(1982) 03 CAL CK 0007

Calcutta High Court

Case No: Criminal Reference No. 5 of 1982

State		APPELLANT
	Vs	
Shyamal Kr. Dey and Others Protap Ch. Mukar and Bapi and Others Vs State		RESPONDENT

Date of Decision: March 30, 1982

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 193, 202, 220, 223, 235
- Explosives Act, 1884 - Section 6
- Penal Code, 1860 (IPC) - Section 148, 149, 302, 304, 317

Citation: 86 CWN 702

Hon'ble Judges: N.G. Chaudhuri, J; N.C. Mukherji, J

Bench: Division Bench

Advocate: Dilip Kumar Dutta, Partha Sarathi Bose, for the Appellant; S. Mukherji, Public Prosecutor for the State, Balai Ch. Roy amicus curiae, for the Respondent

Judgement

1. Criminal Reference 5 of 1982 arises on a reference made by the Assistant Session Judge, 3rd Court, Howrah under S 395(2) of the Code in connection with Sessions Trial No.2 of January, 1982 (State v. Shyamal Kr. Dey & Ors.) under S. 399/402 I.P.C. and 27 of the Arms Act. While we were disposing of Criminal Reference No. 5 of 1982 on March 15, 1982 and I put my signature my learned brother was about to put his signature, Mr. Dilip Kumar Dutta, learned Advocate appearing on behalf of the petitioner in Criminal Revision Case No. 257 of 1982 submitted that the same point of law is involved in Criminal Revision Case No. 257 of 1982 and asked to hear him on the points of law. Thereafter, we heard both Criminal Refernce No. 5 of 1982 along with Criminal Revisional Case No.257 of 1982 together and requested Mr. Balai Ch. Roy to assist the Court. Mr. Roy readily complied with our request and lent his able assistance.

2. G. R. Case No. 1535 of 1978 was registered in the Court of the Sub-divisional Judicial Magistrate, Howrah, under S 399/402 I.P.C. and 25/27 of the Arms Act and under S 6(3) of the Indian Explosives Act. The learned Sub-divisional Judicial Magistrate committed the case to the Court of Sessions. The learned Sessions Judge transferred the case to the court of the Assistant Session Judge. The learned Judge framed charge under S. 395/402 and also under S. 25(1) and 27 of the Arms Act. The plea of the accused was taken. It appeared to the learned Judge subsequently that commitment of this case to the Court of Sessions was without jurisdiction in so far as it involves the offence under S. 25(1)(a) and 27 of the Arms Act and the order of the Court in relation to the framing of charges under those sections of the Arms Act against accused Shyamal Dey and his taking of plea thereunder was also without jurisdiction. The learned Judge on 2.2.82 passed a long order quoting several sections of the Criminal Procedure Code and the Schedule of the Code. The learned Judge is of opinion that the offences under Ss. 25 and 27 of the Arms Act are exclusively triable by a Magistrate and as such accused Shyamal Kr. Dey could not have been committed to the Court of Sessions to face his trial under Ss. 25 and 27 of the Arms Act. The learned Judge refers S. 26(b) of the Code which provides that "subject to the other provisions of this Code any offence under any other law shall, when no court is mentioned in this behalf in such law, be tried by such court and when no court is so mentioned, may be tried by - (i) The High Court, or (ii) in any other court by which such offence is shown in the first schedule to be triable." The learned Judge then points out that punishment under Ss. 25 and 27 of the Arms Act is less than 7 years and in the Arms Act there is no provision as to which court will try the offences. In the schedule of the New Code officers for which punishments are up to 7 years can be tried by a Magistrate of First Class. The Court of Sessions which appeared in the Schedule of the Old Code for trying such offences has been omitted from the Schedule of the New Code. As such according to the learned Judge, when the accused has also been charged under Ss. 25 and 27 of the Arms Act, the case so far as there offences are concerned could not have been committed to the Court of Sessions and the learned Sessions Judge also could not have taken cognisance and framed charges under Ss. 25 and 27 of the Arms Act and should not have taken the plea of the accused.

