(1957) 03 BOM CK 0039

Bombay High Court

Case No: Criminal Reference No. 7 of 1956

The State		APPELLANT
	Vs	
Dhirajlal Maneklal		RESPONDENT

Date of Decision: March 14, 1957

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302

Citation: (1957) 59 BOMLR 645

Hon'ble Judges: Vyas, J; Shelat, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Vyas, J.
This reference raises a short but rather an interesting point of law, and the point of law is as to the construction of Sub-section (4) of Section 207A of the Criminal Procedure Code. Sub-section (4) says:

The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged;...

and the point is whether under this sub-section it is obligatory upon the prosecution to produce before the Magistrate at the stage of the committal inquiry all or any of the persons who might have witnessed the actual commission of the offence or whether it is left to the discretion of the prosecution to decide about it.

2. There is no doubt that under this sub-section the Magistrate is bound to take the evidence of such persons as are produced before him by the prosecution as being witnesses to the actual commission of the offence, The subject of controversy is whether the prosecution is bound to produce before the Magistrate at the stage of the inquiry all or any of the persons who might be witnesses to the actual

commission of the offence. A Division Bench of the Saurashtra High Court, as it then was, consisting of Shah C.J. and Baxi J., took the view that under Sub-section (4) of Section 207A, it was obligatory upon the prosecution to produce before the Magistrate persons who might have witnessed the actual commission of the offence for their evidence being taken. Mr. Justice Chainani, before whom the matter came on reference by the Sessions Judge of Madhya Saurashtra, felt that, upon the language of Sub-section (4), it was possible to take a different view, and he referred the case to a Division Bench of this Court.

3. The facts which have given rise to this reference are that the accused Dhirajlal Maneklal has been committed to the Court of Session, Madhya Saurashtra, for trial u/s 302 of the Indian Penal Code. The material upon which the Magistrate ordered the commitment of the accused consisted of the charge-sheet, the statements of witnesses before the Police, other relevant documents and the examination of the accused under Sub-section (6) of Section 207A. It may be noted that the prosecution did not produce any witness before the Magistrate, with the result that the Magistrate did not record the evidence of any witness before passing the order of commitment. The learned Sessions Judge, relying upon the decision of the Saurashtra High Court that under Sub-section (4) of Section 207A it is obligatory upon the prosecution to produce before the Magistrate at the committal inquiry persons who might be witnesses to the actual commission of the offence, has taken the view that the commitment of the accused is bad and has made this reference for quashing the commitment.

4. Now, the Saurashtra High Court, as it then was, has taken the view that the provision contained in the words "as may be produced by the prosecution" in Sub-section (4) is not discretionary, but it is mandatory, and it requires the prosecution to produce before the Magistrate persons who might be witnesses to the actual commission of the offence. According to this view, the production of such witnesses is obligatory upon the prosecution, and not merely optional resting with the discretion of the prosecution. In our view, with respect, this construction of Sub-section (4) is neither in consonance with the object of the Code of Criminal Procedure (Amendment) Act No. XXVI of 1955 nor justified by the language of the sub-section. It is a well-settled rule of construction that the words of a statute must be so construed as would harmonise with and promote the object for which the statute is enacted. As pointed out by the learned Chief Justice who delivered the judgment of the Bench in Arunachalam Swami and Others Vs. State of Bombay and Another, the object of the Legislature in enacting Section 207A was to effect a radical change in the procedure relating to inquiry into cases instituted on Police reports and triable by the Court of Session or High Court. Before the Code of Criminal Procedure (Amendment) Act No. XXVI of 1955 was passed by the Legislature, the procedure relating to the committal inquiry into cases instituted upon Police reports and those instituted otherwise than upon Police reports was regulated by Section 208 as it then stood. It was an elaborate procedure. The

