Girish Chandra and Others Vs Emperor

None

Court: Calcutta High Court

Date of Decision: Sept. 2, 1929

Acts Referred:
Criminal Procedure Code, 1898 (CrPC) â€" Section 215, 432#Presidency Towns Insolvency Act, 1909 â€" Section 103

Citation: AIR 1929 Cal 756

Hon'ble Judges: Rankin, C.J; Mukerji, J; C.C. Ghose, J; Buckland, J; B.B. Ghose, J

Bench: Full Bench

Judgement

Rankin, C.J.
On 19th September 1928, Lort Williams, J., exercising the jurisdiction of the High Court under the Presidency Towns

Insolvency Act (3 of 1909 as amended by Act 9 of 1926) and being of opinion that there were grounds for thinking that certain insolvents had

committed offences u/s 103 of the said Act, made a complaint u/s 104, thereof to the Chief Presidency Magistrate of Calcutta. The Magistrate

issued process on the accused and from the earliest stage of the proceedings determined to conduct them under Chap. 18, Criminal P.C., being of

opinion that the case was one which ought to be tried at the High Court Sessions. On 17th December 1928, be formally committed the three

accused Girish Chandra Kundu, Sudhir Chandra Kundu and Pramatha Nath Kundu accordingly. On 8th March 1929 the case came before

Buckland, J. in the ordinary original criminal jurisdiction of the Court. The learned Judge took the view that as on conviction for an offence u/s 103

of the Act of 1909, the maximum punishment to which the accused is liable to imprisonment for a term which may extend to two years and as there

is no provision for imposition of a fine in addition to imprisonment, it was not possible to say of the offence charged that it could not be adequately

punished by the Magistrate who has power to impose two years" imprisonment. In this view, being of opinion that the commitment was illegal,

Buckland, J., directed that the commitment be quashed and that the record, with a copy of his judgment, be returned to the Chief Presidency

Magistrate in order that be might deal with the complaint according to law. The accused persons had an opportunity before Buckland, J., of being

heard upon the question whether the commitment should be quashed, but nothing was urged upon this point on their behalf. When the matter went

back to the Magistrate, they filed a petition contending that the order of Buckland, J. read as a whole amounted to a discharge of the petitioners.

The Magistrate thereupon has acted u/s 432, Criminal P.C., with a view to obtaining a decision upon certain question of law which he has

indicated.

2. Section 432 provides that a Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises

in the hearing of any case pending before him : and Section 433 provides that when a question has been so referred the High Court shall pass such

order thereon as it thinks fit and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose

of the case conformably to the said order. It will be observed that while the power of the Magistrate is to refer any question of law, the power of

the High Court is to pass such order thereon as it thinks fit. In the present case the Magistrate has formally stated seven questions:

(i) What is the correct interpretation of Section 215, Criminal P.C. ?

(ii) Does it give power to the Judge presiding at the Sessions to quash a commitment made to him by a competent Magistrate ?

(iii) Does it refer to a power of the High Court in its revisional jurisdiction ?.

(iv) Does it, refer to both of these powers ?

(v) If it gives the power referred to in (ii), what is the effect when the Judge so presiding quashes a commitment ? Has it, as suggested by the

accused in their petition, the effect of a discharge, so that the Committing Magistrate has no further jurisdiction in the matter, in the absence of a

fresh complaint ; or can, the Magistrate proceed with the case as it stood prior to his passing the order of commitment.

(vi) Subsidiary to the question raised in (v) is the question whether the Judge presiding at the Sessions has power to direct what shall be the effect

of his order quashing the commitment.

(vii) The learned Judge in the present case has quashed the commitment on a point of law, viz., that the charge in the case u/s 103, Presidency

Towns Insolvency Act, is punishable with a maximum imprisonment of two years, that this being not more than the maximum punishment the

Magistrate could award, his order of commitment was illegal.... Is the Magistrate bound by that order, so that in due course when the matter

comes on again, he must not commit the case, though with all respect, he differs from the view of the law thereby expressed, and is of opinion that

he has power to commit the case ?

