

(1972) 06 BOM CK 0012

Bombay High Court

Case No: None

Harnam Singh Sardar

APPELLANT

Vs

The State and the Deputy
Controller of Imports and Exports

RESPONDENT

Date of Decision: June 12, 1972

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 207A, 208

Citation: (1973) CriLJ 1357 : (1973) MhLj 592

Hon'ble Judges: Bhole, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Bhole, J.

A summons case u/s 5 of the Imports and Exports (Control) Act, 1947 has been filed by the Deputy Chief Controller of Imports and Exports, Bombay against the present petitioner. The Deputy Chief Controller is required to do so u/s 6 of the said Act. Another complaint by Police has also been filed on 27-7-1971 against the petitioner under Sections 467 and 471, IPC and also for an offence u/s 5 of the Imports and Exports (Control) Act, 1947. The petitioner is the Manager of Auto & Tools Agencies, Bombay and accused No. 2 is his partner. The petitioner applied on 15-6-1964 to the office of the Joint Chief Controller, Imports and Exports, Bombay as the Manager of the said firm for grant of import licence to import motor vehicle parts. The Joint Chief Controller issued three import licences valued at Rs. 1,000/-, 4904/- and 1000/- dated 2-7-1964, 23-6-1964 and 2-7-1964 respectively to the said firm for the import of new motor vehicle parts. The petitioner applied on 26-6-1964 to the office of the Joint Chief Controller of Imports and Exports, Bombay for endorsements on the abovesaid import licences permitting the firm of the accused to import army disposal vehicle parts. The Joint Chief Controller, however, did not accede to the request of the said firm.

2. It is in the abovesaid circumstances that the petitioner again applied in April and June, 1965 for the grant of duplicate copies of the said import licences stating that the licences which were granted were either misplaced or lost. The applications were supported by the affidavits of the third accused. On the basis of these applications the Joint Chief Controller issued duplicate copies of the licences to the petitioner's firm. But it appears that the firm had already imported some consignment of second hand military disposal vehicle parts on the licences bearing forged endorsements prior to the receipt of the duplicate copies of the above-said licences. The petitioner cleared the goods through their clearing agent. It appears that the petitioner later on the ground that the original set of import licences which was lost was traced delivered them to the custom authorities through their clearing agents. These circumstances raised suspicion in the minds of the customs authorities and they thought that the endorsements on the copies of the licences meant for customs were forged by the petitioner and his firm. During the course of the inquiry the customs authorities found that the petitioner and his firm placed orders for the import of army disposal vehicle parts knowing fully well that the licences were for the import of new motor vehicle parts and that their request for the endorsement on the licences for the import of army disposal vehicle parts was not acceded to by the Joint Chief Controller of Imports and Exports. It is in these circumstances that the petitioner and the other partners of the firm were prosecuted. For the purpose of bringing home the guilt against the accused the Police as well as the Deputy Chief Controller of Imports and Exports cited as many as 15 witnesses.

3. When these two matters came up for trial before the learned Addl. Chief Presidency Magistrate, Bombay, the petitioner prayed that the procedure prescribed u/s 208, Criminal P. C. be followed and that the procedure prescribed u/s 207-A may not be followed because Section 208, Criminal P. C. gave certain advantages to the accused. In the circumstances of the case in the alternative it was further prayed that even if the procedure prescribed u/s 207-A, Criminal P. C. was followed the witnesses to the actual commission of the offence with which the accused was charged should be examined in Court. The learned Magistrate after considering the application of the petitioner was of the view that no prejudice will be caused to the petitioner if no witnesses were examined because the copies of the statements and documents recorded during the course of the investigation have already been furnished to him and that the right of the petitioner-accused to cross-examine the witnesses cannot be said to have been taken away because according to him he cannot proceed with the case when it is triable by a Court of Session. In his view prejudice also will not be caused to the accused if the witnesses were not examined even though there is a private complaint u/s 5 of the Imports and Exports (Control) Act filed by the Deputy Chief Controller. It is in that view of the matter, therefore, that he ordered that both the complaints should be tried together and that the procedure laid down in Section 207-A, Criminal P. C. should be

followed; that the procedure u/s 208, Criminal P. C. cannot be followed. The petitioner's application, therefore, was accordingly dismissed. It is against this order of the learned Addl. Chief Presidency Magistrate that the petitioner has come here in revision.

