

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.1119 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, is filed by the petitioners/ accused 4 to 7 and 9 to 19 assailing the order, dated 31.03.2017, of the learned Additional Judicial Magistrate of First Class, Srikalahasthi, Chittoor District, passed in P.R.C.No.32 of 2016.

2. I have heard the submissions of *Sri J.Ugra Narasimha*, learned counsel for the petitioners/ Accused, and of the learned Public Prosecutor, State of Andhra Pradesh, appearing for the respondent-State. I have perused the material record.

3. The facts, which are necessary to be stated as a preface to this order, in brief, are as follows:

After conclusion of the investigation in the case in Crime No.98 of 2015, on the file of Yerpedu Police Station, the Inspector of Police, Renigunta Rural Circle, filed a charge sheet before the aforesaid Court of the learned Magistrate stating that the accused 1 to 19 including the petitioners/ accused herein are liable to be punished for the offences punishable under Sections 448 and 333 read with Section 149 of the Indian Penal Code, 1860, as they have committed acts of criminal trespass and assault on a public servant-LW1 with a common intention and caused grievous injuries to LW1. Along with the charge sheet, medico-legal case wound certificate, dated 08.12.2015, issued by the casualty Medical Officer, SVRR Government General Hospital, Tirupati, and a medical certificate, dated 07.12.2015, styled as 'To whomsoever it may concern' issued by Dr. Sunil Dachepalli of Yashoda Hospital, Somajiguda, Hyderabad, were also produced. In the order impugned, the learned Magistrate noted that during investigation, the Sections of Law were altered,

on 10.12.2015, to Sections 448 and 333 read with 34 IPC, basing on the wound certificate of LW1 and that charge sheet was filed against all the accused for the offences punishable under Sections 448 and 333 read with 149 of IPC. The learned Magistrate has taken the case on file for the said offences and committed the case to the Court of Session, Sessions Division, Chittoor, under Section 209 of the Code as the offences are triable exclusively by the Court of Session. Aggrieved thereof, the petitioners/ accused herein filed the present revision case.

4. The case of the petitioners and the submissions made on their behalf, in brief, are as follows:

The crime was registered initially for the offences punishable under Sections 448, 323 and 353 read with 34 IPC. The alleged incident occurred on 26.11.2015. LW1 was examined, on 26.11.2015, in SVRR Government General Hospital and a wound certificate was issued on 08.12.2015. This certificate, which was issued by a Doctor of the said General Hospital, discloses that X ray chest was taken and CT scan of chest was done and that the same are normal and that the two injuries, namely, pain left side of chest and pain left side of face are simple injuries in nature. However, on 28.11.2015, LW1 got himself examined at Yashoda Hospital, Hyderabad, and a Doctor of the said private hospital issued a second certificate, dated 07.12.2015, by strangely styling the said certificate as 'whomsoever it may concern'. In this certificate it was stated that evaluation of the CT scan was suggestive of fracture posterolateral aspect of 11th rib and compression fracture (horizontal) of L1 vertebral body with no evidence of retropulsion. The doctor of the said private hospital, who issued the said second certificate, certified that the above injuries noted in the said certificate given by him are grievous in nature. The said certificate formed the basis for alteration of Section of Law from 353 to 333 IPC. The learned Magistrate failed to note that there are no compelling reasons for LW1 to take treatment in a private hospital when he is working in Renigunta Airport. The

learned Magistrate has not assigned any reasons for giving preference to the certificate issued by a private hospital at Hyderabad and for not taking into consideration the MLC wound certificate issued by a Government doctor of a Government Hospital, Tirupati. The learned Magistrate has not assigned any reasons for presuming that the persons who stood as sureties for the accused at the time of release of the accused on bail would continue as sureties after the committal of the case to the Court of Session and till its disposal. The learned Magistrate stated in the committal order that the accused were questioned regarding their financial status to engage advocates to defend them and that they have stated that they are in a position to engage advocates to defend them at the time of trial though most of the petitioners/ accused were not present before the learned Magistrate on the date of passing committal order. The committal order was passed in the absence of some of the accused. The learned Magistrate ought not to have taken the case on file for the offence punishable under Section 333 of IPC and ought not to have passed the committal order, which is impugned, and ought not to have committed the case to the Court of Session simply on the basis of a second wound certificate issued by a private doctor of a private hospital, that too, when the said certificate was issued after belated examination of the LW1, on 28.11.2015. Hence, the order may be set aside and the matter may be remitted to the learned Magistrate for consideration afresh in accordance with the procedure established by law.

4.1 The learned counsel for the petitioners alternatively contended that, in case, the order impugned is sustained by this Court, necessary liberty may be reserved to the petitioners/ accused herein as they intend to file certain applications in the Court of Session prior to the examination, hearing on charges and framing of charges.

5. The learned Public Prosecutor supported the impugned orders of the learned Magistrate. He submitted that the order passed is a well-reasoned order and that there is no bar under law for passing a committal order in the absence of some of the accused, who are on bail, and that the order was passed after consideration of the material on record and by following the procedure envisaged under law and that the learned Magistrate was justified in passing the impugned order as the offence punishable under Section 333 IPC is triable exclusively by the Court of Session and that the said order is valid and sustainable.