3. Upon the reference coming before a Division Bench, the learned Judges have intimated their opinion and have referred two questions to this Full

Bench for determination. Their opinion in substance is that Buckland, J., had no power to quash the commitment ; that the ground upon which he

decided to quash it was erroneous and that if he acted u/s 215, Criminal P.C., the accused should stand discharged. The two questions which they

have referred to us are as follows:

(1) Has a Judge presiding over the Sessions of the High Court power u/s 215, Criminal P.C., to quash a commitment made to him by a competent

Magistrate ?

(2) Where in a case triable by a Magistrate and not exclusively triable by a Court of Sessions, the Magistrate commits to the Court of Session,

being of opinion that it should be tried by that Court, without saying that he could not award adequate punishment or the case is such where

maximum punishment is within the competency of the Magistrate, is the commitment without jurisdiction ?

4. Now, it appears to me that the power of reference conferred upon the Presidency Magistrate by Section 432 of the Code is confined to

questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him ; and that the Magistrate

ought not to refer to this Court questions of law unless they are matters upon which he has a duty to make up his mind. In substance the Chief

Presidency Magistrate has in this case asked this Court to express its opinion upon three questions:

(1) whether the learned Judge at Sessions had power to quash the commitment ;

(2) whether he was right in law in quashing the commitment for the reasons given by him ; and

(3) whether it is competent for the Magistrate to proceed in the absence of a fresh complaint or whether he can proceed with the case as it stood

prior to his passing the order of commitment.

5. I have some difficulty in seeing that either of the first two questions is a question which arises in the hearing of the case pending before the

Magistrate. I should have thought that for the purpose of this case the Magistrate had amply discharged his duty if he had taken the order of the

High Court as an effective order quashing the commitment and had proceeded to deal with this case upon the footing that it was for him to deal

with it himself as a warrant case under the provisions of Chap. 21, Criminal P.C.

6. Assuming, however, that the first question which has embarrassed the Magistrate is the question whether it is open to him to ignore the order of

the learned Judge and to treat it as null and void, I am of opinion that the answer to this question is in the negative.

7. Prior to Act 13 of 1865 which abolished Grand Juries in the Presidency towns, original criminal jurisdiction of the High Court over an individual

accused was based upon the presentment of the Grand Jury. Act 18 of 1862 contained elaborate provisions for the amendment of indictments and

provided that every verdict and judgment should be of the same force and effect in all respects as if the indictment had originally been in the

amended form. It contained also various provisions according to which an offence might be dealt with, tried and punished by the Supreme Court

according as the offence had been either commenced or completed, or as the consequence had ensued, within the local jurisdiction of the Court. It

gave jurisdiction in the case of. offences committed on a journey or on a voyage in British India. It provided that every objection to an indictment

for uncertainty or for any formal defect apparent on the face thereof should be taken by demurrer or motion to quash such indictment before the-

jury had been sworn and not afterwards. It defined the word "" indictment "" to include information, inquisition or presentment as well as indictment ;

and also plea, application or other pleading.

8. Act 13 of 1865 provided that any Magistrate who shall commit to custody or hold to bail any person for trial before the High Court for an

offence committed, or which according to law may be dealt with as having been committed within the local limits of its ordinary original civil

jurisdiction, should deliver to the clerk of the Crown a written instrument of charge signed by him stating for what offence such person is so

committed or held to bail. It empowered the clerk of the Crown to alter, amend or add to the charge and directed that the charge, with such

amendments, alterations or additions, if any, should be recorded in the High Court. Section 6 enacted that upon the charge being recorded as

aforesaid, the persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law and

should be arraigned at suit of the Crown and the verdict recorded thereupon. Under this Act it is evident that the foundation of the jurisdiction of

the High Court was the written instrument of charge signed by the Magistrate and delivered by him to the clerk of the Grown. It was only after

charges so made had been recorded that the accused were to be deemed to have been brought before the High Court in due course of law.

