

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.M.C. 4606/2018 & CRL. M.A. 31840/2018

Reserved on : 30.01.2020

Delivered on : 04.06.2020

IN THE MATTER OF:

SMT. RAJNI GOSWAMI

..... Petitioner

Through: Dr. L.S. Chaudhary, Mr. Ajay
Chaudhary, Mr. Viresh
Chaudhary, Mr. Anurag Tomar
and Ms. Rubhi Tomar, Advocates.

versus

THE STATE (GOVT. OF N.C.T. OF DELHI) & ANR. Respondents

Through: Mr. Mukesh Kumar, APP for State
Mr. Anjan Datta, Ms. Kanika and
Mr. Vishal Arun Mishra, Advs. for
R-2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

1. The present proceedings are directed against an order dated 18.05.2018 passed by Addl. Sessions Judge in SC No.1642/16 whereby the application filed by the complainant (petitioner herein) under Section 464 Cr.P.C. was dismissed.

2. Briefly, the facts of the present case, as recorded in the impugned order, are that on 18.07.2008, the complainant filed a complaint under Sections 384/420/468/471/406/376/ 506 IPC against accused/respondent No.2 before the concerned M.M.

3. Learned M.M. vide order dated 29.07.2008 listed the complaint for pre-summoning evidence. On 18.09.2008, the pre-summoning evidence of the complainant was recorded under Section 200 Cr.P.C. and the matter was listed for arguments on the point of summoning of the accused. On 13.07.2009, learned M.M. took cognizance under Sections 384/376/506 IPC and summoned the accused/respondent no.2.

4. The aforesaid order of summoning was challenged by respondent no.2 before the Sessions Court however, the challenge stood dismissed vide order dated 17.05.2010.

5. In the meantime, the accused/respondent no.2 appeared through his counsel before the learned M.M. on 25.11.2009 and after supply of copies of the documents, the case was listed for recording of pre-charge evidence. Subsequently, on 05.06.2013, learned M.M. after observing that the accused had been summoned for the offence under Sections 384/376/506 IPC which were exclusively triable by the Court of Sessions, committed the case to the Court of Sessions.

6. The Sessions Court listed the matter for pre-charge evidence and for consideration of charge. Subsequently, on 10.11.2014 and 25.05.2017, the pre-charge evidence was partly recorded by examining the complainant as CW-1.

7. While the matter was pending before the Sessions Court, on 25.04.2018, the complainant filed an application under Section 464 Cr.P.C. for rectification of the proceedings. It was contended that the proceedings ought to have been conducted in line with the procedure for trial before the Sessions Court and not as trial of warrant case by the Magistrate by recording pre-charge evidence. The case remained pending before the Sessions Court. At the time of hearing arguments on charge, it

was observed by the Sessions Court that the correct procedure was not followed as per the Code of Criminal Procedure, 1973 as pre-charge evidence was recorded before the Sessions Court. The case was directed to be listed for arguments on the above issue.

8. Vide impugned order dated 18.05.2018, the Sessions Court while relying on the decision of a Co-ordinate Bench of this Court in Smt Dhano v. State and Anr. reported as **2008 SCC OnLine Del 677**, directed that file of the complaint case be sent to the concerned C.M.M. with a further direction to proceed in accordance with law. The application filed by the complainant under Section 464 Cr.P.C was dismissed.

9. The present petition impugns the aforesaid order. Learned counsel for the petitioner contended that the present complaint case ought to have been tried as a Sessions trial case and not as a Warrant case before the Magistrate. He placed reliance on the decision in Shivjee Singh v. Nagendra Tiwary & Ors. reported as **AIR 2010 SC 2261**. It was also contended that the procedure adopted by the learned Sessions Court in recording the pre-charge evidence was irregular. Further, the direction given to the learned M.M. to proceed with the complaint case is also assailed in the present petition.

