Gopinath Misra and Another Vs The State

Court: Calcutta High Court

Date of Decision: Dec. 9, 1969

Acts Referred: Penal Code, 1860 (IPC) â€" Section 134, 161, 200, 302, 34

Citation: 75 CWN 948

Hon'ble Judges: Sarma Sarkar, J; R.N. Dutt, J

Bench: Division Bench

Advocate: S.S. Mukherjee and Samar Roy Chowdhury, for the Appellant;Amiya Lal Chatterjee, for the State, for the Respondent

Judgement

R.N. Dutt, J.
This Rule was issued at the instance of the petitioners for setting aside the order of a learned Magistrate at Krishnagar

committing them to the Court of Session to stand their trial u/s 302\34 of the Indian Penal Code. The short allegations are as follows:

One Kumbha Nath Sukla was the owner of a lorry, No. W.G.A. 1940. On January 25, 1968 he accompanied by the petitioners who were the

driver and the cleaner of the lorry went to Dhulian in the lorry. On January 26, 1968 they started back for Calcutta and on way they had

altercation. The three of them were seen on the lorry at about 7-30 p.m. on January 26, 1968 at Berhampore Esso Petrol Pump. Thereafter they

were last seen together in the lorry at Dhubulia on January 26, 1968 at about 9-30 p.m. The lorry reached Jagatdul on January 27, 1968 at about

8-30 a.m. with the petitioners, namely, the driver and the cleaner. The owner was not in the lorry at that time and his dead body was found by the

roadside near Bahadurpur Forest at noon of January 28, 1968.

2. On some first information report the police made an investigation and submitted a final report on December 31, 1968 but the final report was

not accepted and the Sub-divisional Magistrate summoned the petitioners u/s 302134 of the Indian Penal Code on March 27, 1969. Thereafter

the case was transferred to the learned Magistrate for an enquiry under Chapter XVIII of the Code and the learned Magistrate made an enquiry

u/s 207A of the Code and has committed the petitioners to the Court of Session for trial u/s 302134 of the Indian Penal Code.

3. Mr. Mukherjee first contends that since the complainant was not examined u/s 200 of the Code in this case the cognizance taken by the learned

Sub-divisional Magistrate was bad and so the entire proceedings should be quashed. We have said that on some first information report the police

made an investigation and submitted a final report on December 31, 1968. But the learned Sub-Divisional Magistrate did not accept the final

report and on March 27, 1969 he summoned the petitioners u/s 302/34 of the Indian Penal Code on the basis of the Police report. It is true that

when the final report was submitted by the police on December 31, 1968 the complainant filed a naraji petition. It is also true that the complainant

was not examined u/s 200 of the Code on this naraji petition but, as we have said, the learned Magistrate did not take cognizance of the offence on

the basis of the naraji petition but he took cognizance on the basis of the police report itself. Had the learned Magistrate taken cognizance on the

basis of the naraji petition it was incumbent on him to have examined the complainant u/s 200 of the Code. Mr. Mukherjee refers to the decision in

(1) A. C. Samaddar v. Sunesh Chandra Jana, 53 C.W.N. 270, but there what is decided is that the Magistrate dannot ''take cognizance of an

offence upon complaint without examination of the complainant u/s 200 of the Code. But as we have said, the learned Magistrate in this case has

not taken cognizance on the basis of the naraji petition but he has taken cognizance on the basis of the police report. Mr. Mukherjee however

argues that the learned Magistrate has not taken cognizance on the police report but he has taken cognizance on the police papers. The learned

Magistrate has said that he ""does not accept the final report but summons the petitioners u/s 302/34 of the Indian Penal Code on the basis of the

materials so far collected by the Investigating Officer."" True, but then this Court has in its Full Bench decision in (2) A. K. Boy v. State of West

Bengal 1962(1) Cr. L.J. 285 said that with a view to take cognizance on the statement of facts contained in a police report the Magistrate can look

into the materials contained in the case diary and obtained during investigation including the statements recorded u/s 161 of the Code. We do not

think that the learned Sub-divisional Magistrate has in this case done more than this and so we are not prepared to say that the cognizance taken

by the learned Sub-divisional Magistrate is bad in law.

4. Mr. Mukherjee then contends that the learned Magistrate who made the order of commitment has not complied with section 207A(4) of the

Code as he has not examined any witness during the commitment proceeding. We should record that there is no witness to the actual commission

of the alleged offence. The learned Magistrate was not, therefore, required u/s 207A (4) of the Code to examine any witness in this caser But Mr.

Mukherjee refers to the Supreme Court decision in (3) Kirpal Singh v. The State of Uttar Pradesh, 1965 (1) Cr. L.J. 636. But as we read that

decision we find what the Magistrate was bound to do is to insist upon the examination of the principal witnesses to the actual commission of the

offence. Here, as we have said, there is no witness to the actual commission of the offence but Mr. Mukherjee submits that the witnesses who

would prove the incriminating circumstances should have been examined. We are not prepared to accept this contention and we do not think that

under the terms of section 207 A (4) of the Code a Magistrate is bound to examine witness who would prove incriminating circumstances in a case

where there is no witness to the actual commission of the alleged offence.

5. Mr. Mukherjee then argues that the """"petitioners were not examined u/s 342 of the Code during the commitment proceeding. This appears to be

so but u/s 207A(6) of the Code the Magistrate is to examine the accused if. he thinks necessary and under the first part of section 342(1) of the

Code also the Magistrate is to examine the accused if he considers it necessary. Though normally the committing Magistrate should examine the

accused before an order of commitment is made we do not think that non-examination should lead us to setting aside of the order of commitment.

Mr. Mukherjee lastly raises the question of merit and submits that the incriminating circumstances are not such as will lead to the irresistible

conclusion that no one but the petitioners must have done the alleged offence. We do not want to enter into a detailed discussion of the

circumstances which appear in this case because that may prejudice the parties at the trial. We should only record that now that an order of

commitment has been made and the petitioners are before the Court of Session for their trial we do not propose to interfere with the order of

commitment.

In the result, the Rule is discharged. Let the records be sent down at once.

Sarma Sarkar, J.

I agree.