9. Between 1865 and the enactment of the Criminal Procedure Code of 1872 the effect of these provisions of the Act of 1865 was considered in

Queen v. Thompson [1868] 1 B.L.R. 1. The accused was tried for an offence committed on Board a British ship on the high seas. The written

instrument of charge in that-case had in fact been made by a Magistrate but the fact did not appear from: the instrument itself. Peacock, C.J. made

it clear that if in fact it had not been preferred by a Justice of the Peace, it could not have been supported. But with reference to the provisions

which I have already cited from Act 18 of 1862, ho held that:

although we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so preferred

and that the Judge presiding at the trial would not have quashed the charge for the defect now relied upon but would have caused the charge to be

amended.

10. He refers to Section 41, Act 18 of 1862 and to Section 7, Act 13 of 1865 which provided that in the former Act the word ''indictment ''

should be understood to include the word '' charge '' and that all the provisions of the said Act should apply to charges recorded as aforesaid and

the trial of such charges. It is clear, therefore both on authority and on the terms of the statutes themselves, as well as upon principle that after 1865

the power of the Court to quash an indictment had become a power to quash the charge comprised in the written instrument of charge delivered by

a Justice of the Peace to the clerk of the Crown.

11. The written instrument of charge, or as it is now called the order of commitment, has from 1865 onwards a double aspect : it is in the first place

an order of the Magistrate : it is in the second place the foundation of the jurisdiction of the superior Court. It may be regarded in either of these

ways and it may have to be dealt with under either aspect.

12. This was the position when the legislature passed the Criminal Procedure Code of 1872 which purported to be:

An Act for regulating the procedure of the Courts of Criminal Judicature, other than the High Courts in Presidency towns in the exercise of their

original criminal jurisdiction.

13. Chapter 15 of that Code dealt with the procedure to be adopted in enquiries before Magistrates in cases triable by Courts of Sessions or High

Courts. Section 196 provided that when evidence has been given before a Magistrate which appears to justify him in sending the accused person

to take his trial for an offence which is triable exclusively by the Court of Sessions or High Court, or which in the opinion of the Magistrate is one

which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Sessions or High Court as

the case may be. Section 197 was as follows:

If such accused person (not being a European British subject) is accused of having committed an offence conjointly with a European British subject

who is about to be committed for trial, or to be tried before the High Court on a similar charge, and the evidence appears to justify the Magistrate

in sending the accused person for trial, he shall commit such accused person to take his trial before such High Court, and not before a Court of

Sessions ; and such High Court shall have jurisdiction to try such person.

Explanation.--A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law This

explanation applies also to Section 196.

14. It may well be that in this Code, as in the subsequent Codes, the definition of "" High Court "" (which is the same as that now appearing in

Section 4 of the Code of 1898) is one that does not always fit in with the meaning of the words as used. This is no great matter in the Code of

1872 as Section 4 of the Act qualifies the definition therein contained by the phrase "" unless a different intention appears from the context.

Remembering, however, that it was no part of the purpose of the Act of 1872 to regulate the procedure of High Courts in the exercise of their

original criminal jurisdiction, we will find it impossible to suppose that an "" explanation "" appended to Section 197 of this Code, which itself speaks

of ""trial before the High Court "" was intended to alter the law under which a High Court Judge at Sessions had the right and the duty to quash the

charge if the prisoner had not been brought before him in due course of law. In the Cede of 1882 this-explanation re-appears as Section 215. In

that Code the old definition of "" High Court "" is still applicable to Chap. 18. Section 215 re-appears in the Code of 1898 in which Code the

definition applicable to Chap. 18 is the definition in Section 266.

15. In my judgment the question is put upon a wrong footing if it be asked in the form whether the power conferred by S. 215 is conferred upon

the Judge exercising the ordinary original criminal jurisdiction. To begin with the internal arrangements of the High Court are dealt with by its Rules

and the Code does not decide what functions can be exercised by a single judge or must be exercised by a Division Bench. It deals with the High

Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts.