4. The only point that arises here for consideration is whether the order passed by the Court below is legal and proper.

5. The simple point before me is whether it was right for the learned Magistrate to consolidate both the private complaint as well as the complaint filed at the instance of Police and whether after consolidation it was proper for the learned Magistrate to order procedure u/s 207-A of the Criminal P. C. and not u/s 208.

6. Section 207-A Criminal P. C. deals, with a procedure to be adopted in the proceedings instituted on a Police report. Under Sub-section (4) of Section 207-A the Magistrate has to proceed to take evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged and if the Magistrate is of the opinion that it is necessary in the interest of justice to take evidence of any one or more of the witnesses for the prosecution he may take such evidence also. Section 208 deals with the proceeding instituted otherwise than on a police report in which the Magistrate shall when the accused appears or is brought before him proceed to hear the complainant, if any, and take in the manner provided in the Code all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate. The accused is also given liberty to cross-examine witnesses for the prosecution and in such a case the prosecution may re-examine them. u/s 208 the, Magistrate, therefore has to record evidence, hear the complainant and allow the accused to cross-examine witnesses for the prosecution. The accused also u/s 208 is given leave to lead defence evidence. The accused has a right to lead evidence for the purpose of showing that no prima facie case was made out against him. On the other hand the accused is not given any right to lead his defence evidence u/s 207-A. The accused, however, has a limited right to cross-examination witnesses, if any, examined by the prosecution and only when they are produced by the prosecution. The Magistrate, however, can take evidence of such persons who are witnesses to the actual commission of the offence alleged. It is, therefore, clear that the accused has more advantages u/s 208, Criminal Procedure Code and very little advantage u/s 207-A thereof.

7. It is contended by Mr. Merchant, the learned advocate for the petitioner, that the learned Magistrate has erred in refusing to follow the procedure u/s 208. According to him his order that the procedure u/s 207-A should be followed is erroneous. It is also contended by him that even if the learned Magistrate follows the procedure u/s 207-A, it is necessary for him to examine the persons who are witnesses to the actual commission of the offence alleged. He gave a list of witnesses who are mentioned in both the private complaint as well as in the charge-sheet. According to

Mr. Merchant, witnesses Bhavani, Bawdekar, Bhasin, Batra, clearing agent Shirwadkar and Afzal are the persons who can rightly be said to be the witnesses to the actual commission of the offence. On the other hand the learned Asstt. Govt. Pleader, Mr. Gambhirwala says that the order passed by the learned Magistrate consolidating both the complaints and ordering the procedure u/s 207-A, Criminal Procedure Code to be followed is quite legal and proper. We have, therefore, to examine these rival contentions.

8. Mr. Merchant, the learned advocate for the petitioner, relies on two unreported judgments of this Court viz. Criminal Application No. 182 of 1965 decided on 1-9-65 and Criminal Revision Application No. 509 of 1969 dated 12-8-69. The former is a Division Bench judgment and the latter is a single Judge's judgment. Mr. Merchant relies on them for the purpose of showing that some of the witnesses, who are mentioned above, ought to have been examined by the learned Magistrate even if he decides to follow the procedure u/s 207A. Now the Division Bench was dealing with a charge-sheet for the commission of offences u/s 366 read with Section 34, IPC and u/s 376 read with Section 34, IPC Accused No. 2 applied to this Court for setting aside the order of committal passed by the learned Magistrate below on the ground that it was wrong for the Magistrate to have not complied with the provisions of Section 207-A (4), Cr.PC It was contended that the only witness who was examined by the Magistrate below was the Investigating Officer who had not actually seen the commission of the offences. On the other hand there were at least four persons who had actually seen the offences and yet they were not examined. It was, therefore, contended that the learned Magistrate has not complied with the provisions of Section 207-A (4), Cr.PC The Division Bench after relying on Kirpal Singh v. The State of Uttar Pradesh, (1964) 1 SCJ 411 : (1965) 1 Cri LJ 636, observed "it is now no longer open to the Magistrate to refuse to examine the principal witnesses to the actual commission of the offence." Further, the Division Bench was of the view that "the victim of the offence Edwin Keith will be at least one of the principal witnesses to the actual commission of the offence and so she must be examined in Court." The learned Judge also held "since the procedure laid down by Section 207-A (4) of the Criminal Procedure Code has not been followed in this case, the applicant is entitled to make a complaint about it in this Court."

