(1977) 05 CAL CK 0024

Calcutta High Court

Case No: Criminal Revision No. 524 of 1976

Tushar Kanti Banerjee		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: May 4, 1977

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 193, 194, 209, 226, 227
- Penal Code, 1860 (IPC) - Section 304

Citation: 82 CWN 652 : (1977) 1 ILR (Cal) 600

Hon'ble Judges: R. Bhattacharya, J; A.P. Bhattacharya, J

Bench: Division Bench

Advocate: Monoj Mukherjee, for the Appellant;N.R. Biswas, for the Respondent

Final Decision: Allowed

Judgement

R. Bhattacharya, J.

This revisional application has been filed by the accused-Petitioner Tushar Kanti Banerjee against the judgment and order passed by the Sessions Judge, Purulia, in criminal Appeal No. 98 of 1975 affirming the order of conviction and sentence passed by the Assistant Sessions Judge in Sessions Trial No. 22 of 1975. The Petitioner was convicted u/s 304, pt, I of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years.

2. The prosecution case, in brief, is that P.W. 1 Lachu Gharain and others cultivate some lands in mouza Matiara as Bhagchasis for a number of years. They claim to have cultivated the said lands and on November 23, 1974, when Lachu Gharain and others, including Lachu''s son Bharat, went to cut paddy produced by them on those lands, the accused came there with a gun and in order to resist them from cutting the paddy he fired two rounds and as a result thereof Lachu''s son Bharat got injured and ultimately Bharat died that very day on account of the injuries.

3. The defence case is that Lachu Gharain and others never cultivated the lands in question as bargadars under the accused. It was the accused who had the lands cultivated and grew paddy on those lands. The story of possession of the land by Lachu and others has been denied. It was Lachu Gharain and others who went to assault the accused and unlawfully trespassed on the lands of the accused and in fact assaulted him. The defence case further is that Gharain tried to snatch away the gun from the accused and that during a scuffle two shots were fired accidentally. The case appearing in the statement of the accused u/s 313 of the Code of Criminal Procedure, 1973, is that in the night preceding the date of occurrence, he got information that a tiger had arrived. In the morning he loaded his gun and proceeded along the road. While he was proceeding, he was attacked from behind by the deceased Bharat, his father and others who assaulted him. Bharat and his father caught the gun and began pulling it. The accused caught in the middle portion of the gun and the trigger of the gun acted accidentally. He did not shoot. Several witnesses were examined both on the side of the prosecution and on the side of the accused. After trial the Assistant Sessions Judge convicted and sentenced the accused finding him guilty as indicated earlier. An appeal was taken against that order of conviction and sentence before the Sessions Judge who dismissed the appeal.

4. Mr. Manoj Mukherjee appears to support the application on behalf of the accused-Petitioner and Mr. N.R. Biswas opposes on behalf of the State of West Bengal.

5. Mr. Mukherjee has taken three points of law to challenge the judgment of the learned Assistant Sessions Judge in this revisional application. First, it has been contended that the trial by the Assistant Sessions Judge was bad in law since the trial was partly held earlier by the Sessions Judge. Secondly, it is submitted that the learned Sessions Judge acted without jurisdiction to hear the appeal causing prejudice to the accused and failure of justice since he himself conducted the trial partly at the initial stage. Lastly, it has been contended that the judgment of the Court of Appeal below was not a proper judgment because the learned Sessions Judge failed to take notice of material facts and evidence appearing in the case.

6. Before we proceed to deal with the contentions raised, it is necessary to state the relevant facts touching the first two points raised by Mr. Mukherjee. The case against the accused person was committed by the Magistrate on May 14, 1975. On May 16, 1975, the records were received in the Court of Sessions Judge Mr. A.C. Sen Gupta. On June 16, 1975 the Public Prosecutor and the defence lawyer were heard and on consideration of the materials on record, Mr. A.C. Sen Gupta framed a charge u/s 304, pt. I of the Indian Penal Code against the accused and the said charge was read over to the accused who pleaded not guilty of the said charge. The case was then transferred to the Assistant Sessions Judge for trial. On August 20, 1975, the accused who was on bail was present. The learned Advocates on behalf of

