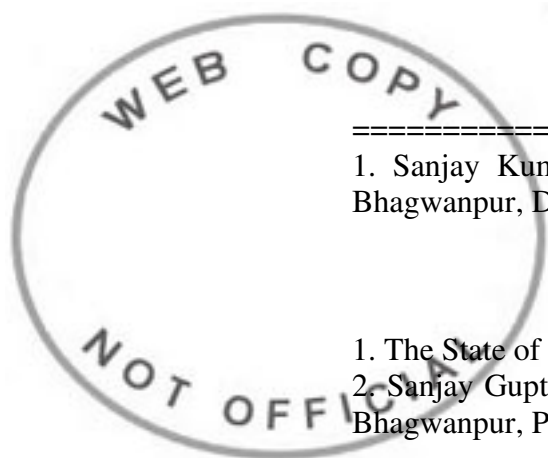




IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.24629 of 2016

Arising Out of PS.Case No. -63 Year- 2007 Thana -BHAGWANPUR District-
VAISHALI(HAJIPUR)

=====

1. Sanjay Kumar, son of Sri Dashrath Sah, resident of Village Kiratpur, P.S. Bhagwanpur, District Vaishali.

.... Petitioner/s

Versus

1. The State of Bihar
2. Sanjay Gupta @ Sanjay Kumar Gupta, Son of Gopalji Sah, Resident of Village Bhagwanpur, P.S. Bhagwampur, District Vaishali

.... Opposite Party/s

with

=====

Criminal Miscellaneous No. 25978 of 2016

Arising Out of PS.Case No. -63 Year- 2007 Thana -BHAGWANPUR District-
VAISHALI(HAJIPUR)

=====

1. Sanjay Kumar son of Sri Dashrath Sah resident of village Kiratpur, P.S. Bhagwanpur, District Vaishali.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Sanjay Gupta @ Sanjay Kumar Gupta Son of Gopalji Sah Resident of Village Bhagwanpur, P.S. Bhagwanpur, District Vaishali.

.... Opposite Party/s

=====

Appearance :

(In Cr.Misc. No.24629 of 2016)

For the Petitioner/s : Mr. Shravan Kumar-Sr. Advocate
Mr. Dinesh Maharaj-Advocate
For the Opposite Party : Mr. Krishna Prasad Singh-Sr. Advocate
Mr. Ranjan Kumar Singh-Advocate
For the State : Mr. Pranav Kumar-A.P.P.

(In Cr.Misc. No.25978 of 2016)

For the Petitioner/s : Mr. Shravan Kumar-Sr. Advocate
Mr. Dinesh Maharaj-Advocate
For the Opposite Party : Mr. Krishna Prasad Singh-Sr. Advocate
Mr. Ranjan Kumar Singh-Advocate
For the State : Mr. Pranav Kumar-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 19-08-2016



Cr. Misc. No.24629 of 2016 as well as Cr. Misc. No.25978 of 2016 arose out of from common case bearing Bhagwanpur P. S. Case No.63 of 2007 and in both the petitions, petitioner is the same and on account thereof, both the petitions have been heard together and are being disposed of by common order.

2. In Cr. Misc. No.24629 of 2016, petitioner-accused has challenged the order dated 19.01.2016 whereby and whereunder the learned Additional Chief Judicial Magistrate-XII, Vaishali at Hajipur has committed the case Bhagwanpur P. S. Case No.63 of 2007 to the Court of Sessions invoking Section 323 of the Cr.P.C. while Cr. Misc. No.25978 of 2016 has been preferred by the petitioner-accused against an order dated 11.04.2016 passed by the learned Sessions Judge, Vaishali at Hajipur in Sessions Trial No.36 of 2016 arising out of Bhagwanpur P. S. Case No.63 of 2007 whereby and whereunder prayer made on his behalf under Section 228(1)(a) of the Cr.P.C. has been rejected.

3. For better appreciation of the dispute brought up under aforesaid two petitions, the facts of the case is to be taken care of.

(A) For an occurrence alleged to have taken place on 01.07.2007, two cases were instituted as counter to each other bearing Bhagwanpur P. S. Case No.63 of 2007 under Sections 147, 148, 149, 323, 324, 504, 341, 379, 427 of the I.P.C. as well as Bhagwanpur P. S.