Legislature intended to introduce expedition in that procedure, so far as the inquiry into cases instituted upon Police reports was concerned, and it was with that intention that the Legislature enacted Section 207A. The old Section 208 was split up into two sections by the Act No. XXVI of 1955, and the two sections are the present Sections 207A and 208. Under the new Section 208, the procedure relating to the committal inquiry into cases instituted otherwise than upon Police reports, which obtained before the passing of the Act No. XXVI of 1955, was maintained. But u/s 207A, the old procedure relating to inquiry into cases instituted upon Police reports was radically changed, and the change was made with a view to bring to an expeditious conclusion the inquiry prior to the commitment of the accused. Now, if we were to construe the words: "such persons, if any, as may be produced by the prosecution" in Sub-section (4) as casting an obligation upon the prosecution to produce before the Magistrate at the inquiry stage all the persons who might be witnesses to the actual commission of the offence, the construction would militate against the object underlying the enactment of the sub-section itself. Indeed, such a construction, instead of introducing expedition in the inquiry proceedings, would bring about a contrary result. It would tend to make the inquiry even more protracted than under the old procedure. Under the old Section 208, it was left to the discretion of the prosecution to produce, at the stage of the committal inquiry, such witnesses as it might. It was not bound to produce all witnesses, not even all ''eye-witnesses''; and even so, the Legislature considered that procedure rather elaborate and wanted to speed it up. In our view, with respect, if the construction placed by the Division Bench of the Saurashtra High Court upon Sub-section (4) were to be accepted, it would not only not promote the object of the Legislature for which it enacted Sub-section (4), but would tend to produce an opposite result.

5. Besides, the language of Sub-section (4) itself is against the construction that the prosecution is bound to produce at the inquiry stage all or any of the witnesses who might have seen the actual commission of the offence. The words: "such persons, if any, as may be produced by the prosecution" are clearly indicative of the discretion which the Legislature intended to vest in the prosecution in the matter of production before the Magistrate at the inquiry stage of witnesses who might have seen the actual commission of the offence. The discretion conferred upon the prosecution in this respect is absolute and the words "persons, if any, as may be produced" must, in our opinion, mean that the prosecution cannot be compelled to produce any ''eye-witnesses'' of the offence at that stage if it does not wish to do so. If it wishes to produce all the ''eye-witnesses'' before the Magistrate, it may do so. If it wishes to produce only some of them or none of them, that also would be within its competence to do. If the intention of the Legislature in enacting'' Sub-section (4) had been to cast an obligation upon the prosecution to produce at the committal inquiry all persons who might be witnesses to the actual commission of the offence, they would have used the words: "such persons as may be witnesses to the actual commission of the offence alleged" instead of the words "such persons, if any, as

may be produced by the prosecution as witnesses to the actual commission of the offence alleged.'"' The words "as may be produced" would be wholly inconsistent with that intention, and the Legislature would not have used them in that case. Mr. Desai, who appears amicus curiae, says that the Legislature has used the words "as may be produced", not with a view to relax the obligation on the prosecution to produce persons who might be witnesses to the actual commission of the offence, but in order to leave latitude to the prosecution not to produce such of them who would not support its case or whose evidence would not be essential to the unfolding of its case. We think Mr. Desai is not right. If the Legislature had intended to impose an obligation on the prosecution to produce witnesses before the Magistrate at the stage of the committal inquiry, they would have used the language indicative of emphasis on obligation, and not indicative of emphasis on discretion. Obligation and discretion have widely different connotations and different words are necessary to express those connotations. In our view, the words "as may be produced" are not expressive of obligation. They are expressive of discretion.

6. Moreover, if the intention of the Legislature in enacting Sub-section (4) of Section 207A was that the prosecution must produce the ''eye-witnesses'' before the Magistrate, it would scarcely have been necessary to provide that the Magistrate was bound to take their evidence. If a statutory obligation is levied upon the prosecution to produce the ''eye-witnesses'' before the Magistrate, the contingency of the Magistrate refusing to take their evidence would not arise. Such a contingency would only arise if a discretion is left with the prosecution in the matter of production of witnesses and if, in the exercise of that discretion, the prosecution produces such number of witnesses as it likes before the Magistrate. If the Legislature creates a law that the production of the ''eye-witnesses'' before the Magistrate is obligatory, it means that in the opinion of the Legislature it is essential to consider the evidence of those witnesses before deciding whether the order of commitment should be made or not. "Where the Legislature considers the taking of evidence of witnesses necessary in the committal inquiry and with that object in view makes it compulsory upon the prosecution to produce the witnesses before the Magistrate, the Magistrate would have no discretion to refuse to take their evidence. He would be bound to record their evidence, and a specific provision to that effect would hardly be necessary. It is only where discretion is left to the prosecution whether to produce all or any of the witnesses and where it may in its discretion produce a large number of witnesses that a question would arise of a Magistrate refusing to take their evidence unless the statute imposes an obligation upon him to do so. That being so, if the law were to compel the prosecution to produce the witnesses before the Magistrate, the Magistrate would be bound to take their evidence and it would be superfluous to make a specific provision about it. In our view, the fact that Sub-section (4) in terms provides that the Magistrate "shall then proceed to take the evidence,of such persons, if any,..." would show that

in the matter of production of witnesses before him (the Magistrate) the Legislature left a discretion with the prosecution,

