

(2013) 11 MAD CK 0159

Madras High Court

Case No: Criminal O.P. No. 26752 of 2013 and M.P. No. 1 of 2013

T. Selvakumar

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: Nov. 12, 2013

Hon'ble Judges: P. Devadass, J

Bench: Single Bench

Advocate: K. Pasupathy, for the Appellant; C. Emalias Additional Public Prosecutor, for the Respondent

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

P. Devadass, J.

This petition involves an interesting question as to whether a Magistrate can commit a case to the Court of Sessions, which does not involve a sessions offence. Petitioner Selvakumar, who is A-1 in the Sessions Case in S.C. No. 131 of 2013, pending before the learned III Additional Sessions Judge, Chennai, seeks direction for completion of investigation in Crime No. 565 of 2011 by the respondent, namely, the Inspector of Police, P-6, Kodungaiyur Police Station, Chennai, and commit the case to the said Additional Sessions Judge for joint trial along with the said Sessions Case in S.C. No. 131 of 2013.

2. At No. 182, GNT Road, Errukkencherry, Chennai 118, there is a TVS Service Centre. Petitioner, Parthiban and certain others are employed there. On 13.05.2011, one Lakshmanan left his friend Maruthupandian's Auto in the said Service Centre for carrying out certain repairs.

3. On the same day, at about 5 p.m., Maruthupandian, his friends Lakshmanan and Durariraj came to the service centre and demanded the Auto. In this connection, quarrel arose between them and the staff of the service centre. Maruthupandi sustained injuries. Petitioner also sustained injuries. Lakshmanan took away the

injured Maruthupandi to the hospital.

4. Parthiban, a staff of the Service Centre, gave complaint to the respondent police on the incident took place inside the Service Centre. A case in Crime No. 565 of 2011 for offences under Sections 341, 294(b), 323 and 427 IPC, has been registered as against Maruthupandi, Durariraj and Lakshmanan.

5. At about 6.45 p.m., at the hospital, Maruthupandian passed away. Lakshmanan gave complaint to the respondent police. A case in Crime No. 566 of 2011 for offences under Sections 342, 147, 148, 323, 324, 302 IPC has been registered by the police as against the petitioner, Parthiban and certain others.

6. The Investigation Officer investigated the murder case in Cr. No. 566 of 2011 and filed the final report before the Court for offences under Sections 147, 148, 149, 342 and 302 IPC as against petitioner and 4 of his colleagues. In P.R.C. No. 160/2011, the learned Xth Metropolitan Magistrate, Egmore, Chennai committed the case to the Court of Principal Sessions Judge, Chennai. The learned Principal Sessions Judge took cognizance in S.C. No. 131 of 2013 and made over the case to the learned III Additional Sessions Judge, Chennai for trial. The case is pending for trial.

7. At this juncture, Selvakumar, viz., A1 in the said Sessions case approached this Court with the prayer already stated in para 2, supra.

8. The learned Additional Public Prosecutor submitted that in the assault case in Crime No. 565 of 2011 also now investigation has been completed and final report for offences under Sections 341, 294(b), 352 IPC also has been filed before the learned Vth Metropolitan Magistrate, Egmore, Chennai.

9. The learned counsel for the petitioner contended that the Sessions Case and the said assault case, which is a calendar case are "case and counter case". Thus, they have to be tried jointly. In the circumstances, the learned Magistrate has to send the assault case also to the learned III Additional Sessions Judge, Chennai and the Sessions Court has got the power to try the calendar case also. In this respect, the learned counsel for the petitioner also cited [Sudhir and Others etc. Vs. State of M.P. etc.,](#) .

10. Heard the learned Additional Public Prosecutor.

11. I have anxiously considered the submissions of the learned counsels. Perused the materials on record and the decision cited at the bar.

