D.P. Mazumdar Vs Harminder

Court: Calcutta High Court

Date of Decision: Feb. 17, 1984

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 190(1)(a), 193, 200, 202
Penal Code, 1860 (IPC) â€" Section 395

Citation: 88 CWN 718

Hon'ble Judges: N.G. Chaudhuri, J

Bench: Single Bench

Advocate: Dilip Kumar Datta and Hem Kumari Chaturvedi, for the Appellant;Balai Chandra Roy, Sovanlal Hazra and Sasanka Kumar Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

N.G. Chaudhuri, J.
This application u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the Code) filed on

behalf of the accused-petitioner is directed against order No. 11 dated 8.12.80 in Sessions Case No. 111 of 1980 in the Court of Assistant

Sessions Judge, Asansol. By the order impugned the learned Assistant Sessions Judge has ordered issue of summons on the witnesses of the

complainant-opposite party who were not examined by him before the committing Magistrate. A complaint was filed alleging commission of an

offence triable exclusively by a Court of Sessions namely, an offence u/s 395 I.P.C. along with a list of 11 witnesses in the Court of S.D.J.M.

Asansol. On 3.4.80 four witnesses were examined and on 7.4.80-4 more witnesses were examined. There is nothing in the order-sheet of the

learned Magistrate that he postponed issue of process against the accused pending enquiry by himself u/s 202(1) of the Code. On 10.4.80 the

learned Magistrate issued process against the present petitioner and other accused obviously u/s 204 of the Code. The accused surrendered in

court and on their prayer they were released on tail on 11.4.80. Thereafter, without examining the remaining three witnesses and recording their

deposition, the learned Magistrate committed the accused in the Court of Sessions u/s 209 of the Code. The Sessions Judge transferred the case

to the court of Assistant Sessions Judge who after perusing the records and documents framed charge, recorded the plea of the accused u/s 228 of

the Code and fixed dates of evidence u/s 230 of the Code. Thereafter the learned Assistant Sessions Judge, on the prayer of the prosecution, by

the impugned order, issued summons against witnesses, who were not examined by the complainant before the learned Magistrate and whose

deposition have not been supplied to the accused u/s 208(1) of the Code. The learned Court passed the impugned order overruling objection of

the petitioner.

2. On behalf of the petitioner not only the order impugned but also ell the proceedings derived from the order of commitment are being assailed as

illegal. Relying on the case of Govinda Ghosh -vs- Subola Ghosh, reported in 1978, Calcutta High Court Notes, 376, Special Bench decision of

Dwip Chand Munda and Another Vs. Pravash Kumar Chowdhury and Another, Paranjothi and others -vs- State, reported in 1976 Crl.L.J. 598,

the case of Smt. Anisa and another -vs- Banne Khan reported in 1982 Crl.L.J. 1270 and the case of Govinda Raja Pillai -vs- Thangavelu Pillai

and others reported in 1983 CLJ 917 Mr. Dilip Kumar Dutt the learned advocate for the petitioner argues vehemently that the provisions of

Section 202 of the Code including the proviso have been held to be mandatory and the learned Magistrate having violated the aforesaid mandatory

provision, his order of commitment itself is illegal and void. It is submitted that the commitment order being illegal the proceedings in the Sessions

trial so far taken on the order of commitment are liable to be set aside. Mr. Dutt also places reliance on the case of Kama/ Krishna Dey -vs- State

reported in 1977 CLJ 1492, Baburam and another -vs- State of U.P. reported in 1978 CLJ 1430 and the case of Shyamkento-vs- State of

Maharastra reported in 1980 Crl.L.J. 1388, to fortify his contention. Mr. Dutt further submits that u/s 208 subsection (1) of the Code the accused

petitioner had as inviolable right to have statements of all witnesses to be examined by the complainant for the purpose of preparing his defence.

He emphasizes that the order of commitment was not made on the basis of FIR and chargesheet submitted by the police and the accused petitioner

has not been served with statement of witnesses ordinarily recorded u/s 161 Cr. P.C. Mr. Dutt argues that the petitioner is handicapped in the

defence to be undertaken and the order of Commitment being illegal the such order and further proceedings in the Sessions trial passed on the

order of commitment are liable to be set aside. Mr. Dutt, however, does not argue that the statements of witnesses recorded by the learned

Magistrate did not make out a prima facie case.

3. Mr. Balai Roy, the learned advocate for the complainant opposite party on the ether hand contends that provisions of sections 202(2) of the

code do not invariably apply to proceedings arising out of complaint alleging commission of an offence triable exclusively by the Court of Sessions.

Reading sub-section (1) of Section 202 of the Code; he submits, that only when the Magistrate postpones issue of process to undertake an

enquiry contemplated under sub-section (1) he is required to proceed in the fashion indicated in sub-section (2). He submits that in the present

case there is not the slightest indication in the orders of the learned Magistrate that he ever thought it fit to postpone issue of process to enquire into

the case himself. Mr. Roy, in short, argues that provisions of section 202(2) have not invariable application to all complaints relating to offences

triable exclusively by a court of Sessions. He points cut that even after the learned Magistrate ordered issue of process u/s 204 Cr. P.C. the

petitioner did not raise any objection. He proceeds on to argue that upto the stage of framing charge by the learned Assistant Sessions Judge and

fixing the dates for prosecution evidence u/s 230 of the Code the petitioner did not raise objection. Mr. Roy submits that this omission on the part

of the petitioner clearly shows that he has in no way been prejudiced in the matter of his defence. In this connection he contends that the petitioner

could pray for discharge before the learned Assistant Sessions Judge u/s 227 of the Code. Relying on Section 193 of the Code he contends that

the Court of Session has taken cognizance of the offence as a Court of original jurisdiction pursuant to an order of commitment made by the