10. Per Contra, learned counsel for the accused/respondent no. 2 has supported the impugned order and has relied on the decision in case of Dhano (Supra).

11. I have heard learned counsels for both the parties and have also gone through the case records.

12. The sole issue to be decided is, where an offence alleged against the accused is of rape along with offences of extortion, cheating, breach of trust, forgery and criminal intimidation, whether the procedure to be

followed is that of ‘trial of Warrant case by Magistrate’ or as a ‘Session triable case’.

13. Chapter XIV of the Criminal Procedure Code, 1973 prescribes ‘Conditions Requisite For Initiation Of Proceedings’. Section 190 Cr.P.C. provides for taking cognizance of offence by a Magistrate upon receipt of a complaint. It reads as under:

“Cognizance of offences by Magistrates. –

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try”

14. Section 200 under Chapter XV of the Criminal Procedure Code, 1973 provides that a Magistrate taking cognizance of an offence shall examine the complainant and the witnesses present. It reads as under:

“Examination of complainant-

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.”

15. Subject to Sections 202 & 203, the next relevant provision is Section 204 under Chapter XVI and it provides that if in the opinion of Magistrate taking cognizance, there is sufficient ground for proceeding against the accused, process is issued. In a complaint case, once the accused appears and the case is triable exclusively by the Court of Sessions, then after supply of statements and documents, the Magistrate is required to commit the case to the Court of Sessions in terms of Section 209 which reads as under:

“Commitment of case to Court of Session when offence is triable exclusively by it –

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) Commit, after Complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this code relating to bail, remand the accused the custody until Such commitment has been made;

(b) Subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) Send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) Notify the Public Prosecutor of the commitment of the case to the Court of Session.”

16. Once the case stands committed to the Court of Sessions, the procedure enlisted under Chapter XVIII heading ‘Trial Before A Court of Sessions’ is followed. A bare perusal of Section 226 to 228 would show that there is no provision for recording any pre-charge evidence. After hearing and considering the records of the case and the documents, the accused is either discharged under Section 227 or if the case is exclusively triable by the Sessions Court, a charge is framed under Section 228 (1)(b). If the Judge is of the opinion that the case is not exclusively triable by the court of sessions, then he may frame the charge against the accused and transfer the case for trial to the Chief Judicial Magistrate.

17. The trial of warrant cases before Magistrate is governed by the provisions under chapter XIX. Section 244 onwards provides for procedure to be followed in cases instituted otherwise than on police report.

18. The First Schedule (Part 1) under Cr.P.C. provides for Classification of Offences under the Indian Penal code. As per the classification, Section 376 (offence of rape) is exclusively triable by the Court of Sessions. The relevant entry in the First Schedule reads as follows:

“Once any of the offences alleged against the accused is classified as an offence exclusively triable by Court of Sessions, after appearance of the accused in pursuance to the process issued, mandatorily need to be committed to the Court of Sessions. The use of word “Shall” by the legislature in Section 209 leaves no manner of doubt in this regard.”

19. In Shivjee (Supra), the Supreme Court explained the procedure as follows:

“Section 208 provides for supply of copies of statement and documents to accused in the cases triable by the Court of Sessions. It lays down that if the case, instituted otherwise than on a police report, is triable exclusively by the Court of Sessions, the Magistrate shall furnish to the accused, free of cost, copies of the statements recorded under Section 200 or Section 202, statements and confessions recorded under Section 161 or Section 164 and any other document on which prosecution proposes to rely. Section 209 speaks of commitment of case to the Court of Sessions when offence is triable exclusively by it. This section casts a duty on the Magistrate to commit the case to the Court of Sessions after complying with the provisions of Section 208. Once the case is committed, the trial is to be conducted by the Court of Sessions in accordance with the provisions contained in Chapter XVIII.”

20. In view of above, it is clear that a case involving an offence which is exclusively triable by a court of sessions, once committed in terms of Section 209 Cr.P.C., has to proceed in terms of chapter XVIII where there is no provision for recording pre-charge evidence.