the prosecution and the accused were also present. The charges framed u/s 304, pt. I of the Indian Penal Code already framed by the Sessions Judge on June 16, 1975, against the accused was read over and explained in Bengali to the accused who pleaded not guilty and claimed to be tried. Then the learned Assistant Sessions Judge proceeded with the trial by examination of the witnesses. The judgment was delivered on August 27, 1976 and sentence was passed against the accused after several days of protracted trial. Against the judgment and the order of conviction and sentence, an appeal was filed on August 30, 1975, before Mr. A.C. Sen Gupta, the learned Sessions Judge of Purulia, who admitted the same and called for the trial Court records and fixed September 20, 1975, for hearing of the appeal. Arguments were heard and concluded on March 22, 1976 and the judgment was delivered on March 30, 1976, dismissing the appeal. It may be stated that the first two points now raised before this Court by Mr. Mukherjee were not taken either before the trial Court or before the learned Sessions Judge in the appeal. Neither were these two points mentioned as grounds in the revisional application filed before this Court. We have, however, allowed the two points to be taken as they are points of law and particularly they have got some importance in view of the introduction of the Code of Criminal Procedure, 1973.

7. With regard to the first point of Mr. Mukherjee, his argument is that when on receipt of the commitment case against the accused the learned Sessions Judge framed charge against the accused u/s 304, pt. I of the Indian Penal Code, the trial began before the learned Sessions Judge and therefore, he had no jurisdiction to transfer the case against the accused to be tried by the Assistant Sessions Judge. According to Mr. Mukherjee, the Sessions trial against the accused cannot be held by two Judges belonging to the same Sessions Division. Such procedure, Mr. Mukherjee says, vitiates the trial being without jurisdiction.

8. In order to decide the point we are to consider several sections of the new Code of Criminal Procedure, 1973. This Code was introduced to dispose of criminal cases within the shortest possible time and without delay by avoiding the unnecessary complications and procedural decorations. To achieve this purpose the new Code has been prepared keeping several provisions of the old Code and also introducing new provisions to straighten the procedural part to see that proper and just decision can be arrived at according to law. To ascertain the correctness of the contention raised by Mr. Mukherjee we must know when the trial in the Court of Sessions starts after the commitment of the case against the accused by the Magistrate. It should be particularly noted that in the Code of Criminal Procedure, 1872, ''trial'' was defined. In the Code of Criminal Procedure, 1898, the definition of the word ''trial'' was not inserted. Such definition has not been given in the present Code of Criminal Procedure, 1973.

9. In Section 6 of the new Code of Criminal Procedure we get four classes of criminal Courts besides the High Courts and other Courts constituted under any law in every

State. Those are (i) Courts of Session, (ii) Judicial Magistrates of the first class and in any metropolitan area Metropolitan Magistrates, (iii) Judicial Magistrates of the second class and (iv) Executive Magistrates.

10. According to Section 7 of the Code, every State shall be a Sessions Division or shall consist of Sessions Divisions and every Sessions Division shall for the purposes of the Code be a district or consist of districts. Section 9 of the Code says that a State Government shall have a Court of Session for every Sessions Division and every Court of Session shall be presided over by a Judge to be appointed by the High Court. He is known as Sessions Judge. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judge to exercise jurisdiction in a Court of Session.

11. Section 193 of the present Code says that except as otherwise expressly 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 unless the case has been committed to it by a Magistrate under the Code. Section 194 is to be noted. This section says that an Additional Sessions Judge or an Assistant Sessions Judge shall try such, cases as the Sessions Judge of the Division may, by general or special order, make over to him for the trial.

12. Chapter XVIII of the new Code deals with the trial before the Court of Session with which we are at present concerned. Section 226 of the Code says that when the accused appears or is brought before the Court in pursuance of a commitment of the case u/s 209, the Prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. In this connection, Section 209 is to be noted. According to this section, when in a case instituted on a Police report or otherwise the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit the case to the Court of Session. The offences triable by the Court of Session and those to be tried by Magistrates will appear in the First Schedule which is a part of the Code of Criminal Procedure. This schedule gives classification of offence under the Indian Penal Code mentioning about the punishment and the Court by which the offences are triable amongst other things.

13. Section 227 of the Code speaks about the discharge of the accused. The Judge, while acting in the Sessions Division, on consideration of the record of the case and the documents submitted therewith shall hear the submissions of the accused and the prosecution upon the same and if the Judge thinks that there is no sufficient ground or material for proceeding against the accused, he shall discharge the accused after recording his reasons for so doing.