Case No.64 of 2007 registered under Sections 323, 341, 504, 324, 379, 427, 34 of the I.P.C.

(B) After concluding investigation of Bhagwanpur P. S. Case No.63 of 2007, police had submitted chargesheet under Sections 323, 324, 341, 427, 504, 149 of the I.P.C. whereunder cognizance was taken and accordingly, it was transferred to the Court of Magistrate for trial. At the other end, after concluding investigation, chargesheet was submitted under Section 341, 323, 324, 326, 307, 427, 504, 34 of the I.P.C. relating to Bhagwanpur P. S. Case No.64 of 2007 whereunder cognizance was also taken and accordingly, after conducting commitment inquiry, the case was committed to the Court of Sessions where it is going on.

(C) During course of sailing of Bhagwanpur P. S. Case No.63 of 2007 before the Magistrate, a petition was filed on behalf of prosecution that both the cases should be tried together and on account thereof, Bhagwanpur P. S. Case No.63 of 2007 be committed to the Court of Sessions, which was dismissed as withdrawn. However, the prayer was reagitated and the same was rejected vide order dated 28.01.2011 and during course thereof, liberty was given to the prosecution to reagitate in case materials are placed before the Court justifying applicability of Section 323 Cr.P.C. While the trial was going on during course thereof, two witnesses were examined.

During midst thereof, Cr. Revision No.56 of 2011 was filed before the learned Sessions Judge against the order dated 28.01.2011, which was dismissed as withdrawn vide order dated 25.04.2011.

(D) Later on, Cr. Misc. No.32 of 2011 was filed purported to be under Section 408 Cr.P.C. and vide order dated 16.05.2011, the learned Sessions Judge, Vaishali at Hajipur allowed the same vide order dated 04.06.2011 directing transfer of Bhagwanpur P. S. Case No.63 of 2007 from the Court of Magistrate to the Court of learned Additional Sessions Judge, Fast Track Court-1, Vaishali at Hajipur where Bhagwanpur P. S. Case No.64 of 2007 was pending. Subsequently thereof, the order dated 04.06.2011 passed by the learned Sessions Judge, Vaishali at Hajipur in Cr. Misc. No.32 of 2011 was challenged before the High Court under Cr. Misc. No.22819 of 2011 and the same was allowed vide order dated 07.04.2014 setting aside the same. Accordingly, record of Bhagwanpur P. S. Case No.63 of 2007 returned back to the Court of Magistrate, but till then, witnesses were examined before the Court of Sessions. Thereafter, a petition under Section 323 of the Cr.P.C. was filed before the learned Magistrate and the same was allowed by the order impugned. The aforesaid order happens to be subject matter of Cr. Misc. No.24629 of 2016.

(E) After commitment, the record of Bhagwanpur P. S.



Case No.63 of 2007 came up before the Court of Sessions wherefrom it was transferred to the concerned Court where Bhagwanpur P. S. Case No.64 of 2007 was pending and at the time of charge, a petition under Section 228(1)(a) of the Cr.P.C. was filed which has been rejected by the Court concerned vide order dated 11.04.2016, which happens to be the subject matter of Cr. Misc. No.25978 of 2016.

4. Learned counsel for the petitioner while assailing the respective orders has submitted that learned lower Court had adopted wrong procedure on account thereof, both the orders are fit to be set aside.

5. To substantiate such plea, it has been submitted that at first round of litigation, while the Bhagwanpur P. S. Case No.63 of 2007 was committed to the Court of Sessions, and before the order of the learned Sessions Judge passed in Cr. Misc. No.32 of 2011 was set aside, during midst thereof, so many witnesses were examined before the Sessions Court and then thereafter, as the matter reverted back to the Court of Magistrate after having the order of the learned Sessions Judge set aside under Cr. Misc. No.22819 of 2011, then in that event, the evidence of the witnesses who were examined before the Court of Sessions would not have been considered during course of appreciation of prayer made under Section 323 of the Cr.P.C. as those evidences could not be taken into consideration by the Magistrate. On

account thereof, applicability of committal of the case in terms of Section 323 Cr.P.C. happens to be bad.

