

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.22952 of 2014

Arising Out of PS.Case No. -135 Year- 2011 Thana -SITAMARHI GRP CASE District-
SITAMARHI

- =====
1. Braj Kishore Thakur Son of Late Ram Prakash Thakur
 2. Rekha Devi Wife of Braj Kishore Thakur
 3. Dipak Kumar Son of Braj Kishore Thakur All resident of village- Prem Nagar,
Tole Bahori, Poilice Station- Runnisaidpur, District- Sitamarhi

.... Petitioner/s

Versus

1. The State of Bihar
2. Rameshwar Thakur son of Janak Thakur Resident of village- Prem Nagar,
Tole Bahori, Poilice Station- Runnisaidpur, District- Sitamarhi

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. V.R.P. Singh, Adv.

For the Opposite Party No.1: Mr. A. Haque, APP

For the Opposite Party No.2 : Mr. Rajesh Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

Date: 26-07-2017

Heard Shri V.R.P. Singh, the learned counsel for the
petitioners, Shri A. Haque, learned Additional Public Prosecutor for
the State and Shri Rajesh Kumar for the Opposite Party No.2.

2. The brief facts of the case are that a complaint
bearing Complaint No.135 of 2011 dated 02.02.2011 was filed by one
Rameshwar Thakur against the petitioners herein alleging therein that
on 01.02.2011 at about 2 in the after-noon when the daughter of the
complainant had gone to the field to steal the vegetable, then she saw
that the daughter of the petitioner no.1 herein was also stealing
vegetables from the field and thereupon the daughter of the



complainant is said to have gone near the daughter of the petitioner no.1 and tried to snatch the vegetables being carried away. At that moment the petitioner no.2 had come there and had beaten the daughter of the complainant. It has been further alleged in the complaint that the daughter of the complainant had returned to her house and had made a complaint to the wife of the complainant, whereupon the wife of the complainant, namely, Asha Devi had gone to the house of the petitioners herein where the petitioners herein reprimanded her. It is the case of the complainant that at about 3 P.M., all the three accused persons, variously armed, came to the house of the complainant and started abusing and assaulting the wife of the complainant as well as took away her attaché containing ornaments etc.

3. It appears that cognizance was taken by the learned trial court for the offence punishable under Sections 323, 389, 504/34 of the Indian Penal Code by an order dated 16.03.2012 passed in Complaint Case No. 135 of 2011.

4. It further appears that the petitioner no.1 had filed a written report before the police on 04.2.2011 alleging therein that on 01.02.2011 at about 3 P.M. while he was sitting at the door of his house, the Opposite Party No.2, namely, Rameshwar Thakur (Complainant of Complaint Case No. 135 of 2011), Santosh Thakur,



Janak Thakur wife of Shiv Shankar Thakur came there and started abusing the informant as also told him to remove the 'Khapra' (earthen tiles) and upon not heeding to their request, the said accused persons had assaulted the informant resulting in the informant receiving injuries. On the basis of the said fardbeyan of the petitioner no.1 herein, Runisaidpur P.S. Case No. 55 of 2011 was registered for the offence punishable under Sections 341, 323, 324 and 504/34 of the Indian Penal Code against the complainant of the aforesaid case i.e. the Opposite Party No.2 and other accused persons. The complainant of the aforesaid first case i.e. Opposite Party No.2 filed a petition dated 18.01.2014 before the learned Judicial Magistrate, Sitamarhi for committing the case to the court of Sessions for trial of the complaint case by the Additional Sessions Judge, Sitamarhi along with Sessions Trial No. 18 of 2012/ 129 of 2013 i.e. the one arising out of Runisaidpur P.S. Case No. 55 of 2011.

5. The petitioners had filed a rejoinder to the said application and contended that the nature of both the aforesaid case are different, the said two cases cannot be said to be a case and counter case, hence, the application filed by the Opposite Party No.2 is fit to be dismissed.

6. The learned Judicial Magistrate- Ist Class, Sitamarhi, by an order dated 27.03.2014 has allowed the aforesaid



petition dated 18.01.2014 filed by the Opposite Party No.2 and the said Complaint Case No. 135 of 2011 has been committed to the court of Sessions by virtue of powers under Section 323 of the Code of Criminal Procedure.

7. The aforesaid order dated 27.03.2014 passed by the learned Judicial Magistrate, 1st Class, Sitamarhi has been assailed in the present application.