12. For the purpose of administration of Criminal Justice hierarchy of courts have been constituted. (See: Chapter II, Section 6 Cr.P.C.). On the judicial side, there are Court of Sessions, Chief Judicial Magistrates, Chief Metropolitan Magistrate, Ist class Magistrates, which now includes Judicial II class Magistrates also, Metropolitan Magistrates and Special Magistrates and Special Judges. All the criminal courts are functioning in a Sessions Division. (See: Section 9 Cr.P.C.). Each Court has territorial

jurisdiction. Ist-Schedule to the Code of Criminal Procedure mentions offences, which the courts have to try. The cases are generally classified as sessions cases, warrant-cases, summons-cases and summary trial cases.

13. The sentencing power of each Judge also has been specified in the Code of Criminal Procedure. (See: Chapter-III). Sessions cases are triable by the Sessions Courts. The warrant-cases and calendar cases are triable by the Judicial Magistrates/Metropolitan Magistrates. So far as the Sessions Judges are concerned whether Principal or Additional Sessions Judges, they can impose any sentence authorised by law. The only rider is that the death sentence passed by them will have to be confirmed by this Court. (See: Section 28(2) Cr.P.C.). Thus, the learned Sessions Judges can try any offence, but the learned Magistrates can try only those offences which have been specifically earmarked for them. (See: Ist-Schedule to the Code).

14. The offences, which have been earmarked for the Sessions Courts (See: Ist-Schedule to the Code) cannot be straightway filed before the Sessions Courts. These cases have to be first filed before the learned Magistrates(committal court). Some preliminary work have to be done there(See: Section 207 Cr.P.C.). When the package is ready, the learned Magistrate shall commit the case to the Sessions Court. (See: Section 209 Cr.P.C.).

15. Under the Old Code of 1898, accused has been committed to the Court of Sessions for trial. Under the Old Code, the committal Magistrate played a major role. Even they had the power to discharge the accused from the case, if the accused is entitled to be discharged. But, under the New Code of 1973, the learned committal Magistrate has very limited role to play, as now they are committing the case and not the accused to the Court of Sessions.

16. There are two major type of cases. One is police case, where F.I.R. is registered. It is State prosecution. The other one is private case, where a private complaint is presented to the Magistrate. It is private prosecution. But, in both the type of cases, if they involves offences exclusively triable by a Court of Sessions necessarily the Magistrate has to comply the formalities prescribed under Sections 207, 208 Cr.P.C., as the case may be and commit the case to the Court of Sessions. (See: Section 209 Cr.P.C.).

17. Thus only upon committal, the Sessions Judges can try the cases.[See: Section 193 Cr.P.C.]. Thus, the Sessions Courts have no original jurisdiction. But, under certain circumstances, they have original jurisdiction, namely, cases filed under TADA, POTA, complaints u/s 500(i) IPC. filed by the Public Prosecutors and cases as specified in certain special enactments.

18. But, when the cases committed by the learned committal Magistrate do not disclose a sessions offence, the learned Sessions Judge himself may try the case. (See: Section 228(1)(a) Cr.P.C.) or he may frame a charge or without framing a

charge, send the case to the Chief Judicial Magistrate, thereafter, he alone can try the case. (See: Section 228(1)(a) Cr.P.C.).

19. So, what emerges from the above is that the Sessions Judges can try all type of cases including warrant-cases, summon cases. Higher always includes the lower, but not vice versa.

20. Sessions offences (See: 1st Schedule to the Code) alone has to be committed by the Magistrate to the Court of Sessions u/s 209 Cr.P.C. Other type of cases, such as warrant-cases, summon-cases are not to be committed by the learned Magistrate u/s 209 Cr.P.C.

21. But, both in the assault case reported in Crime No. 565 of 2011 by Parthiban and in the murder case reported in Crime No. 566 of 2011 by Lakshmanan, the occurrence is alleged to have been taken place at the same place and at about the same time. The accused in the murder case (Sessions Case No. 131 of 2013) are figuring as complainant and certain witnesses in the assault case in Crime no. 565 of 2011. Similarly, the accused in the assault case in Crime No. 565 of 2011 are figuring as complainant and certain witnesses in the murder case. Thus, they are "case and case in counter". They are "cross-cases". But, the assault case has to be tried as a calendar case by the learned Xth Metropolitan Magistrate. While, the murder case has to be tried by the learned III Additional Sessions Judge. Thus, the two versions as to the said occurrence have to be presented before two different judges. In such circumstances, there will be conflict of decisions. In such circumstances, trial of both the cases by different judges will not be a fair trial.