9. In the latter case My Lord the Chief Justice was dealing with a revision application of the five applicants, who were charged u/s 436 read with Section 34, Indian Penal Code. The allegation was that the accused had thrown lighted bottles of petrol on the cinema screen in consequence of which the screen caught fire. Two eye-witnesses were cited in that case. Relying on the above cited Supreme Court decision My Lord the Chief Justice was of the view that the Magistrate ought to have-examined the two eye-witnesses in that case. Accordingly, therefore, he held that the Magistrate had not exercised the discretion judicially. It is in the light of these observations in the judgments of the two above cited cases that Mr. Merchant says that the learned Magistrate, even if he wanted to follow the procedure u/s

207-A, Criminal Procedure Code ought to have examined, several witnesses, who can rightly be said according to him, to be the witnesses to the actual commission of the offence. It is, however, difficult for me to accept this contention because none of the witnesses cited by Mr. Merchant can be said to be either eyewitnesses to the offence committed by the petitioner or witnesses to the actual commission of the offence.

10. The allegations against the petitioner and others are that the petitioner's; firm had already imported some consignment of military disposal goods on the licence; bearing a forged endorsement although they were not allowed under the import licence obtained by them, to do so. The allegation is that not only the petitioner and his firm forged the endorsement but also imported certain goods which were not permitted to them under the forged licences. Now, it is contended by Mr. Merchant that the accused made false representations to witness-Banerji and cheated him. Witness Bawdekar had examined the goods which were imported on false licences. Bhasin and Batra had opened the letters of credit and were presented to the Bank of Baroda and another bank. Witnesses Shirwadkar, Ghangale and Afzal were the clearing agents and they were also, according to Mr. Merchant, witnesses to the actual commission of the offence. It is difficult for me to accept these contentions for the obvious reason that they are neither eye-witnesses to forgery nor to the use of the forged documents by the petitioner or his firm. By no stretch of imagination could Banerji or other witnesses be called witnesses to the actual commission of the offence alleged. There is, therefore, no question of these witnesses being classified as witnesses to the actual commission of the offence. The words "actual commission" in Section 207 A (4) clearly indicate evidence which goes directly to prove the fact in issue. In the case which is to be established by circumstantial evidence it would be difficult to find persons who can be said to be eye-witnesses to the actual commission of the offence. In the instant case it does not, therefore, appear to me that the witnesses as cited by Mr. Merchant can be said to be witnesses who are witnesses to the actual commission of the offence alleged against the petitioner or his firm. There is, therefore, no question of their being examined u/s 207-A, CrIPC

11. Mr. Merchant relies on *The State of West Bengal v. Tulsidas Mundhra* (1964) 1 Cri LJ 443 for the interpretation of Sections 208 and 207-A, Cr.PC There can be no doubt that there is considerable difference between the provisions -of Sections 207 A and 208 and there is no doubt that the accused has more advantages u/s 208 and less u/s 207-A.