8. The learned counsel for the petitioners submits that though the date and time of the occurrence are similar, both the cases cannot be said to be arising out of the same occurrence since the place of occurrence and manner of occurrence are different, hence, it is not a case and counter case, thus, the Complaint Case No. 135 of 2011 could not have been tagged with the aforesaid Sessions Trial No. 18 of 2012.

9. Per contra, the learned counsel for the Opposite Party no.2 submits that a bare perusal of the impugned order dated 27.03.2014 would show that it has been admitted by both the parties before the learned trial court that the aforesaid two cases arise out of the same transaction. It has been further submitted that even in a case, which is not exclusively triable by the court of sessions, the Magistrate has the power to commit the case to the court of Sessions in terms of Section 323 of the Code of Criminal Procedure.



10. The learned counsel for the Opposite Party No.2 has relied upon a judgment reported in **2007(2) PLJR 856 (Supojit Dutta vs. the State of Bihar)**. The learned counsel has referred to paragraphs no. 10, 13 and 15, which are as follows:

“10. From a plain reading of the aforesaid provision, it is evident that the Magistrate at any stage of inquiry into an offence or trial but before signing of the judgment can commit a case to the Court of Session if he is of the opinion that it "ought to be tried" by it. Whether the expression "ought to be tried" by the Court of Session includes only those offences which are exclusively triable by the Court of Sessions under First Schedule of the Code or other offences also? I am of the view that the expression "ought to be tried" in Section 323 of the Code shall not include only those offences which are exclusively triable by the Court of Sessions in the light of the First Schedule of the Code. One has to bear in mind that an offence exclusively triable by a Court of Session under First Schedule of the Code is to be tried by it and the Code has not given any discretion in this regard. Therefore, the discretion given to the Magistrate to commit the case to the Court of Sessions which "ought to be tried" by it shall obviously include such offences which are not triable exclusively by a Court of Session. There may be a case like the present one in which the maximum sentence provided in law is imprisonment for life or with imprisonment for either description for a term which may extend to ten years. The legislature has provided punishment for the aforesaid offence and many other offences although triable by a Magistrate of the First Class more than what a Magistrate of the First Class or a Chief Judicial Magistrate could inflict. In case the expression "ought to



be tried" in Section 323 of the Code is read to mean offences exclusively triable by a Court of Session, in no case maximum punishment provided under Section 409 of the Indian Penal Code can possibly be inflicted. Thus, in my opinion, a case in which the Magistrate is of the opinion that the punishment provided under the law can neither be inflicted by him or by the Chief Judicial Magistrate but the allegations justify higher punishment, he is obliged to commit the case to the Court of Session. This power can be exercised at any stage of the proceeding before signing the judgment. On such commitment the provision of Chapter XVIII, which deals with trial before a Court of Session shall apply. The view which I have taken finds support from a judgment of this Court in the case of **Emperor vs. Deo Narain Mullick** (AIR 1928 Patna 551) in which it has been held as follows:

"The offence in this case is not exclusively triable by the Court of Sessions. Therefore the Magistrate could only commit the accused to the Court of Sessions if he had been of the opinion that the case ought to be tried by that Court. He must give reasons for his entertaining that opinion, for the order of commitment is judicial order."

13. It is worthwhile mentioning that in the case of **Narendra Amratlal Dalal** (*supra*) the Gujarat High Court had U0 preserved the power of the Magistrate to commit the case to the Court of Session straight-away under Section 323 of the Code, wherein a question other than quantum of punishment is involved, which would be evident from the following passage of the judgment:

"It must be made clear, however, that this interpretation does not affect the power of a Magistrate or a Metropolitan Magistrate to commit under Sec. 323 of the new Code a case to the Court of



Session wherein a question other than the quantum of punishment, which ought to be received by the accused, is involved. It is cases other than the punishment which ought to be received by the accused as collated by Sec. 325(1) in which a Magistrate or a Metropolitan Magistrate can have resort to Section 323 of the new Code.”

15. With deepest respect, I am unable to persuade myself to agree to this view. As has been held above the expression "ought to be tried by a Court of Session" is not confined to offences exclusively triable by a Court of Session under First Schedule of the Code. Thus discretion has been conferred on the Magistrate to adjudicate as to the case which ought to be tried by a Court of Session. In my opinion the complexity of the case may be a ground for the Magistrate to come to the conclusion that the case be tried by a Court of Session. Similarly punishment that an accused should receive ought to be different in kind and more severe than what the Magistrate is competent to inflict can be also a good ground for a Magistrate to come to the conclusion that the case ought to be tried by a Court of Session. Hence, I am of the considered opinion that a Magistrate while holding inquiry into an offence or the trial is satisfied that the case is one which ought to be tried by a Court of Session and this satisfaction may be on account of quantum of punishment, he can commit the case to that Court straightaway, but this power has to be exercised before signing the judgment

11. I have perused the materials on record and gone through the impugned order dated 27.03.2014.



12. At this juncture it would be relevant to quote Section 323 of the Code of Criminal Procedure herein below:

“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 provision of Chapter XVIII shall apply to the commitment so made”.