Magistrate under the Code, and, therefore the proceedings before the Sessions court cannot be found fault with. Placing clause (i) of Section 206

of the Code he contends that the petitioner was entitled to all the statements recorded by the Magistrate u/s 200 or Section 202 of all persons

examined and that has been done in the present case. He contends that Section 208 of the Code does not require furnishing of statements of all the

witnesses of the complainant. He relies on the provisions of Section 231 (2) of the Code and contends that to prevent prejudice to the accused

petitioner the Judge may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or

recall any witness for further cross-examination. Mr. Roy accordingly submits that there is no question of the accused petitioner being prejudiced in

any manner by the order summoning additional witnesses. He emphasizes that the Judge u/s 230 is to take all such evidence as may be produced in

support of the prosecution and the rule of evidence is only limited by the rule of admissibility and relevance and nothing else. Mr. Roy further

contends that there is no rule of law that witness who have not been examined by the Magistrate in the case of complainant relating to an offence

triable exclusively by a court of Sessions cannot be examined as evidence by the Sessions Court.

4. For proper appreciation of the problem raised the functions of courts in relation to offences triable exclusively by a court of Session under

sections 202, 204, and 227 of the Code will have to be closely studied, particularly with reference to the words ""sufficient grounds for proceeding

occurring in all the three sections. If on perusal of the complainant and on examination of himself and his witnesses, the Magistrate concludes that

there is no ground for proceeding he may dismiss the complaint u/s 203. If on the other hand, he is satisfied that there are good grounds, he may

order issue of process u/s 204 of the Code. For the third category of cases, where the Magistrate cannot make up his mind regarding sufficiency of

grounds, if he thinks fit he may postpone issue of process to undertake an enquiry referred to in section 202(1). In such event the manner of

enquiry will be as prescribed in the proviso to section 202(2). Once the process has been issued and accused has appeared, the Magistrate is

obliged to commit the case to the court of Sessions. After this stage only the court of Sessions may discharge the accused u/s 227 of the Code on

the ground of insufficiency of grounds to proceed with as held in Kerala F.B. Case of Kaimala Bhargavi reported in 1979 Cr. L.J. 1279. In the

case of Kewal Krishna vs. Suraj Bhan reported in 1980 Cr. L.J. 1277, Supreme Court whilst commenting on the beneficial use of section 227

against harassing and protracted Sessions trials, has observed that the Sessions Judge has to discharge the accused u/s 227 of the Code if sufficient

grounds do not come out of the materials mentioned in that section. In no case cited by Mr. Dutta the stage of the case after the Sessions Judge

has taken cognizance was considered. Only in the case of Bajji vs. State of U.P. reported in 1981 Cr. L.J. 1558 situation after commencement of

Sessions trial was considered and proceedings from the stage of commitment were quashed. In that case a purported police report which could

not be treated as complaint u/s 190(1) (a) of the code was the sole basis of the order of commitment, but neither the complainant nor any of his

witness was examined. In the facts stated above there was no bar to Sessions Judge''s discharging the accused u/s 227 of the Code at the

appropriate stage. However, considering the interrelation of sections 202, 204 and 227 of the Code, we reach the conclusion that after the

Sessions Judge has taken cognizance of the case u/s 193 of the Code, it will be only for him to discharge the accused for insufficiency of grounds

under Sec. 227; and after the above stage is reached there is little scope for finding fault with the order of commitment which has served out its

purpose.

5. Apart from the stage of the case as discussed above, there is necessity for rethinking if the proviso to section 202(2) is mandatory and has

invariable application as held in the cases cited by Mr. Dutt. Plain reading of the section 202 and its literal construction, particularly the words

may, if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself.....for the purpose of deciding

whether or not there is sufficient ground for proceeding"", occurring in sub-section (1) do not appear to have been considered in the aforesaid

cases. The cases of Kochu Mohammed reported in 1977 Cr. L.J. 1867 and Govinda Raja Pillai reported in 1983 Cr. L.J. 917 support the

contention that the proviso to Sec. 202(2) is neither mandatory nor inflexible its application. It is again to be considered if in the application of the

proviso aforesaid the Magistrate will take a mechanical approach. For example if, after naming 15 witnesses in his complaint and actually

examining only 12 witnesses"" the complainant chooses not to produce further witnesses will the Magistrate, inspire of a prima facie case having

been made out, refuse to issue process and order of commitment. The Code, It should be remembered, has shortened the commital inquiry and it

is no longer the duty of the Magistrate to meticulously examine the evidence adduced at that stage.

6. There is another reason for dismissing the present petition u/s 482 of the Code. The order of the Assistant Sessions Judge, impugned herein is

beyond doubt an interlocutory order. The Supreme Court, in the case of Amarnath and another v. State of Haryana reported in 1977 Cr. L.J.

1891 has observed ""A harmonious construction of sections 397 also and 482 would lead to the irresistible conclusion that where a particular order

is barred u/s 397(2) and cannot be subject of revision then to such a case provisions of section 482 would not apply. It is well settled that Inherent

powers of the Court can ordinarily be exercised when there is no express provision on the subject matter. When there is an express provision

barring a particular remedy, the Court cannot resort to exercise of inherent power"". For the reasons stated above the petition under consideration

should fail, and Is dismissed on contest. The Rule Issued is discharged and the order of stay is recalled and vacated. The Assistant Sessions Judge

will have however the liberty to assess in his own way the reliability of the additional witnesses summoned and the probative value of their

testimony.