
(2012) 01 GAU CK 0065
In the Gauhati High Court

Abdul Sukkur Barbhuiya, S/o Late Haji Moin Uddin Barbhuiya, APPELLANT
Vill.Chiporsangon Pt.III, P.S.-Algapur, Dist.-Hailakandi

Vs

State of Assam, to be represented by the Public Prosecutor, RESPONDENT
Assam

Date of Decision : 24-01-2012

Acts Referred:

Citation : (2012) 01 GAU CK 0065

Hon'ble Judges : B.D.Agarwal, J

Bench : Single Bench

Advocate : Advocates for the petitioners : Sri A M Barbhuiya, Sri A M S Mazumder, Sri JUNM Laskar, Advocates for the respondents: Smt B Saikia, Addl. P.P., Assam, Sri M H Rajborbhuiya, Smt R Chetri, Sri R Dev, Smt D J Borah., Advocates appearing for Parties

Judgement

1. A short but an important issue is involved in this revision application.
2. The issue is whether after commitment of a case (which is not exclusively triable by the Sessions Court), by a Judicial Magistrate to the Sessions Court, the learned Sessions Judge is bound to follow the procedure of trial, laid down under Chapter XVIII of the Code of Criminal Procedure, 1973.
3. Heard Sri A M Barbhuiya, learned counsel for the petitioner and Sri M H Rajborbhuiya, learned counsel for the respondent Nos. 2, 3, 4, 5 and 6/accused persons. Also heard Smt B Saikia, learned Additional Public Prosecutor for the State of Assam/respondent No. 1.
4. This application under Sections 397/401, read with Section 482 of the Code of Criminal Procedure, 1973, ("CrPC" in short) has been filed by the complainant in CR Case No. 848 of 2000, challenging the legality and correctness of the order dated 25.04.2011, whereby the learned Sessions Judge, Hailakandi, has rejected the prayer of the complainant for denovo trial (in Sessions Case No. 36 of 2009), after commitment of the case.

5. Before advertng to the rival submissions, it would be just and proper to have a glance over the facts of the case, which are as below:

An incident of marpit took place on 23.07.2000. On the same day, both the parties filed their respective FIRs at Algapur Police Station. The private respondents' case was registered as Algapur PS Case No. 77 of 2000, whereas the petitioner's FIR was registered as Algapur PS Case No. 78 of 2000. After investigation, Final Report in the cross case (Algapur PS Case No. 78 of 2000) was submitted in the Court of learned CJM at Hailakandi. After the final report, a complaint was filed wherein cognizance of the offences under Sections 147/148/149 and 326 of the Indian Penal Code, 1860, was taken. On the appearance of the accused persons (respondent Nos. 2 to 6), the learned ACJM proceeded with the trial. On the other hand, the FIR filed by the respondent Nos. 2 to 6 resulted into the filing of the chargesheet. After the chargesheet, one of the victims succumbed to the injuries. Accordingly, Sections 302/304 IPC were also added in the case. Since the aforesaid offences were exclusively triable by the Court of Session, the learned Additional CJM, Hailakandi, committed GR Case No. 510 of 2000 to the Court of Session vide order dated 02.05.2009. On such commitment, Sessions Case No. 35 of 2009 was registered and the trial proceeded in accordance with law.

6. As could be gathered from the record, the learned Magistrate also committed CR Case No. 848 of 2000, along with GR Case No. 510 of 2000 by the same order dated 02.05.2009. Accordingly, the complaint case was also registered as Sessions Case No. 36 of 2009. However, the learned Sessions Judge decided to take into consideration the evidence recorded by the Judicial Magistrate in the complaint case before its commitment. However, for effective and judicious decision, the learned Sessions Judge decided to record the evidence of the Doctor as a Court witness. Being aggrieved with this decision of the learned Sessions Judge, taken on 06.07.2009, the complainant filed a petition on 07.03.2011, under Petition No. 329, requesting for denovo trial, as provided under Section 323 CrPC. This petition has been rejected by the learned Sessions Judge vide impugned order dated 25.04.211, which is under challenge in this revision petition.

7. Since the learned counsel for the petitioner is relying on Section 323 CrPC and since the learned counsel for the private respondents is relying upon Section 326 CrPC, the relevant provisions of both the Sections are extracted below for ready reference:

?Section 323 Procedure when after commencement of inquiry or trial, Magistrate finds case should be committed 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.?

?Section 326Conviction or commitment on evidence partly recorded by one Magistrate and partly by another (1)Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [Judge or Magistrate] who has and who exercises such jurisdiction, the {Judge or Magistrate} so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.

Provided that if the succeeding Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may resummon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) xxxxx xxxxx xxxxx

(3) xxxxx xxxxx xxxxx?

8. Sri Barbhuiya, learned counsel for the petitioner contended that when 2 (two) cases are arising out of the same incident it is desirable that both the cases are tried parallelly/simultaneously by the same Court to avoid conflicting judgments. The learned counsel also submitted that if one of the two cases is not legislatively triable by the Sessions Court, the same can also be committed to the Court of Session if the connected case is sessions triable. To buttress these submissions, the learned counsel for the petitioner referred to the Judgments of the Hon'ble Supreme Court, rendered in the cases of Nathi Lal vs State of Uttar Pradesh; 1990 (Suppl.) SCC 145 and Sudhir vs State of Madhya Pradesh; (2001) 2 SCC 688.