3. Mr. Dilip Dutta supports all the reasonings of the learned Judge, Mr. Dutta refers to a Full Bench decision reported in Jiban Banerjee Vs. The State, . In this case, it was held "The correct position in law is that the provisions as regards joint trial as provided in S. 235 and S. 239 will have application only if the court concerned has jurisdiction under other provisions of law to try the offences sought to be tried together. Thus if under other provisions of the Criminal Procedure Code or any other law a Magistrate has jurisdiction to try offences A, B and C, these offences may be tried together if they come within the provision of Ss. 235 and 239; if, on the other hand, of these offences, A, B and C the Magistrate has under other provisions,

jurisdiction to try offences A and B but not the offence C, only offences A and B can be tried together but not the offence C." It was, of course suggested by their Lordships that to remove lacuna in law, amendment should be made of Ss 235 and 239 introducing suitable words to provide that a Magistrate having jurisdiction to try and of the offences which may be tried together will have jurisdiction to try all of them. Mr. Dutta next refers to a decision reported in State of Uttar Pradesh Vs. Sabir Ali and Another, . In this case, the accused was charged with offence under S 15(1) U. P. Private Forests Act, 1948. Such offence required to be tried by Magistrate of Second of Third Class. The offence was tried by a Magistrate of the First Class. It was held that "As jurisdiction of the Magistrate of the First Class is excluded by S. 29, Criminal Procedure Code, the trial is void under S. 530(p), Criminal Procedure Code". It is no doubt that as the Schedule now stands under the New Criminal Procedure Code, if a person is charged under Ss. 25 and 27 of the Arms Act, he will have to be tried by a Magistrate of the First Class and not by the Court of Session. The point for our consideration is if a person is also charged with other offences along with these offences and if the other offences cannot be tried by a Magistrate but must be tried by a Court of Sessions whether such a case can be tried by a Court of Sessions.

4. Mr. S. Mukherjee, learned Public Prosecutor, submits that S .26 should not be read in isolation and the said section should be read along with Ss. 220 and 223 of the Code. Section 220 provides for a trial for more than one offence. This section provides that "if, in series of acts so connected together as to form the same transactions, more offences then one are committed by the same person, he may be charged with and tried at one trial for, every such offence Section 23 provides for when more than one person can be charged and tried together.

5. Mr. Balai Ch. Roy supports the learned Public Prosecutor and submits that S. 26 is required to be read with S. 220 of the Code. Mr. Roy points out that the provisions of S 193 of the Code which provide that the Court of Sessions has no other option but to take cognizance of an offence when the case is committed to it by a Magistrate. Mr. Roy puts emphasis on the word ''case''. The entire case has been committed to the Court of Sessions. True along with Ss. 397 and 402 the accused has also been charged under Ss. 25 and 27 of the Arms Act. But Mr. Roy submits that the Magistrate could not have split up two portions of the case and sent some portion of the case to the Court of the Sessions. The Magistrate is only required to see whether the case is such which can be committed to the court of Sessions. Mr. Roy points out that for the offence under S. 304 only the Court of Sessions has been mentioned in the Schedule. But for the offence under S. 317 for which the punishment is upto 7 years the Court of Sessions has been excluded and only the court of the Magistrate of First Class has been shown in the Schedule. But, according to the provisions of S. 26 of the Code all offences under the Indian Penal Code can be tried by a court of Sessions. Mr. Roy also refers to the provisions of S .202 of the Code which also provide that if it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions he can commit the case to the Court of Magistrate. True that

some of the offences were triable by the Court of Sessions but the other offences of the Penal Code were triable exclusively by the Court of Sessions and as such, the Magistrate had no other option but to commit the case to the Court of Sessions. Mr. Roy in course of his argument takes support from a decision reported in B.C. Chenna Reddy and Others Vs. State of Andhra Pradesh and Another, . Here, the learned Judge committed the case to the Court of Sessions framing charge against the accused under S .367 which is exclusively triable by the Court of Session along with the main offences under S. 325 and 327 I.P.C. It was held that "the offence under S. 367 I.P.C. being triable only by a Court of Sessions could not be tried by a Magistrate. Consequently, the committal by the Magistrate was justified and was not liable to the quashed and the case did not call for interfere under S. 561-A". The next case referred to by Mr. Roy has been reported in Emperor, through Bachan Lal Vs. Subedar Singh and Others, . In this case, it has been held that "the effect of S. 28 is that a Court of Sessions has jurisdiction once a case has property come before it, that is on a legal order of commitment, even in matters of offences not ordinarily triable by it." Mr. Roy next refers to a decision reported in ILR 24 Cal 429 (Queen Empress v. Kayemullah Mandal & ors.). In this case, it has been held that "the Magistrate is quite competent to commit a case to the Court of Sessions for offences which are exclusively triable by the Court of Sessions along with the offences which are exclusively triable by the Magistrate.