12. The point, therefore, now is whether the learned Magistrate was right in not only consolidating the two proceedings "but also following the procedure u/s 207-A. Mr. Merchant relying on [Gopal Vs. State](#), for the proposition that if there was a private complaint and if there was also for the same incident a police complaint, the two cannot be consolidated. The Division Bench of Rajasthan High Court has taken the

view that the proceeding started on a private complaint against the accused in respect of an offence u/s 307 IPC and also the proceeding started on a Police challan filed against one of them u/s 307 IPC with respect to the same incident cannot be consolidated. According to the learned Judges the order consolidating the two proceedings was wrong. It was held that according to the amended Criminal Procedure Code the procedure for inquiry in cases triable by the court of session on police report has been simplified and by tagging the police challan with the complaint the very purpose of expediting trial is frustrated. They further held that the procedure u/s 208 and subsequent sections is different and the reason for the difference is that while the police is not interested in one or the other party, the complainant is a person interested and satisfactory evidence is necessary to be recorded by the court before it comes to the conclusion that the accused should be committed. It was ordered by the Court below there, that the trial was to proceed u/s 207-A as per the amended procedure. It is, therefore, contended by Mr. Merchant that the order of consolidation and the order to proceed u/s 207-A Criminal Procedure Code passed by the learned Presidency Magistrate are erroneous. But in *State v. Matu* (1961) 2 Cri LJ 422 the Rajasthan High Court while dealing with two references arising out of a private complaint and a police challan has observed:

There is no express provision in the Code of Criminal Procedure for consolidation of an inquiry proceeding on a police report with an inquiry commencing on a private complaint. At the same time there is no express bar either against consolidation in an appropriate case. If the two inquiries are consolidated, the Magistrate should proceed u/s 208, Criminal Procedure Code because it lays down a longer procedure which is more beneficial to the accused than the one laid down in Section 207-A, Criminal Procedure Code. The consolidation should, however, be avoided as far as possible, because the very purpose of providing Section 207-A is to expedite the inquiry and that purpose should not be allowed to be frustrated.

13. It does appear that there is no express provision in the Criminal Procedure Code for consolidation of a proceeding on a police report with an inquiry commencing on a private complaint.

14. The point, however, after consolidating the two proceedings is whether the learned Magistrate can still follow the procedure u/s 207-A. It would be erroneous in my view for the Magistrate after consolidating the two proceedings to follow the procedure laid down u/s 207-A and not u/s 208. We have seen that the accused has very little rights to defend himself u/s 207-A. He has no right to lead evidence to show that there was no prima facie case against him. He has merely a right to cross-examine witnesses only if the prosecution chooses to examine. On the other hand u/s 208, Criminal Procedure Code there are more benefits and advantages available to the accused, The learned Magistrate has to record evidence of the witnesses and the accused is given an opportunity to cross-examine them. The

accused has also a right to lead defence evidence if he chooses to. If therefore, the proceeding instituted on a police report is consolidated with the proceeding instituted on a private complaint, the Magistrate should proceed u/s 208, Criminal Procedure Code because it gives more benefits to the accused than those available u/s 207-A. It would be in the fitness of things if he follows the procedure u/s 208, Criminal Procedure Code. Mr. Gambhirwalla, the learned Asstt. Government Pleader, has not been able to invite my attention to any case either of this Court or any other High Court which would be contrary to the view which I am now taking.

15. Mr. Merchant, the learned advocate for the petitioner, also relied upon [Amal Chakraborty and Others Vs. The State](#), . But that in my view will not help him. In that case the argument was based on the two decisions of Chakrawarti, C. J. and Das Gupta, J., where their Lordships held that the provisions of Section 156 of the Code were not applicable to the Calcutta Police and that the Calcutta Police had no right to submit a report u/s 173 of the Code. That case, therefore, will be of no use to Mr. Merchant. It appears to me, therefore, that the order passed by the learned Magistrate consolidating the two proceedings is proper. But his order that the procedure u/s 208 CrIPC should not be followed is erroneous. In my view he should follow the procedure u/s 208 Cr.PC but should also try to expedite its disposal according to the spirit of Section 207-A.

16. The petition is therefore partly allowed. The learned Magistrate is directed to follow the procedure u/s 208 Cr.PC

17. Rule is accordingly disposed of.