7. It is a canon of construction settled upon judicial authority that if the Legislature uses the same expression in the same context in the same statute, it would ordinarily carry, unless expressly provided to the contrary, the same meaning. As I have said, Section 208 of the Criminal Procedure Code as it formerly stood was split up into two sections, viz., Section 207A and Section 208, by the Code of Criminal Procedure (Amendment) Act No. XXVI of 1955, and it is noteworthy that the words "as may be produced" occurred in the old Section 208 and they also occur in the new Sections 207A and 208. Now, there is no controversy that under the former Section 208, the prosecution had the discretion in the matter of producing witnesses before the Magistrate. Under the new Section 208 also the prosecution has the same discretion. Under the old Section 208, the prosecution was not, and under the new Section 208 also it is not, under a statutory obligation to produce all its witnesses before the Magistrate at the inquiry stage. Now, if the Legislature, while using the words "as may be produced" in Section 208 as it stood before the amending Act No. XXVI of 1955 and also'' in Section 208 even after the amendment, intended to leave the matter of production of witnesses before the Magistrate to the discretion of the prosecution, it is difficult to accept the contention that, while enacting Sub-section (4) of the new Section 207A, it used these very words with a contrary intention, viz., the intention, to compel the prosecution to produce the ''eye-witnesses'' before the Magistrate. Surely, the Legislature in Section 207A could not have intended to use the words ""as may be produced" in the sense of imposing an obligation and, in the next following section, in the sense of conferring discretion.

8. Then, in this context, we may usefully turn to Section 252, Sub-section (1), of the Criminal Procedure Code. Here also the words ""as may be produced by the prosecution" occur and it is not disputed that under this, section also the prosecution has the discretion in the matter of production of witnesses before the Magistrate. Thus, the use, by the Legislature, of the expression "as may be produced" in the old Section 208 and in Sections 208 and 252 after the amending Act No. XXVI of 1955 gives us a clue to the intention of the Legislature in using these words wherever they occur in the Criminal Procedure Code. In our view, these words a lie used in the sense of giving discretion to the prosecution, and not casting an obligation upon it, in the matter of production of witnesses before the Magistrate.

9. Mr. Desai says that, while enacting Sub-section (4) of Section 207A, the Legislature could not have intended to leave the matter of producing ''eye-witnesses'' in the committal inquiry to the discretion of the prosecution, since such a procedure was apt to be abused by the prosecution and was likely to prejudice the accused and lead to miscarriage of justice. Mr. Desai contends that if the prosecution were free to decide which witnesses to the actual commission of the offence they should

produce before the Magistrate, they might not produce such witnesses Who might be likely to make certain statements in favour of the accused; and this, says Mr. Desai, would prejudice the accused.

10. Mr. Desai''s fear is groundless. u/s 173, Sub-section (4), of the Criminal Procedure Code, copies of statements, recorded u/s 164 and Section 161, Sub-section (3), of all persons whom the prosecution proposes to examine as its witnesses are to be furnished to the accused. Therefore, when the inquiry under Chapter XVIII of the Criminal Procedure Code starts and evidence is taken by the Magistrate under Sub-section (4) of Section 207A, the accused has got with himself the statements of all persons who were interrogated and examined by the Police during investigation and upon whose evidence the prosecution is going to rely at the trial of the accused. Under Clause (a) of Sub-section (1) of Section 173, it is obligatory upon the officer in charge of the Police station to forward to the Magistrate a report in the prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. Therefore, if the Magistrate finds that the prosecution does not produce before him any person who is alleged to be a witness to the actual commission of the offence or if he finds that the prosecution produces only some of such persons and not others or that some persons amongst those not produced appear to be acquainted with the circumstances of the case, though they may not be witnesses to the actual commission of the offence, it is open to him to ask the prosecution to produce such persons before him. On the other hand, the accused also, who has been furnished with the Police statements of all the persons whom the prosecution proposes to examine as its witnesses, can ask the Magistrate to call upon the prosecution to produce those or any of those persons before the Magistrate if he (the accused) finds that the prosecution does not produce them or any of them and. that in their Police statements they had made averments against the prosecution.