6. Be it first noted that the FIR discloses that the alleged incident occurred on 26.11.2015 and that initially the crime was registered for the offences punishable under Sections 448, 323 and 353 read with 34 of IPC. No doubt, LW1 was examined on the same day by a doctor of the SVRR Government General Hospital and later a medico legal wound certificate was issued, on 08.12.2015. In the said certificate, the two injuries sustained by LW1, namely, pain left side of chest and pain left side of face are certified as simple injuries. A plain perusal of the said certificate discloses that it was issued after examining X-ray chest and CT scan of chest, which are normal. Be that as it may. The second certificate that was issued by a private doctor of a private hospital reflects that LW1 was examined, on 28.11.2015, by the said doctor and that the evaluation of CT scan was suggestive of fracture posterolateral aspect of 11th rib and compression fracture (horizontal) of L1 vertebral body with no evidence of retropulsion. Be that as it may, during the course of investigation, the Investigating Officer filed an Alteration Memo before the Court of the learned Magistrate intimating about the alteration of Sections of Law and taking up of further investigation. He eventually filed the charge sheet against the accused for the offences punishable under Sections 448 and 333 read with 149 IPC and the learned Magistrate has taken the case on file for the said offences and committed the case to the Court of Session, Sessions Division,

Chittoor, under Section 209 of the Code as the offences are triable exclusively by the Court of Session.

7. At this stage, it is necessary to note that the learned counsel for the petitioners/ accused relied upon the decision in *Rizwan v. Waqar Ahmad and others*¹, wherein the facts show that though the accused was charged under Section 307 of the IPC for inflicting several injuries on the complainant, the learned Magistrate having regard to the nature of the injuries, which are simple in nature, converted it into a warrant case instead of committing the case to the Court of Session and proceeded to try the accused under Sections 323 and 324 of IPC. The Court of Session reversed the said orders in a revision. However, the High Court and the Supreme Court confirmed the order of the Magistrate. Further, the decision in *Dharam Pal and others v. State of Haryana and another*² was relied upon in support of the proposition that cognizance of an offence can only be taken once and that in the event a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceeding to issue summons will not be in accordance with law and that if cognizance is to be taken of an offence, it could be taken either by the Magistrate or by the Court of Session. Nevertheless, in this decision, the Supreme Court agreed with the view expressed in *Kishun Singh v State of Bihar*³ that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders, but whose complicity in the case would be evident from the materials available on record and that even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report, to stand trial along with those already named therein.

¹ 1993 Supp (2) Supreme Court Cases 121

² (2014) 3 Supreme Court Cases 306

³ (1993) 2 SCC 16

Further, in *Balveer Singh and others v. State of Rajasthan and others*⁴, the Supreme Court having considered the decisions in *Dharam Pal's case* (2nd supra) held as follows:

As per this judgment, since the Court of Session is acting as the Court of original jurisdiction under Section 193 of the Code, after the committal proceedings to it by the Magistrate, it is empowered to take cognizance and issue summons and it cannot be treated as taking second cognizance of the same offence.

7.1 It is also apt to refer to the following observations of the Supreme Court in the decision in *Sanjay Gandhi v. Union of India* [(1978) 2 SCC 39] which are referred to in the decision in *Balveer Singh* (4th supra).

The scheme of the Code, particularly, the provisions of Sections 207 to 209 Code of Criminal Procedure, mandate the Magistrate to commit the case to the Court of Session, when the charge-sheet is filed. A conjoint reading of these provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Session, he must commit the case to the Sessions Court.

The Magistrate, in exercise of its power Under Section 190 Code of Criminal Procedure, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 Code of Criminal Procedure, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case.

7.2 In *Balveer Singh* (4th supra) the Supreme Court having further referred to the judgment in *Ajay Kumar Parmar v. State of Rajasthan* [(2012) 12 SCC 406] noted that in that case it was held that when the offence is exclusively triable by Sessions Court, the Magistrate must commit the case to the Sessions Court and cannot refuse to take cognizance of the offence and acquit the accused on the basis of the material produced before it. From the ratio in the decision of the Supreme Court, it appears that the following is the legal position: 'When an offence is cognizable by the Sessions Court, the Magistrate cannot probe into

⁴ AIR 2016 SC 2266 = (2016) 6 SCC 680

the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned; and, in case, an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.' In *Dharam Pal* (2nd supra) the questions which fell for the consideration of the Constitution Bench are as follows:

- (i) Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?
- (ii) If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?
- (iii) Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?
- (iv) Can the Session Judge issue summons under Section 193 Code of Criminal Procedure as a Court of original jurisdiction?
- (v) Upon the case being committed to the Court of Session, could the Session Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?
- (vi) Was Ranjit Singh's case (supra), which set aside the decision in *Kishun Singh's case* (supra), rightly decided or not?

It is apposite to now reproduce the following paragraphs from the Judgment of the Hon'ble Constitution Bench of the Supreme Court in *Dharam Pal's case* (2nd supra).

Questions 4, 5 and 6 are more or less interlinked. The answer to question 4 must be in the affirmative, namely, that the Session Judge was entitled to issue summons under Section 193 Code of Criminal Procedure upon the case being committed to him by the learned Magistrate. Section 193 of the Code speaks of cognizance of offences by Court of Session and provides as follows:

193. Cognizance of offences by Courts of Session. - Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

The key words in the Section are that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code." The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been

made by Mr. Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said Section.

This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

7.3 Further, the relevant part of Section 228 of the Code reads as under:

228. Framing of charge.

(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.

8. The legal position obtaining, which needs no further dilation, makes it manifest the powers and the limitations on the powers of the learned committal Magistrate. Having regard to the facts of the instant case and the precedential guidance, this Court is of the considered view that the order impugned does not warrant interference. However, without expressing any views, which will have a bearing on the merits of the main case, this revision case can be disposed of with appropriate observations, in the considered view of this Court.

9. In the result, while holding that the order impugned does not warrant interference, this Criminal Revision Case is accordingly disposed of reserving liberty to the petitioners/accused to file before the Court of Session, any appropriate applications, which the law permits, if they so desire and are so advised.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

12th June 2017
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