21. In Dhano (Supra), the facts of the case were that in a complaint case, after recording evidence under section 202 Cr.P.C and after considering the evidence on record, the accused were summoned only for the offence punishable under Sections 323/506 IPC, both offences being

Magistrate triable. On a challenge raised by the complainant, the Sessions Court observed that offence under Section was also made out and the accused persons be summoned under Section 308 IPC as well. Consequently, both the accused were summoned under Section 308/34 IPC as well and the case was committed to Court of sessions. In Sessions Court, the complainant was asked to lead pre-charge evidence and thereafter charge was framed. The order was challenged by the accused in a revision petition before this Court. While disposing of the revision, it was held that the Sessions Court committed grave error when it proceeded to record the pre-charge evidence. Although it was held that gross irregularity was committed by Court of Sessions in adopting the procedure laid down in Section 244 Cr.P.C and the charge was set aside but in the latter part, it was also directed that the Id. ASJ will send the file back to the concerned Magistrate for holding an enquiry under Section 244 Cr.P.C for pre-charge evidence.

I respectfully disagree with the latter part of the decision in the captioned case as one of the offences involved for which the accused stood summoned was Section 308 IPC, which is exclusively triable by the Court of Sessions. As discussed above, once the case stands committed to the Court of Sessions under Section 209 Cr.P.C, there is no provision to hold any pre-charge evidence. The Sessions Court has to proceed to hear arguments on charge and only when after such consideration and hearing, if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence which is not exclusively triable by the Court of Sessions, he may frame the charge and by order, transfer the case for trial to the CJM/any other Magistrate. In reaching such conclusion, I deem it fit to refer to the

following paras of the 41st Law Commission Report, as reproduced in the case of Raj Kishore Parsad v. State of Bihar and Anr. Reported as (1996)

4 SCC 495:

“17.11. Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we proposed in regard to such offences, the provision in this respect can take a simple form and can be placed in this Chapter as forming part of the commencement of proceedings before Magistrate. It will be convenient to refer to this process as "commitment of the case to the Court of Session" although the procedure is radically different from the commitment proceedings at present provided in Chapter 18.

(ii) Cl. 214 (S. 209). "Preliminary inquiries by Magistrates in cases exclusively triable by the Court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of an inquiry provided for by the amendment made in 1955 and contained in Section 207-A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems, Preliminary inquiries are, therefore, being dispensed with in cases triable by a Court of Session, However, to perform certain preliminary functions like granting copies, preparing the records, notifying the Public Prosecutor, etc, provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit the case to the Court of Session. As regards private complaints in cases triable exclusively by a Court of Session the enquiry into the complaint made by the Magistrate under the existing Section 202 will serve the purpose of a

*preliminary scrutiny." S.O.R. Gaz. of Ind. 10.12.1970.
Pt.-II S, 2, Extra, p. 1309 (1320). "*

22. In the present case, a complaint was filed under Section 376 IPC along with other sections, which is exclusively triable by Court of Sessions, the learned M.M. rightly committed the case to the Sessions Court. The procedure adopted thereafter in recording pre-charge evidence was illegal and contrary to provisions of law. Further, the impugned order in remanding the case to the court of CMM with a direction to proceed in accordance with law, being illegal, is equally untenable. In view of the above discussions, the impugned order is set aside and the petition is allowed and disposed of along with the pending application.

23. The case is directed to be listed before the concerned Sessions Court initially on 06.07.2020 for directions where after the trial in the present case shall proceed as "trial before a Court of Sessions", as outlined under Chapter XVIII Cr.P.C.

24. A copy of this order be communicated to the learned District Judge to assign the case to the concerned Court of Sessions.

25. The petition is disposed of in the above terms.

(MANOJ KUMAR OHRI)
JUDGE

JUNE 04, 2020