6. It has also been submitted that when case has been committed at 2nd round of litigation, the petitioner prayed for that as no case is made out to be exclusively triable by the Court of Sessions, hence, the same should be remitted back in terms of Section 228(1)(a) of the Cr.P.C. which has been rejected by the learned Sessions Court illegally. To substantiate such plea, it has been submitted that there happens to be no material available in the case diary to substantiate the trial of the case by the Court of Sessions. That being so, rejection of the prayer made by the petitioner happens to be perverse as well as non-application of judicial mind and on account thereof, both the orders are fit to be set aside.

7. The learned Additional Public Prosecutor opposed the prayer and submitted that the successive orders are in accordance with law and so, both the petitions are fit to be dismissed.

8. How the trial of case and counter-case should be proceeded with is not at all prescribed under the Criminal Procedure Code. That means to say, the legislature had not perceived legal necessity on that very score, whereupon no such provisions has been made. However, Courts have considered that for proper adjudication as well as for uniformity in the judgment, the case and counter-case

should be tried by the same Court irrespective of the fact that both the cases are triable by two different Courts. During course of consideration, the Courts have also taken note of Section 26 of the Criminal Procedure Code whereunder the High Court or the Court of Sessions or any other Court by which such offence is shown under first Schedule to be competent enough to try any offence under the Indian Penal Code. For better appreciation, Section 26 of the Cr.P.C. is quoted below:-

“26. Courts by which offences are triable.

Subject to the other provisions of this Code,-

(a) any offence under the Indian Penal Code (45 of 1860), may be tried by-

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable;

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by-

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable.”

9. At the present juncture, Sections 209 as well as 323 of the Cr.P.C. are to be taken note of which commands the event of commitment. Section 209 is applicable where the offences on its face speak it trial to be conducted by the Court of Sessions in the background of order of cognizance while Section 323 of the Cr.P.C.



deals with the event whereunder subsequently, during course of trial, the material so brought up during trial justify trial by the Court of Sessions. Furthermore, Section 193 of the Cr.P.C. speaks with regard to power of the Sessions Court over taking of cognizance with regard to the cases having committed to the Court of Sessions. Under the backdrop of aforesaid legal provisions now one should see the relevant judicial pronouncement on that very score.

10. In *Nathi Lal and others v. State of U.P. and another reported in 1990 (Supp) SCC 145*, the matter was taken into consideration and the same has been answered in affirmative and for better appreciation the relevant Para is quoted below:-

“2. We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross case one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment is that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the case, he can

rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in the particular case without being influenced in any manner by the evidence or arguments urged in the cross case, But both the judgments must be pronounced by the same learned Judge one after the other.”

11. In ***Kulwant Singh v. Amarjit Singh and two others with Kulwant Singh v. Jitender Singh and Nine others reported in (2000)3 SCC 290***, it has been observed:-

“10. We are quite amazed as to why the two appeals, which arose out of the same incident and in fact resulted in cross-sessions cases, could not have been heard together.....”

12. In ***Sudhir and others v. State of M. P. with State of M. P. v. Lavkush and others reported in (2001) 2 SCC 688***, it has been held:-

“8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by



pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "cross cases" by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court (Waller, and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same court, and each party would represent themselves as having been the innocent victims of the aggression of the other."

9. *Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide [Krishna Pannadi vs. Emperor](#) AIR 1930 Madras 190). The learned judge said thus:*

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried

in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

10. *We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in [the Code](#). The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.*

11. *In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This court has given its approval to the said practice in [Nathi Lal & ors. vs. State of U.P. & anr.](#) [1990 (Supp) SCC 145]. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it*

can be extracted here:(SCC pp. 145-46, para 2)

"2. We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."



12. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in [Section 209](#) of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with [Section 209](#) of the Code, the magistrate has, nevertheless, power to commit the case to the court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. [Section 323](#) is incorporated in [the Code](#) to meet similar cases also. That section reads thus:

"323. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing

judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made."

13. The above section does not make an inroad into [Section 209](#) because the former is intended to cover cases to which [Section 209](#) does not apply. When a magistrate has committed a case on account of his legislative compulsion by [Section 209](#), its cross case, having no offence exclusively triable by the Sessions Court, must appear to the magistrate as one which ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons why it should be so. Hence the magistrate can exercise the special power conferred on him by virtue of [Section 323](#) of the Code when he commits the cross case also to the Court of Sessions. Commitment under [Section 209](#) and [323](#) might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in

Chapter XVIII.