In the second place Section 215 is a negative or restrictive section. It is intended to negative the existence in Sessions Courts of power to quash a

commitment and it is intended to restrict the High Court to cases in which it can be said that the commitment is bad in law. This last restriction is a

restriction put upon all powers which the High Court might otherwise possess. I have no doubt at all that it is a restriction which attaches to the

powers of the High Court in revision. Indeed as a Court of trial there could be no question of the High Court quashing a commitment on the ground

that the evidence would not support the charge. But it is a very different matter to contend that it takes away by implication any other power to

quash a commitment for illegality which the High Court may have had. If a Judge of the High Court trying a prisoner discovers that the accused or

the offence is, for any reason, outside the jurisdiction of the Committing Magistrate or that the accused has been brought before him by an illegal

order of an inferior Court, it is clearly his duty to take some action upon these considerations. His concern with Section 215 is, in my judgment,

only this, that he is bound to see that he does nothing which the section prohibits.

16. The question of what he has to do takes us first to Section 532 of the Code. This section, it is to be observed, is one of a series which give

power to remedy defects of procedure, which otherwise might result in criminal proceedings being set aside for errors not productive of injustice.

Section 532 in my opinion is directed to the case of commitments that are bad by reason of a defect personal to the committing officer. It envisages

a Magistrate purporting to exercise powers duly conferred upon him and this in my judgment is a reference to Section 206. The case supposed is

one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. In

these circumstances Section 532 provides that if the Court of Sessions or High Court considers that the accused has not been injured by the

irregularity, it may accept the commitment, provided, however, objection had not been made to the jurisdiction of the Magistrate before the order

of commitment was made. This section in my opinion has no reference to a case in which a Magistrate who has general powers to commit an

accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which, upon a true

construction of the Code, is not triable by a Court of Sessions or High Court. Section 532 has, in my judgment, no application to the present case

but it does remind us that an order of commitment has a double aspect, being at once an order of the committing Court and an order which is the

foundation of the jurisdiction of the higher Court. For the limited purposes of the section the Court of Sessions as well as the High Court has to

make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly

interpreted in the interests of accused persons. It is idle to argue from the provisions of this section that it assumes or implies that the High Court at

a trial has no other authority to quash a commitment.

17. The next section to be considered is Section 273. This is a special power given to High Courts. If it appears to the High Court at any time

before the commencement of the trial that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to

that effect and

such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be.

18. In my judgment this section has no reference to cases of illegal commitment. The reference to portions of a charge and to the charge or portion

thereof being ""clearly unsustainable"" is sufficient to show that the section is intended to provide a short and effective way by which charges which

have no merits may be disposed of.

19. The prohibition in Section 215 by which the High Court is limited to a point of law as a reason for quashing a commitment has in my opinion a

plain purpose. In Charoo Chunder Mullick v. Empress [1882] 9 Cal. 397 the Court refused an application u/s 147, High Courts Criminal

Procedure Act (10 of 1875), finding that the object of the application was to get an order quashing a commitment on the ground that there was an

insufficient case upon the evidence. The Judges pointed out that if a commitment may be quashed upon the merits and application to this effect may

be made, it would in practice be made only in doubtful cases. If such an application were entertained and refused the result would be that a

prisoner committed upon evidence, sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of the

High Court pronounced against him to the effect that the commitment ought not to be quashed. Applications of this character would clearly be

objectionable. But Section 273 provides suitably for this very class of cases. The charge must be ""clearly"" unsustainable or else the Judge will not

take into his own hands the functions of the jury.

20. If these Sections 532 and 273 are not addressed to a case in which the High Court as a Court of trial has before it a prisoner whose

commitment is contrary to law in the sense that he is not amenable to the jurisdiction of the Court at all, it would seem that there is no express

provision in the Code to direct the Judge''s action. The Sessions Judge has a power of reference to the High Court. Is the High Court Judge left in

such a case to some irregular or informal arrangement by which he may call in aid a different jurisdiction of the Court--the revisional jurisdiction

over the committing Magistrate ? Or is he to say to the prisoner:

You have made a very good plea in Bar but I cannot listen to it. I will try you though I see I have no right to try you but I will let you take your

objection on the general issue?