11. Mr. Desai says that the words "other witnesses" in the latter part of Sub-section (4) of, Section 207A are used in contradistinction to the words "witnesses to the actual commission of the offence alleged" in the earlier part of the sub-section, and that, therefore, in the earlier part of the sub-section the Legislature must have intended to cast an obligation upon the prosecution to produce before the Magistrate persons who might be witnesses to the actual commission of the offence. This construction of the expression "other witnesses" does not appear to be a correct construction. In the context, Sub-section (4) comes immediately after Sub-section (3) and the stage contemplated by sub-section (4), viz., the stage of taking evidence, is reached only after the stage referred to-in Sub-section (3) is over. This is clear from the word "then" in the opening words of Sub-section (4) : "The Magistrate shall then proceed." Sub-section (3) lays down that at the commencement of the inquiry, the Magistrate has to satisfy himself that the accused has been furnished with the documents referred to in Section 173. Under

Sub-section (4) of Section 173, the officer in charge of the police station is required to furnish to the accused, before commencement of the inquiry, amongst other documents, statements recorded u/s 164 and statements recorded u/s 161, Sub-section (3), of all the persons whom the prosecution proposes to examine as its witnesses. Thus, under Sub-section (3) of Section 207A, when the inquiry commences before a Magistrate, the Magistrate is required to satisfy himself that the accused has been supplied with the statements, recorded u/s 164 and Section 161, Sub-section (3), of the Criminal Procedure Code, of all the persons whom the prosecution proposes to examine as its witnesses. Sub-section (4) lays down that if, out of those witnesses, i.e. out of the witnesses (eye-witnesses and other witnesses) whose statements have been recorded by the Police during investigation and whom the prosecution proposes to examine as its witnesses, the prosecution produces before the Magistrate any person or persons as witnesses to the actual commission of the offence, the Magistrate shall take the evidence of such person or persons. If only some of the witnesses to the actual commission of the offence, and not all of them, are produced before the Magistrate by the prosecution under the earlier part of Sub-section (4), and if the Magistrate who has already been furnished with a report by the Police under Clause (a) of Sub-section (1) of Section 173 is of the opinion that it is necessary in the interest of justice to take the evidence of any one or more of the other witnesses for the prosecution, i.e. any one or more of the other persons whose statements were recorded during investigation and whom the prosecution proposes to examine as its witnesses at the trial, but whom it has not produced before him, he may take such evidence also.

12. Mr. Desai says that the expression "other witnesses" in the latter part of Sub-section (4) means other persons who are not witnesses to the actual commission of the offence. In our view, such a construction of the words '"' other witnesses'"' does violence to the language of the sub-section and puts a limitation upon the words "other witnesses for the prosecution" which is not warranted by the plain connotation of these words. It is to be noted, and this is important, that the words "for the prosecution" which the Legislature has used after the words "other witnesses" in the latter part of Sub-section (4) have been significantly used. If we were to accept Mr. Desai''s construction of the expression "other witnesses", the words "for the prosecution" which immediately follow this expression would lose their significance. There is no doubt that the expression "other witnesses for the prosecution", in the plain connotation of these words, must mean "other persons whom the prosecution proposes to examine as its witnesses". Now, we know, by reference to Sub-section (4) of Section 173, that the persons whom the prosecution proposes to examine as its witnesses are persons whose statements u/s 164 and u/s 161, Sub-section (3), of the Criminal Procedure Code have been recorded by the Police during investigation. There is, therefore, no doubt, in our view, that when the Legislature used the words "other witnesses for the prosecution" in the latter part of Sub-section (4) of Section 207A, it used them, with the intention that they should

mean "other persons whose statements u/s 164 and Section 161, Sub-section (3), of the Criminal Procedure Code were recorded by the Police during investigation and whom the prosecution proposes to examine as its witnesses minus the persons already produced by the prosecution before the Magistrate under the earlier part of the sub-section, as witnesses to the actual commission of the offence." In our view, unless this construction is put upon the expression "other witnesses for the prosecution", the words "for the prosecution" would lose significance.