22. Long ago, In re Krishtamma (1929 MWN 881), a Division Bench of this Court suggested as under:-

a case and counter-case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other.

23. Under the Old Code of 1898, there was no provision to deal with the situation arising out of counter-cases. Thus, in [Krishna Pannadi Vs. Emperor](#), Justice Jackson observed as under:-

There is no clear law as regards the procedure in counter-cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.

24. Explaining the need to try the counter-cases by one and the same Judge and the benefit of it, in [Sudhir and Others etc. Vs. State of M.P. etc.](#), the Hon'ble Supreme Court observed as under:-

8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter-case" by some High Courts and "cross cases" by some other High Courts."

The practical reasons for adopting a procedure that such cross-cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts. (3) In reality the case and the counter-case are, to all intents and purposes, different or conflicting versions of one incident.

25. In *Nathilal v. State of U. P.* , as regards trial of counter-cases, the Hon"ble Apex Court advocated the following procedure:-

We think that the fair procedure to adopt in a matter like the present where there are cross-cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other.

26. Under the New Code, Section 323 Cr.P.C. enables the Magistrates to meet the contingency arising out of a case and counter case. The Magistrates can resort to this provision at any stage of the case, but, it must be before pronouncing the judgment.

27. This aspect has been elaborately considered by the Hon"ble Apex Court in *SUDHIR*(supra) and it was explained as under:-

12. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions Court, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The Magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions

subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Session, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:

323. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made.

13. The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a Magistrate has committed a case on account of his legislative compulsion by Section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as one which ought to be tried by the same Court of Session. We have already adverted to the sturdy reasons why it should be so. Hence the Magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross-case also to the Court of Session. Commitment under Sections 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII.

28. From the above, it emerges that though in the assault case in Crime No. 565 of 2011 final report has been filed by the police before the learned Magistrate, which is to be tried as a calendar case it has become a counter-case to the sessions case in SC. No. 131 of 2013 which is to be tried by the learned III Additional Sessions Judge, Chennai.

29. As already stated, the III Additional Sessions Judge has the power to try the calendar case also. In view of the facts and circumstances, since both the cases are required to be tried by the very same III Additional Sessions Judge, the learned Magistrate can invoke Section 323 Cr.P.C., and commit the calendar case to the Court of sessions.

30. In the facts and circumstances, question of clubbing the calendar case with the Sessions case, in other words, joint trial will not arise. In both the cases, evidence has to be recorded separately. The evidence in each case has to be assessed independently by the trial Judge. He shall not read the evidence in one case in the other case.

31. One more aspect is prosecutor to conduct prosecution in the calendar case. As the accused in the Sessions Case are the main witnesses in the calendar case, the prosecution in the calendar case has to be conducted by a separate prosecutor.

32. In view of the fore goings ordered as under:

- i) The learned Vth Metropolitan Magistrate, Egmore, Chennai, shall take further action on the final report filed by the respondent police in Crime No. 565 of 2011 in accordance with law and send the case to the learned Xth Metropolitan Magistrate, Egmore, Chennai.
- ii) The learned Xth Metropolitan Magistrate, Chennai after complying the legal formalities, shall invoke Section 323 Cr.P.C. and commit the calendar case to the Court of learned Principal Sessions Judge, Chennai, who will made over the case to the Court of learned III Additional Sessions Judge, Chennai.
- iii) Till the calendar case is received, the learned III Additional Sessions Judge, Chennai shall defer conducting trial in the sessions case in S.C. No. 131 of 2013.
- iv) The learned III Additional Sessions Judge, Chennai will take steps through proper channel for the appointment of a separate prosecutor to conduct prosecution in the calendar case.
- v) The learned III Additional Sessions Judge, Chennai will try the calendar case and the Sessions Case simultaneously and pronounce judgments on the same day one after the other.

With these directions, the Criminal Original Petition is disposed of. Consequently, connected M.P. is closed.