21. One may well hesitate to impute either intention to the legislature.

22. As it appears to me to be clear that prior to the Code of 1882 at all events, the right and duty of the High Court at Sessions to quash a charge

is plain, I am of opinion that before it could be held that the Judge in the exercise of the original criminal jurisdiction of this High Court is unable to

quash a commitment, it must be shown from the language of the Code or from the scheme of the Code that the legislature has taken away this

power prima facie incident to any superior Court receiving commitments from the lower Courts as the basis of its own jurisdiction. In my opinion

no construction that could properly be placed upon Section 215 of the Code could be put so high. The legislature in this matter has I think been

somewhat wiser than has been supposed. It has been content, in view of the revisional powers of the High Court, to take away the power of

quashing a commitment, save u/s 532, from Courts of Session on which formal powers of reference have been conferred, and to leave the powers

of the High Court upon this matter unaffected by special provision save that commitments are not to be quashed except upon a point of law. The

Code of 1882 intends no more than the Code of 1872 intended. It was unnecessary for the purpose of the legislature in any of the Codes and it

was no part of its scheme, to analyse High Courts as though they were a complex of jurisdictions or to set forth the different ways and occasions

which might present the question of quashing a commitment for the consideration of High Courts.

23. In the present case the High Court has in fact quashed the commitment and I think in answer to this reference the Chief Presidency Magistrate

may be informed that it is his duty to treat that order as a valid and subsisting order.

24. The next question raised by the Magistrate is whether the order of Buckland, J., has the effect of a discharge so that the Magistrate has no

further jurisdiction in the matter in the absence of a fresh complaint, or whether the Magistrate can proceed with it as it stood prior to the passing of

the order of commitment. To this question I would reply that while the primary effect of the order quashing the commitment is to supersede any

action taken by the Magistrate u/s 210 and his proceedings subsequent thereto, it is necessary for the Magistrate in this case to go back to the

point at which he took cognizance of the complaint. There is no need whatever for a fresh complaint but it is necessary for the Magistrate to treat

the case as a warrant case and not as the subject matter of an enquiry under Ch. 11. The Magistrate must begin the trial afresh u/s 252.

25. The last question raised by the Magistrate concerns the merits of the order of Buckland, J., and raises the question whether the learned Judge

was right in holding that it is illegal for a Magistrate to commit the accused to trial when the offence is neither exclusively triable on commitment nor

one of which it is possible to hold that the Magistrate has insufficient powoer tinflict adequate punishment.

26. That the Magistrate should think fit to raise this question is presumably to be explained by the circumstance that be entertains a doubt whether

or not the order of the learned Judge was without jurisdiction. That doubt having been resolved, it is not to be supposed that the Magistrate will

entertain a suggestion that when he rehears the case, he should again commit the accused to the High Court Sessions. Such a procedure would in

this case be in the highest degree disorderly. The question whether it is lawful for the Magistrate to commit this case to the High Court Sessions has

been decided by this Court once. This Full Bench is not sitting on appeal from the order of the learned Judge. Whatever be the difficulties in the

question raised and whatever be the answer, there is only one order which could in this case be correct and I am of opinion that it is open to us on

this reference to direct the Chief Presidency Magistrate to proceed with the case as a warrant case and to try it as such in conformity with the

decision which has already been given in the presence of the accused.

27. This reference to the Full Bench has been made under Rule 5, Chap. 7 of the Rules of the appellate side. Under this rule the whole case is

referred to the Full Bench for such orders as to the Full Bench may deem fit. The order which I would propose is as follows:

1. Declare that the order of Buckland, J., is a valid and subsisting order.

2. Direct the Chief Presidency Magistrate to try the accused under Chap. 21, Criminal P.C., upon the basis of the complaint already made.

3. Direct the Magistrate that be is not again to commit this case for trial at the High Court Sessions.

4. Save as aforesaid, this Court does not think fit to make any further order upon this reference.

C.C. Ghose, J.

28. I agree.

Buckland, J.

29. I agree.

B.B. Ghose, J.

30. I agree.

Mukerji, J.

31. I agree.