14. Section 228 of the Code is of great importance. According to this section if on consideration of the record of the case and the documents submitted therewith and

on hearing the parties as indicated in Section 227 the Judge is of the view that there is ground for presumption that the accused has committed offence but that offence is not exclusively triable by the Court of Session, he may frame appropriate charge against the accused and by an order transfer the case for trial to the Chief Judicial Magistrate who shall either himself try the case upon the charge so framed or he shall cause the offence to be tried by a competent Magistrate on that charge in accordance with the procedure for the trial of warrant cases instituted on a Police report. Of course, the Chief Judicial Magistrate will be at liberty to try the offence himself or transfer the case to some other competent Magistrate for trial as indicated. Whether he will himself try or the case would be tried by some other Magistrate is his judicial option. If necessary the Chief Judicial Magistrate will hear the parties concerned before he sends the case for trial to any particular Magistrate. This hearing of the parties may, be necessary if there is any question of prejudice to any of the parties or any other reason. Clause (b) of Sub-section (1) of Section 228 says that if the Judge after consideration of the materials and on hearing the parties finds that there is ground for presuming that the accused has committed an offence exclusively triable by the Court of Session, he shall frame in writing the necessary charge against the accused. The same shall be read and explained to the accused and the accused shall further be asked whether he pleads guilty of the offence charged or claims to be tried.

15. Section 229 enjoins that, if the accused pleads guilty, the Judge shall record the plea and may in his discretion convict him on such plea. The following section, namely Section 230 of the new Code, is also important for consideration of the first point raised by Mr. Mukherjee. According to this provision, if the accused refuses to plead guilty or does not plead or claims to be tried, or if the Judge does not convict him u/s 229, then the Judge shall fix a date for examination of witnesses and on the application of the prosecution may issue process for the attendance of witness, or production of document or other things and on the date so fixed, the Judge shall proceed to take evidence on the side of the prosecution according to Section 231 of the Code of Criminal Procedure, ft is not necessary for us to deal with Section 237 of the Code as that is not relevant for our purpose.

16. Now, let us see when the trial commences in the Court of Session. Section 209 of the Code of Criminal Procedure, 1973, requires the Magistrate to commit the case to the Court of Session if it appears to him that it is triable by the Court of Session. It should be noted that in the Code of 1889 the Magistrate was to frame a charge for offence triable by the Court of Session before the case was committed, but in the present Code the Magistrate need not frame a charge. But that does not relieve the Magistrate of the duty to indicate in his commitment order that he has in fact applied his mind to the materials on record and that it appears to him that the offence against the accused is triable exclusively by the Court of Session and for that purpose he is expected to say which of the offences triable by the Court of Session appears to have been committed by the accused. Unless an indication is there in the

commitment order, there may be scope for non-consideration of the materials on record and avoidance of trial by the Magistrate in appropriate cases which may ultimately require the Judge of the Court of Session to transfer many cases to the Chief Judicial Magistrate for trial on the ground that they are triable by the Magistrate.

17. The Sessions Judge on getting the record of the case after commitment takes cognizance of the offence and necessary order is passed on taking notice of it. In pursuance of Sections 226 and 227 of the Code, on hearing the learned Public Prosecutor and also on consideration of the materials on record and connected documents and of the submission of the parties, the Judge presiding over the Court of Session may discharge the accused if there be no sufficient ground for proceeding against the accused. There is no question of trial at this stage. According to Section 228 of the new Code, the Judge of the Court of Session in dealing with a case committed for trial is to frame charge, if the materials on record demand, both in the case triable by the Court of Session and in the case to be sent to the Chief Judicial Magistrate for trial by a Magistrate according to warrant case procedure. In the case triable exclusively by the Court of Session, the charge framed shall be read and explained to the accused and the accused shall further be asked whether he pleads guilty of the offence charged or claims to be tried. If the accused pleads guilty, the Judge may, according to Section 229, convict him and no trial is required, but if the accused refuses to plead guilty or does not plead or claims to be tried, then the Judge is bound to fix a date of taking evidence, issue processes for witness etc. and to proceed to ascertain if the accused is guilty as alleged by the prosecution. The words ''claims to be tried'' in Sub-section (2) of Section 228 and in Section 230 clearly indicate that the trial of the accused commences after the accused refuses to plead guilty or does not plead or claim to be tried. The trial in the Court of Session starts when the Judge proceeds with the taking of evidence and follows the procedure laid down by Section 231 and the following ones in chap. XVIII of the Code of Criminal Procedure, 1973. Until the accused does not plead guilty to the charge framed or claims to be tried, no issue between him and the prosecution has been joined and no trial can start.

