs. Ram Naresh Pandey, Their Lordships had to consider this issue. The facts in that case are as follows: -

Prosecution was launched against 23 persons about the commission of murder. The part ascribed to one of the accused was that he abetted the murder by reason of certain speeches and exhortations at meetings. While the matter was pending before the Magistrate in the committal stage and before any evidence was taken, Public Prosecutor put in an application for withdrawal of the case as against that accused. It was contended that in a case triable by a Court of Session, an application by the Public Prosecutor for withdrawal does not lie in the committal stage. Withdrawal cannot be made, it was contended, until the case reaches the trial stage in the Sessions Court. After noting the well known distinction between inquiry and trial in the Scheme of the Code, Their Lordships took the view that the word "try" in the phrase "offences for which he is tried" in Section 494 of the old Code (Section 321 of the Code of 1973) is vide enough to cover every kind of inquiry and trial and that the word "try" in the Section has not been used in any limited sense. This authoritative pronouncement of the Supreme Court, we feel should apply to the word "try" used in Section 14 of the Act. It means that the Special Court has not only got the power to try the offences but it has got the power to make every kind of inquiry as a criminal court of original jurisdiction in terms of the provisions contained in the Code.

9. The Code prescribed four methods of taking cognizance of an offence. They are : -

(a) upon a complaint

(b) upon a report of a police officer

(c) where the Magistrate himself comes to know of the commission of offences through some other source, and

(d) in the case of sessions court upon a commitment by Magistrate.

The Special Court under the Act is empowered to try cases concerning atrocities as defined therein. As held earlier, the word ''try'' takes within its ambit proceedings prior to actual trial as well. So the Special Court can take cognizance of offences on circumstances excluding one out of the four recognised modes mentioned earlier, namely upon commitment by a Magistrate as set out in Section 193 of the Code. In other words, the Special Court under the Act can take cognizance of an offence for trial in any one of the remaining three other methods under the Code. If the acts alleged in the complaint constitute not only offence under the Act but also offence under the Penal Code, the special court should take cognizance of that complaint even without an order of commitment by Magistrate as provided by Section 193 of the Code. In such a case, the Special Court should not only try the offence under the Act but also those falling under the Indian Penal Code. Any other view on this aspect will certainly go to defeat the intention of the Legislature in enacting the Act. Further it is worthwhile to note the provisions contained in Section 20 of the Act. As per that Section, the provisions contained in the Act have overriding force over any other law for the time being in force. This also show that the provisions contained in Section 193 of the Code cannot be of any consequence to restrict the jurisdiction of the Special Court.

10. Sub-section (1) of Section 220 of the Code states that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Sub-section (3) of that Section further states that if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. Sub-section (3) covers cases where particular acts constitute offence falling within two or more separate definitions of any law by which offences are denned and punished. When a single act constitutes an offence punishable under two different provisions of law, it comes squarely within the purview of Sub-section (3) of Section 220 of the Code. As per Sub-section (4) if several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with arid tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts. So if the various acts alleged against an accused constitute offence under the Act and combination of those acts constitute offence under the Indian Penal Code as well, the accused can be tried for both in the same proceedings. Thus if the acts alleged against the accused constitute atrocities as defined u/s 3 of the Act as also offence under the I.P.C. as well, accused can be tried for both in the same proceedings. For that, no order of commitment by a Magistrate is called for.

10A. From the facts stated that by the Sessions Judge, it is clear that accused who are charged with offence u/s 3(xii) of the Act are also charged with offence punishable u/s 376 of the Indian Penal Code. If accused in such a case is not to be tried for offence under the I.P.C. it will lead to miscarriage of justice. Section 3(xii) of the Act states that whoever not being a member of a Scheduled Castes or a Scheduled Tribe being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed shall be punishable with imprisonment for a terms which shall not be less than six months but which may extend to five years and with fine. As per this provisions, one who is in a position to dominate the will of the lady exploits her sexually, commits an offence under the Act. As per Section 375 of the Indian Penal Code, sexual intercourse by a man with a woman under any of the six clauses mentioned therein constitute an offence of rape. Consent of the woman obtained prior to the act is a valid defence. But consent given by a lady of the Scheduled Castes and Scheduled Tribe community to one who is in a position to dominate is no defence to a charge u/s 3(xii) of the Act. It means that Section 3(xii) takes within its ambit only a very few of the circumstances which constitute an offence of rape. The maximum punishment for such an offence is imprisonment for a term of five years. But punishment for an offence of rape u/s 376 may extend to imprisonment for life. Legislature cannot be taken to have minimised the gravity of offence of rape if committed on a woman belonging to Scheduled Castes or Scheduled Tribe. So accused who is alleged to have committed offences u/s 3(xii) of the Act and 376 of the I.P.C. should be tried by the Special Court in the same trial.

In view of what has been stated above, we direct the Sessions Judge Thalassery to proceed with the trial of the cases for offences punishable u/s 3 of the Act as well as for offences punishable under the I.P.C. Criminal Reference is answered accordingly.

Before we part with this case, we express our deep sense of gratitude for the excellent assistance rendered to us by Sri. T.R. Raman Pillai who was appointed as amicus curiae and by Sri Ratna Singh the Director General of Prosecution.

L. Manoharan, J.

I have the benefit of perusing the order of my learned Brother. I agree with the conclusion reached by him. I add few words.