13. Mr. Desai has next drawn a comparison between Section 251A, Sub-section (3), and Section 207A, Sub-section (7). Section 251A deals with procedure to be adopted in the trial of warrant cases by a Magistrate, where the cases are instituted upon Police reports, and Section 207A deals with the procedure to be adopted in committal inquiry into cases triable by the Court of Session or High Court, where cases are instituted upon Police reports. u/s 251A, the Magistrate''s opinion whether a charge should be framed or not framed against the accused is to be based upon three categories of material, viz., documents referred to in Section 173, examination, if any, of the accused as made by the Magistrate and the giving of an opportunity to the prosecution and the accused to be heard. u/s 207A, the Magistrate''s opinion whether the accused should be committed for trial to the Court of Session or not is to be based upon the abovementioned three categories of the material pins an additional category of the material, and the additional category is the evidence referred to in Sub-section (4). From this Mr. Desai contends that before the Magistrate passes an order of commitment of the accused, lie must record evidence referred to in Sub-section (4). This contention is a correct contention, but it is correct only so far as it goes. If, in the exercise of its discretion, the prosecution produces any person or persons before the Magistrate as witness or witnesses to the actual commission of the offence alleged, the Magistrate is bound to take the evidence of such person or persons, and where there is such evidence taken under Sub-section (4), then Sub-sections (6) and (7) lay down that such evidence must be considered by the Magistrate along with the documents referred to in Section 173, the examination, if any, of the accused as made by the Magistrate and the giving of an opportunity to the prosecution and the accused to be heard. Where, however, the prosecution does not produce before the Magistrate at the inquiry stage any person or persons as witness or witnesses to the actual commission of the offence alleged, no question arises of the Magistrate taking the evidence of such person or persons, and where such evidence does not exist, no question can arise of the Magistrate taking into consideration that evidence for the purpose of committing the accused to the Court of Session.

14. Mr. Desai has next contended that if the expression "such persons, if any, as may be produced by the prosecution" is to be construed as giving discretion to the prosecution in the matter of production of witnesses before the Magistrate at the inquiry stage, the Legislature in the opening words of Sub-section (6) would have used the words "if any" after the words "when the evidence referred to in

Sub-section (4)". In other words, Mr., Desai says that in that case the opening words of Sub-section (6) would have been: "When the evidence referred to in Sub-section (4) if any." In our view, this contention has no force. As I have just pointed out, the opening words of Sub-section (6) in terms refer to Sub-section (4), and in Sub-section (4) the Legislature has used the words "if any". Therefore, upon a proper construction of Sub-sections (4) and (6) read together, it would be superfluous to use the words "if any" after the words "Sub-section (4)" in the opening words of Sub-section (6). When this was pointed out to Mr. Desai, he contended that in that case the words "if any" after the words "such examination" in Sub-section (7) would also not have been necessary. Mr. Desai, however, appears to overlook that under Sub-section (6) it is not obligatory upon the Magistrate to examine the accused. Discretion is left to the Magistrate to examine the accused, if necessary. Therefore, in Sub-section (7), while referring to the examination of the accused, it was necessary to use the words "if any". On the other hand, while referring, in Sub-sections (6) and (7), to the evidence taken by the Magistrate under Sub-section (4); it was not necessary to use the words "if any", because these words ("if any") are used in the body of Sub-section (4). Therefore, in this contention of Mr. Desai also we are unable to see substance.

15. It may be pointed out that the construction which we have put upon the words "such persons, if any, as may be produced by the prosecution" as occurring in Sub-section (4) of Section 207A, is not in keeping with the construction which the High Courts of Travancore-Cochin, Mysore and Madhya Bharat have put upon these words. In State v. Govindan Thampi AIR [1957] T.C. 29, Krishna v. Mysore State AIR [1957] Mys. 5 and State v. Ramratan AIR[1957] M.B. 7 the view taken by these High Courts was contrary to the one taken by us in this case. We would note, however, with respect, that the comparative phraseology of the old Section 208 and the new Sections 207A, 208 and 252 does not appear to have been brought to the notice of the learned Judges in these cases. It would further appear that the special significance of the words "for the prosecution" after the words "other witnesses" in the latter half of Sub-section (4) of Section 207A, was also not brought to the notice of the learned Judges. It may not be out of place at this stage to point out, with respect again, that State v. Ramratan was a decision of a single Judge. For the reasons stated by us in this judgment, we are, with respect, unable to accept the view taken by the learned Judges in the above cases.

16. The result is that this reference fails and is rejected. We see no reason to quash the order of commitment made by the learned Magistrate.