18. In the Code of Criminal Procedure we get the mention of ''inquiry'' and ''trial''. There are provisions for different trials in different cases, viz. trial of warrant cases, trial of summons cases, summary trials and trials before a Court of Session and the nature of trial in each case is different. The meaning of ''trial'' in different kinds of cases cannot be the same. Perhaps in this view of the matter, the word ''trial'' has not been defined in the Code of Criminal Procedure which were enacted after the Code of Criminal Procedure, 1872. In the case of Jiban Molla Vs. Emperor, a question arose regarding the nature and meaning of ''trial''. A Division Bench of this Court held:

In our opinion, however, "try" and "trial" have no fixed or universal meaning, but they are words which must be construed with regard to the particular context in which they are used and with regard to the scheme and purpose of the measure concerned.

The Federal Court of India appears to have held the same view in the case of AIR 1944 1 (Federal Court) . The case of Jiban Molla Vs. Emperor, and Anr. case, viz. Bakshi Ram and Others Vs. Emperor were considered and the Federal Court has found that the discussion in those cases only confirms

that the meaning of the word "trial" must largely depend on the context and the scheme of the enactment in which it occurs.

In view of the discussions already made, there can be no doubt that under the Code of Criminal Procedure, 1973, the trial in the Court of Session starts after the accused refused to plead guilty or does riot plead or claims to be tried and when the Judge proceeds with the taking of evidence and follows the procedure laid down by Section 231 and in following ones in chap. XVIII.

19. In the present case, the learned Sessions Judge framed a charge u/s 304. pt. I, Indian Penal Code, triable by the Court of Session and as the accused refused to plead guilty, he knew that a trial would be necessary. Before proceeding with the actual trial the Sessions Judge transferred the case to the Assistant Sessions judge for trial. u/s 194 of the Code, the Sessions Judge has the authority to make over the case to the Assistant Sessions Judge for trial. This making over or the transfer of the case be made at any time before the actual trial starts. He may transfer the case u/s 194 after he has received records of the case committed to him u/s 193 but before the stage indicated in Section 226. In that case the Judge to whom the case is made over u/s 194 is to see as the Judge presiding over the Court of Session that the provisions in chap. XVIII including those in Sections 226 to 230 and onwards are complied with. It is submitted from the side of the Petitioner that ordinarily Sessions triable cases are distributed after the records are received from the committing Magistrate, but that does not mean that the Sessions Judge cannot deal with the case upto the plea of the accused and the framing of the charge. In this case, we are not to decide at what stage the case should be transferred by the Sessions Judge for trial either to the Additional Sessions Judge or to the Assistant Sessions Judge. It is for the Sessions Judge to decide that question so that the cases may be quickly and properly disposed of according to law giving the Judges concerned reasonable time to accommodate their diaries. We find no fault with the practice of distribution of cases by Sessions Judge after they are received. It should also be noted that once the accused is produced or he appears and the projection opens the case, it is desirable that the case committed to the Court of Session should be disposed of as quickly as possible and it must be seen that the trial, if any, be not delayed. We find that in this case there has been no actual trial of the accused by the learned Sessions Judge and that the transfer of the case to the learned Assistant Sessions

Judge was not illegal. This transfer did not vitiate the trial held by the Assistant Sessions Judge. We hold that there was no part trial by the learned Sessions Judge or the Assistant Sessions Judge. The first point raised is rejected.