11. Of the two questions referred by the learned Sessions Judge, Thalassery u/s 395(2) of the Code of Criminal Procedure, 1973 (for short "the Code)" the second question would arise only if the first question is answered in the negative. The question concerns the jurisdiction of the special court constituted u/s 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No. 33 of 1989) (for short "the Act"). Section 3 of the Act categorises the offences and Section 14 thereof enjoins that for the purpose of providing for speedy trial the State Government with the concurrence of the Chief Justice of the High Court, by notification in the official gazette shall specify, for

each district a Court of Session to be a special Court to try the offences under the Act.

12. The point consideration is whether the Special Court can take cognizance of the offences under the Indian Penal Code along with the offences enumerated u/s 3 of the Act and whether such cognizance can be taken without committal as per Section 193 of the Code. This will depend upon the character of the jurisdiction of the Special Court if its jurisdiction continued to have the character of Sessions Court, it can take cognizance of the offence only on committal.

13. A Magistrate of the First Class and Second Class empowered under Sub-section (2) of Section 190 of the Code can take cognizance of any offence upon receiving a complaint constituting such offence, upon a police report of such facts, and upon any information received from any persons other than the police officer or upon his own knowledge that such offence has been committed. But so far as the Sessions Court is concerned Section 193 of the Code enjoins that except otherwise provided by the Code or 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.

14. A combined reading of Section 4 and Section 26 of the Code will show, in the absence of any provision regulating investigation, inquiry and trial of non-IPC offences viz. offences under any other law investigation, inquiry and trial shall be as per the Code. Since the Act does not make any specific provision for the same normally the provisions in the Code should apply. But Section 5 of the Code specifically saves the effect of any special, law, or special jurisdiction or the form of procedure prescribed therein. And Section 20 of the Act give overriding effect to the provisions therein.

15. The search therefore, should be find out the effect of special law constituting special court and the nature of the special jurisdiction conferred thereunder particularly with reference to the power to take cognizance of the offence. In spite of the constitution of the Sessions Court into a special Court, if the special Court continues to retain its character as Sessions Court, cognizance of the offence can be only as provided u/s 193 of the Code.

16. The answer to the same should be found from Section 14 of the Act. It reads:

"14. Special Court - For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by-notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

17. The significant aspect to be noted in this connection is Section 14 of the Act instead of providing for appointment of a Special Judge as is done in the Narcotic Drugs and Psychotropic Substances Act and the Prevention of Corruption Act, 1988, states that the State Government shall with the concurrence of the Chief Justice by the notification specified for each district a Court of Session to be a special Court. Thus, a Court of

Session is constituted as Special Court. In other words a Court of Session is transmuted as a Special Court, such transmutation will make the Special Court another forum in nature and substance. In the decision in A.R. Antulay Vs. Ramdas Sriniwas Nayak and Another, the question that arose for consideration was whether the Special Judge can take cognizance as a private complaint of offence under the Prevention of Corruption Act, 1947. In dealing with the same the Supreme Court considered the jurisdiction of the Special Court under the Prevention of Corruption Act and held at page 735 :

"The net outcome of this position is that a new Court of original jurisdiction was set up and whenever a question arose as to what are its powers in respect of specific question brought before it as Court of original criminal jurisdiction, it had to refer to the Criminal P.C. undaunted by any designation claptrap. When taking cognizance, a Court of Special Judge enjoyed the powers u/s 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Session."

18. The principle will apply to Special Court under the Act also because of the effect of transmutation of the Sessions Court as a Special Court. Since the effect of Section 14 of the Act being to constitute Special Court as a Criminal Court of original jurisdiction, in the matter of taking cognizance, Section 193 of the Code cannot apply, only Section 190 of the Code can have application. The effect of Section 14 of the Act has to be understood in the light of its object also. The effect of Section 14 of the Act is to enable the Special Court to exercise original jurisdiction, and therefore its power to take cognizance has to be controlled by Section 190 of the Code and not u/s 193 of the Code. To this extent the provisions of the Code cannot apply. It need hardly be said, the change in the character of the jurisdiction of the Sessions Court as a result of the notification u/s 14 of the Act is only when it exercises jurisdiction as a Special Court under the Act. The result of the same is the Special Court can try offences under I.P.C. along with the offence u/s 3 of the Act when the conditions u/s 220(1), (3) or (4) of the Code are satisfied. As is pointed out by my learned Brother unless the Special Judge is competent to take cognizance without committal of I.P.C. offences committed in the course of same transaction the very object of the Act will be defeated. That certainly is not the intention of the legislature.

19. True, as per Section 14 of the Act, the Constitution of the Special Court is to "try" dffences under the Act. My learned Brother relying on The State of Bihar Vs. Ram Naresh Pandey, has pointed out "try" in Section 14 of the Act is not used in a limited sense. With due regard to the scheme of the Act particularly in the context of Section 14, it is abundantly clear that the word "try" in Section 14 of the Act is not employed in any restricted sense, the same would include every inquiry and trial on the taking cognizance of the offence by the Special Judge.

20. In the light of what is stated above, when the Special Court receives a final report disclosing offence punishable u/s 3 of the Act as well as offence punishable under the Indian Penal Code it can take cognizance of the offences without committal. In view of the

above, the second question does not arise.