13. It is a trite law that the Magistrate is empowered to commit any case to the court of Sessions if he is of the opinion that the case ought to be tried by that court, though he has to furnish reasons for forming such an opinion. Even the provision of law i.e. section 323 Cr. P. C. empowers the Magistrate to commit any case to the court of Sessions, whether triable or not triable by the court of Sessions, subject to the Magistrate recording reasons in writing for such commitment to the court of Sessions.

14. Now coming to the facts of the present case, it is apparent that the place of occurrence, mode of occurrence and the dispute involved in the aforesaid two cases are absolutely different. While the occurrence pertaining to the Complaint Case No. 135 of 2011 had taken place in the agricultural field and the dispute was with regard to stealing of the vegetables and theft of the same by the accused of that case, the place of occurrence in Runisaidpur P.S. Case



No. 2011, is the road in the front of the house of the petitioner no.1 and the dispute was with regard to removal of 'Khapra' (earthen tiles) kept on the road by the petitioner no.1. Moreover, all the accused persons are not common in both the incidents.

15. The learned trial court in the impugned order dated 27.03.2014 has relied upon the judgment of the Hon'ble Apex Court reported in [2001] 2 SCC 688 (**Sudhir Vs. State of M.P.**), wherein it has been held that the case and counter case should be tried by the same court in order to deter a conflict judgment being delivered upon similar facts, although the judgments in both the cases may be pronounced by the same learned Judge, one after other.

16. It has been further held by the Hon'ble Apex Court in the aforesaid case of **Sudhir vs. State of M.P.** (supra) that in reality the case and counter case are, to all intents and purposes, conflicting versions or different versions of one incident.

17. I find from the records of the case that the aforesaid two cases do not pertain to one incident consequently, there is no question of different versions of one incident. This is further fortified by a bare perusal of the complaint case No. 135 of 2011 and fardbeyan of the informant leading to registration of Runisaidpur P.S. Case No. 55 of 2011. If the incident is not one, there is no question of case and counter case. If the aforesaid cases are not the case and



counter case, then the grounds furnished by the learned trial court in the impugned order dated 27.03.2014 for committing the case to the court of Sessions cannot be said to be a legally valid ground. It is another matter that there may be other reasons for commitment of the case to the court of Sessions, but the reason furnished in the present case by the learned trial court for committing the complaint case to the court of sessions is non-existent, hence, the impugned order dated 27.03.2014 cannot be sustained.

18.I may hasten to add that there is an error of record inasmuch as the aforesaid two cases apparently do not arise out of the same transaction and the learned trial court ought to have scrutinized the contents of the complaint case as well as the fardbeyan of the informant before coming to any conclusion.

19.It is also the stand of the petitioners that the opposite party no.2 had filed the aforesaid petition dated 18.01.2014 in a malafide manner, just with a view to linger the case inasmuch as the earlier case pending before the sessions court, was on the verge of conclusion. Be that as it may, the fact remains that the aforesaid two cases arise out of the two different cases/ incidents.

20.I may state that the judgment referred to by the learned counsel for the opposite party no.2 is irrelevant in the context of the issue involved in the present case. The said judgment is only an



authority on the point that the expression ‘ought to be tried by a court of session’ is not confined to offences exclusively triable by a court of Session under 1st schedule of the Code and the Magistrate has the discretion to adjudicate as to the case which ought to be tried by a court of Session, as is clear from the paragraphs of the said judgment re-produced in the preceding paragraphs, herein above.

21. For the reasons stated herein above, the application is allowed, and the order dated 27.03.2014 passed by Sri Neeraj Kumar-II, Judicial Magistrate 1st Class, Sitamarhi in Complaint Case No. C-1/135 of 2011 (Sessions Trial No. 149 of 2014) is hereby quashed.

22. It goes without saying that the quashing of the order dated 27.03.2014 passed by J.M., Ist Class, Sitamarhi will not cause any prejudice to the merits of Complaint Case No.C-1/135 of 2011.

23. There shall be no order as to costs.

(Mohit Kumar Shah, J)

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AFR	AFR
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