14. Now we have to deal with the powers of the Sessions Court in the light of [Section 228](#) of the Code which says that when the Sessions Court, after hearing under [Section 227](#), is of opinion that none of the offences presumed to have been committed by an accused is triable by a Court of Sessions he is to transfer the case for trial to the Chief Judicial Magistrate.

15. In this context, we may point out that a Sessions Judge has the power to try any offence under [the Indian Penal Code](#). It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. This power of the Sessions Court can be discerned from a reading of [Section 26](#) of the Code. When it is realised that the Sessions Judge has the power to try any offence under the Indian Penal code and when a case involving offence not exclusively triable by such court is committed to the Court of Sessions, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial

Magistrate. For this purpose we have to read and understand the scope of [Section 228\(1\)](#) in the light of the above legal position. The sub-section is extracted below:

"228. (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused."

(emphasis supplied)

16. *The employment of the word "may" at one place and the word "shall" at another place in the same sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that*



he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence.

17. In the present case, the Sessions Judge ought not have transferred the second case to the Chief Judicial Magistrate as he did, but he himself should have tried it in the manner indicated in Nathi Lal (supra). To facilitate such a procedure to be adopted we have to set aside the order passed by the Sessions Judge in the second case. We do so.”

13. In ***State of M. P. v. Mishrilal (Dead) and others*** reported in (2003) 9 SCC 426, it has been held:-

CROSS CASES BE TRIED TOGETHER

“7. Undisputedly, accused Mishrilal lodged the



report to the police vide Ex.D-8 over the same incident happened on 5.3.1987, in which he had clearly stated the injuries were sustained by him and his son Madhusudan at the hands of prosecution party. It is also not disputed that on the strength of the complaint lodged by Mishriulal, investigation was also carried out and challan was filed namely crime case no.52/87 under Sections 147, 148, 149 and 324 IPC against the prosecution party which is pending for disposal before the learned Judicial Magistrate First Class. In the said challan, the prosecution party is stated to be an aggressor. This Court in Nathilal Vs. State of U.P. 1990 (Supp.) SCC 145, pointed out the procedure to be followed by the Trial Court in the event of cross cases. It was observed thus:- (SCC pp. 145-46, para 2)

"2. We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he



must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

8. In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross-



cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice.”

14. In ***Motak Yadav @ Awadh Bihari Yadav & others v. State of Bihar & others reported in 2015(1) P.L.J.R. 761***, it has been held:-

“48. While considering the fact that PWs 3 and 4 were accused in Sessions Trial No. 36 of 1998 and they stand convicted, it is imperative to note that though the Code of Criminal Procedure does not lay down any specific



*procedure regarding trial of counter cases, it is the practice adopted, in the interest of justice, by the Courts that if a case is committed to the Court of Session, the Counter Case, arising out of the same incident, should also be, ordinarily, committed to the same Court of Session even if the latter is not exclusively triable by a Court of Session. We have cautiously used the word ordinarily, for, in an appropriate case, the Magistrate, instead of committing the case to a Court of Session, may have to discharge an accused in terms of Section 245 of the Code of Criminal Procedure, particularly, when the case is not exclusively triable by the Court of Session. Undoubtedly, however, the case and the counter case should be tried by the same Presiding Officer in quick succession. The first case should be tried to a conclusion, but the judgment should be reserved till the second case is concluded and, thereafter, the judgment of the two cases should be pronounced separately. (See **Girijananda Bhattacharyya v. State of Assam**, reported in MANU/GH/0022/1977 (Gauhati).”*

15. Thus, it has become abundantly clear that by series of

judicial pronouncement as detailed above, it has conclusively been held that trial of case and counter-case irrespective of its nature is to be conducted by the same Court and further, even the cases having triable by the Court of Magistrate could be fairly tried by the Court of Sessions in terms of power being entertained by the Court of Sessions according to Section 26 of the Criminal Procedure Code and for that, irrespective of nature of evidence, Section 323 of the Cr.P.C. could be availed by the Court of Magistrate to commit the case for that purpose, which could not be questioned over its propriety much less with regard to absence of sufficient materials. That being so, the learned lower Court rightly committed the case to the Court of Sessions. Because of the fact that even the Magisterial trial is to be proceeded with by the Court of Sessions on account thereof, there is no question of applicability of Section 228(1)(a) of the Cr.P.C.

16. Consequent thereupon, both the petitions sans merit and are accordingly, dismissed.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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