9. Armed with the aforesaid Judgments of the Apex Court, the learned counsel for the petitioners argued that after commitment of a cross case, the learned Sessions Judge is bound to follow the procedure of trial prescribed under Chapter XVIII CrPC and there is no escape from this legal prescription. According to the learned counsel, in such a situation, the Sessions Court has no option to accept the testimony recorded by the Magistrate and treat the same as evidence in the Sessions trial.

10. On the other hand, Sri Rajborbhuiya, learned counsel for the respondent Nos. 2 to 6, submitted that a succeeding Judge can act on the basis of evidence recorded by his predecessor. This submission was made on the basis of Section 326 CrPC and the learned counsel also relied upon the Judgment of the Apex Court, rendered in the case of Bhaskar alias Prabhaskar vs State Represented by Inspector of Police, Vellore Taluk Police Station, Vellore; (1999) 9 SCC 551.

11. In the case of Nathi Lal (supra), the Hon'ble Supreme Court has held that it would be fair and desirable that both the cases arising out of the same incident are tried by the same Judge and the judgments are pronounced simultaneously. This judgment has been followed in the case of Sudhir (supra). However, in the

later case, the legal proposition as regards commitment of the crosscase and the procedure to be followed by the Sessions Court has been elaborated. The relevant observations of the Apex Court made in the case of Sudhir (supra) are reproduced below:

?12. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is chargesheeted or complained of, involves offences or offence exclusively triable by a Court of Session, 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 Session, 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 crosscase, 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 Session. 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 crosscase also to the Court of Session. Commitment under Sections 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.?

12. A bare reading of the aforesaid observations of the Hon"ble Supreme Court should be enough to hold that a Magistrate is competent to commit a case to the Court of Session, even if it is not exclusively triable by the Court of Session. The power is so extensive that the proceedings may be committed even at the fag end of the trial, provided it appears to the trying Magistrate that the case should be tried by the Court of Session.

13. In the case before me, both the cases were simultaneously committed to the Court of Session. The learned Sessions Judge also did not take any exception to

the procedure adopted by the learned Magistrate. Consequently, 2 (two) separate sessions cases were registered.

14. The problem has arisen only with regard to the procedure that has been adopted by the learned Sessions Judge. In the order dated 06.07.2009, the learned Sessions Judge observed that the learned Magistrate had already recorded the evidence of witnesses and the case was at the argument stage and as such, it was not desirable to record the evidence afresh. The same view was reiterated in the impugned order dated 25.04.2011.

15. In the case of Sudhir (supra), the Hon'ble Supreme Court has categorically held that although a case can come to the Sessions Court through 2 (two) different provisions, viz., Sections 209 and 323, their Lordships have clarified that after the commitment of the cases the procedure laid down in Chapter XVIII is to be followed. In the case at hand, the learned Sessions Judge has not taken up the Sessions Case No. 36 of 2009 as per Chapter XVIII.

16. Coming to Section 326 CrPC, I am of the view that the provision of acting on the basis of evidences recorded by the previous Judge has been made for a regular trial in the same Court. The words "ceases to exercise jurisdiction" employed in Section 326 succinctly make it clear that the evidence taken by the preceding Judge can be acted upon by the succeeding Judge in the same Court. However, the provisions of Section 326 cannot be invoked in the "summary trials", as has been held by the Hon'ble Supreme Court in the case of Nitinbhai Saevatilal Shah vs Manubhai Manji Bhai Panchal; (2011) 9 SCC 638.

17. In the case before me, the testimonies were recorded by the Judicial Magistrate and, at a later stage, the case was transferred to the Sessions Court. In other words, the learned Magistrate did not cease to exercise jurisdiction when the case was pending before him. At the same time, the learned Sessions Judge also cannot be said to be a successor to the Judicial Magistrate to bring the evidence, recorded by the learned Magistrate, within the mischief of Section 326 CrPC.

18. For the foregoing reasons, I hold that the impugned order dated 25.04.2011, passed by the learned Sessions Judge, Hailakandi, in Sessions Case No. 36 of 2009 is against the law laid down by the Hon'ble Supreme Court. Consequently, the order is hereby set aside. The learned Sessions Judge is directed to proceed with the trial from the stage of framing of charges.

19. Since the incident took place more than a decade ago, the learned Sessions Judge is directed to hold the trial of Sessions Case No. 36 of 2009 in the spirit of daytoday trial and make an endeavour to decide both the cases simultaneously within a period of 4 (four) to 6 (six) months from the date of appearance of the parties. For expeditious disposal of the case, both the parties are directed to appear in the Court of Sessions Judge, Hailakandi, on 13.02.2012 and receive further order(s).

20. With the aforesaid observations and directions, this Criminal Revision Petition stands allowed.