6. Lastly, Mr. Roy very much relies on a decision reported in Purushottamdas Dalmia Vs. The State of West Bengal, . In this case, it has been held that the Court having jurisdiction to try the offence of conspiracy, has also jurisdiction to try an offence constituted by the overt acts which are committed in pursuance of the conspiracy beyond its jurisdiction. Their Lordships observed "the desirability of the trial, together, of an offence of criminal conspiracy and of all the over acts committed in pursuance of it, is obvious. To establish the offence of criminal conspiracy, evidence of the overt acts must be given by the prosecution. Such evidence will be necessarily tested by cross-examination on behalf of the accused. The Court will have to come to a decision about the credibility of such evidence and on the basis of such evidence, would determine whether the evidence of criminal conspiracy has been established or not. Having done all this, the court could also very conveniently record a finding of a guilty or not guilty with respect to the accessed said to have actually committed the various overt acts. If some of the overt acts were committed outside the jurisdiction of the court trying the offence of criminal conspiracy and if the law be that such overt acts would not be tried by that Court, it would mean that either the prosecution is forced to give up its right of prosecuting those accused for the commission of those overt acts or that both the prosecution and the accused are put to unnecessary troubles inasmuch as the prosecution will have to produce the same evidence a second time and the accused will have to test the credibility of that evidence a second time. The time of another court will be again spent a second time in determining the same question. There would be the risk of the second court

coming to a different conclusion from the first court . . . . . In making such observation, their Lordships overruled the Full Bench decision reported in Jiban Banerjee Vs. The State, , relied on by Mr. Dutta. The same reasonings apply to the facts of the present case. Giving our anxious consideration to the position of law as enunciated by the decisions, referred to above and also the several provisions of the Code of Criminal Procedure we are of the opinion that when a Magistrate cannot try a case as some of the offences are exclusive triable by a Court of Sessions he cannot split up the case and commit a part of the same to the Court of Sessions. A Magistrate is required to commit the entire case to the Court of Sessions. That is exactly what has been done in the present case. We are of the opinion that the learned Magistrate acted legally committing the case to the Court of Sessions and the Court of Sessions was also right in taking cognisance on commitment and framing chares and taking the pleas of the accused. The learned Assistant Sessions Judge is directed to proceed with the trial in accordance with law. The reference is thus, disposed of.

Criminal Revision 257 of 1982

7. In this case, the petitioners and other were charged under Ss. 148, 149/302 of the Indian Penal Code. The petitioners were also charged under S. 6(3) of the Indian Explosives Act in Sessions Trial No. XXX(1) of 1980 pending before the Sessions Judge, Howrah. The petitioners have come to this Court for quashing the charge framed against them under S. 6(3) of the Indian Explosives Act. Firstly, it has been urged that the punishment under the Indian Explosives Act being less than 7 years the learned Sessions Judge has no jurisdiction to try the said offence and it is only a Court of Magistrate which can try such offence. This point has been dealt with by us in the Criminal Reference just now disposed of. Next, it has been contended that S. 6(3) of the Indian Explosives Act having been omitted by the Amendment Act of 1978 the framing of charge under this section by the learned Sessions Judge against the petitioners is untenable and cannot be sustained and should be quashed. We find much substance with regard to this contention. In the charge, it has been mentioned that the accused persons committed the offence under S. 6(3) of the Indian Explosives Act on 5th March, 1979, that is after the amendment of the Indian Explosive Substances Act, 1978. By said amendment S. 6(3) has been omitted. In such circumstances, we agree with Mr. Dutta that no charge can be framed against the petitioners under S. 6(3) of the Indian Explosives Act.

8. In the result, this Rule is made absolute. The charge under S. 6(3) of the Indian Explosives Act framed against the accused petitioners is quashed. The learned Session Judge is, however, directed to proceed with the Sessions Trial in respect of other charges framed against the petitioners and other accused.

N.G. Chaudhuri, J.

9. I agree.

10. Rule made absolute; direction to proceed with the trial in respect of charges other than s. 6(3) of the Explosives Act.