20. The second point canvassed by Mr. Mukherjee is that the learned Sessions Judge acted without jurisdiction in hearing the appeal because he had already taken part in the trial as urged in connection with the first point by framing charge against the accused. His grievance is that besides acting beyond jurisdiction the learned Sessions Judge acted against the principles of natural justice causing prejudice to the case of the defence. As I have already found, the learned Sessions Judge did not hold any trial. We cannot say that he was incompetent to hear the appeal against the order of conviction and sentence passed by the Assistant Sessions Judge to whom the case was transferred. According to law, against the order of conviction and sentence for a term of three years passed by the learned Assistant Sessions Judge, the Sessions Judge has jurisdiction to hear the appeal. Regarding the second branch of argument in connection with the second point raised, we find that the learned Sessions Judge, in fact, on consideration of the materials on record and on hearing both the Public Prosecutor and the learned Advocate for the accused framed a charge u/s 304, pt. I of the Indian Penal Code and in reply to the question of the learned Sessions Judge u/s 228, the accused refused to plead guilty and thereafter the case was transferred to the learned Assistant Sessions Judge. There can be no doubt that although the learned Sessions Judge did not take part in the trial against the accused, he framed charge against the accused and for that purpose he not only considered the materials on record and the documents connected therewith but also heard both the learned Public Prosecutor and the Advocate of the accused to decide on the question of framing the charge and Whether there was any ground for presuming that the accused had committed an offence and in fact he framed a charge triable by the Court of Session on the presumption that the accused had committed an offence. Of course, this presumption relates to a prima facie case to see whether a charge can be framed. Although legally the learned Sessions Judge had jurisdiction to hear the present appeal, yet when in the present case the trial was held upon the charge framed by him and when he again framed the said charge as Judge of the Court in the original jurisdiction on consideration of materials on record and necessary documents connected with the offence, the principle of natural justice, in our view, demanded that he should not have ordinarily heard the appeal against the order of conviction and sentence which had been passed in the Court of the original jurisdiction on account of the accused being found guilty of the charge framed by him. Not only had he the occasion to go through the materials of the case against the accused before trial, but it was he who framed the charge of which the accused was found guilty. We are told that in the district of Purulia there was no other Additional Sessions Judge at the relevant time when the appeal was preferred and was heard. Naturally, there was no other Judge who could hear the appeal except the Sessions

Judge himself and as such, he had to hear the appeal, but that would not be the ground for not giving proper relief to the accused. In that event, when there was no other Judge to hear the appeal against the order of conviction and sentence passed by the Assistant Sessions Judge, the learned Sessions Judge ought to have in the fitness of things made over the case committed to him earlier after the receipt of the records of the case to the learned Assistant Sessions Judge for trial without resorting to Section 228 of the Code of Criminal Procedure. In that case there would have been no difficulty for him to hear the appeal." The question of prejudice relating '' either to the mind of the Judge or to the defence case is a mental reflection or reaction. The Court should always see that reasonable scope for bias should be avoided as practically as possible. In a case like this, if no prejudice was caused to the accused and if there was no failure of justice, no valid objection could be taken. But in the facts and circumstances of the present case the judgment of the learned Sessions Judge, according to us, is liable to be set aside due to the manner the learned Judge has dealt with the case in his judgment as we have found during our discussion of the third point of Mr. Mukherjee. The reasonable apprehension of bias and prejudice, the accused has, cannot be brushed aside. 1 he second point is thus disposed of.

21. Coming to the third and last point Mr. Mukherjee has argued that the learned Sessions Judge did not consider the evidence of the witnesses and discuss the evidentiary value and the infirmities thereof. The evidence shows that the accused sustained certain injuries, but the grievance of Mr. Mukherjee is that the learned Sessions Judge did not consider how those injuries could be inflicted with reference to the defence case. The judgment of the learned Sessions Judge has been read out to us. He says that he need not elaborately discuss the evidence of the witnesses examined in this case as the learned Assistant Sessions Judge has considered the evidence of the witnesses examined. He has not discussed fairly the prosecution evidence as required in an appeal. There has not been sufficient discussion about the evidence of the prosecution witness. The Judge should have shown that in the appeal he applied his mind to the material evidence of the witnesses as placed by the Appellant to challenge the finding of the trial Court. The judgment is not a proper judgment in law. However, when we find that the judgment of the learned Sessions Judge in the appeal is liable to be set aside, the said appeal has naturally got to be heard again. We do not like to discuss the evidence in this revisional application and we make no comment on the merit of the case. When the appeal will be heard again, the accused-Petitioner would be at liberty to place his case before the appellate Court in extenso. The third point of Mr. Mukherjee succeeds. No other point has been argued before us.

22. In the result, the revisional application succeeds and the Rule is hereby made absolute. The judgment of the learned Sessions Judge below dismissing the appeal passed on March 30, 1976, is hereby set aside. We understand that Mr. A.G. Sen Gupta who disposed of the appeal is no longer the Sessions Judge of Purulia and the

appeal in question shall be heard and disposed of by the learned Sessions Judge, Purulia, according to law. The Petitioner shall immediately appear before the learned Sessions Judge for taking necessary orders from him. He is discharged from the bail bond already obtained from this Court.

23. Send down the records at once.

A.P. Bhattacharya J.

24. I agree.