

(1966) 07 MAD CK 0033

In the Madras High Court

Case No : Criminal Revision Case No. 838 of 1966 (Cri. Revision Petition No. 822 of 1966)

Appachan and Others

APPELLANT

Vs

R. Raju Gowder

RESPONDENT

Date of Decision : 18-07-1966

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 207

Citation : AIR 1967 Mad 441 : (1967) CriLJ 1646

Hon'ble Judges : Venkataraman, J

Bench : Single Bench

Judgement

Venkataraman, J.—This revision petition under Ss. 435 and 439 CrI P.C. has been preferred by the three persons who were accused in P.R.C. 20 of 1965 on the file of the Sub-Magistrate, Coonoor. The police filed a charge sheet against them for offences under Ss. 392, 394, 397 and 392 read with S. 114 I.P.C. It will be noted that S. 397 I.P.C. is an offence triable exclusively by the court of session. That was why the case was taken on file as preliminary register case, to be enquired into under the provisions of Ch. XVIII of the Code.

2. Briefly, the case of the prosecution was that at the instance of one Menon, P.W. 1 Raju Gowder, owner of a big coffee and tea estate, employed the third accused as a writer in that estate. For unsatisfactory work and absence without leave, his services were dispensed with in or about July 1965. Accused 1 and 2 are uncles of the third accused. On 6-10-1965 at about 8.30 a.m. the third accused came to the bungalow of P.W. 1. Accused 1 and 2 demanded the settlement of the accounts of the third accused. P.W. 1 wanted Menon to be sent for. At that time the second accused caught hold of P.W. 1's hand; and the first accused took out a knife and pointed it towards his chest saying that unless he settled the account of the third accused, he would be murdered. P.W. 1 promised to settle the account. Accused 1 and 2 pulled him out of the chair, took him to another room and pushed him down. P.W. 1's shirt was torn. At that time P.W.

1's daughter-in-law, P.W. 4, came and protested. The first accused caught hold of her, but she went out. She asked the driver of the motor car to go to the police station and report. But the three accused themselves got into the car and went away. P.W. 1 had kept cash of Rs. 10 and some change and a key. The first accused took them away, and the second accused took away the account-book. The Sub-Inspector of Police, Coonoor, came within about half an hour and recorded the complaint of P.W. 1 Ex. P.1. He recovered the torn shirt of P.W. 1 (M.O.1) and also sometime later, his dhoti M. O. 2 P.W. 1 was sent to the hospital. He had some injuries on his elbow, hip, leg and head.

3. The prosecution examined, besides P. Ws. 1 and 4.P.W. 2 Nanjan, the servant of P.W. 1 and the driver of the car, P.W. 3. The learned Sub Magistrate, without examining the other witnesses, and without questioning the accused, discussed the evidence in detail and held that the case was grossly exaggerated and, indeed, false, bristling with vital discrepancies, and that it would be, therefore, sheer waste of time to commit the accused to the court of Session. He consequently discharged the accused under S. 207-A(6) CrI. P.C.

4. Raju Gowder, P.W. 1. preferred a petition under Ss. 435 and 437 CrI P.C. to the learned Sessions Judge. The learned Sessions Judge heard the petition after giving notice to the accused. He pointed out that the learned Sub Magistrate had grossly exceeded his powers in respect of a case triable exclusively by the court of Session, and usurped the functions of the Sessions Court, indulging in special pleading for the accused. The learned Sessions Judge further pointed out that there was sufficient prima facie evidence against the accused and that the learned Sub-Magistrate was wrong in holding that no case had been made out at all against the accused. It is better to quote the relevant portion from paragraph 17 of the judgment of the learned Sessions Judge:

P.W. seems to be a respectable witness owning considerable amount of properties and also of a certain standard of status and literacy. Within a short time after the occurrence a complaint has been made to the Sub-Inspector of Police, wherein the trespass of all these accused and the overt acts committed by them have been made mention of P.W. 1 has also been sent to the doctor for medical examination and the doctor has found some injuries on his person which are described in his certificate. A torn shirt and a dhoti, M. Os, 1 and 2 have been seized by the Sub-Inspector in the course of investigation in the case. Unless some incident had taken place in the house of P.W. 1 on that morning, it is highly improbable if a witness of the status of P.W. 1 would concoct a false story against the accused with ulterior motives. The evidence of P.W. 1 about all these accused coming to his house and some incident happening therein is corroborated to some measure by the evidence of P. Ws. 2 and 4. Though P.W. 4 is the daughter-in-law of P.W. 1, I do not think that merely in order to foist a false case on the accused P.W. 4 would leave the portals of her house and come into public gaze and criticism by figuring as a witness in the case, I do not also think that a man of P.W. 1's position would have been a willing party to make his

own daughter-in-law a participant in his nefarious scheme if the case was really a concocted one. Similarly though P. Ws 2 and 3 are employees of P.W. 1. it cannot be said that merely because they are employees of P.W. 1, they can be branded automatically on that score as suborned witnesses. Above all, it is unbelievable that in order to foist a false case, P.W. 1 would have been found by the doctor who examined him. P.W. 1 is found to be a fairly old person aged about 70 years, and this mature age of P.W. 1 and his status in life go a long way to discredit the contentions of the accused that the case against them is a foisted one. In such circumstances, there is certainly evidence of a prima facie case against the accused and the Sub Magistrate has not come to the proper conclusion in holding that no case has been made out against the accused and that they are entitled to be discharged.

5. At the same time, the learned Sessions Judge felt that on the evidence on record the offence of robbery as defined in S. 390 I.P.C (which is the foundation of the offences under Ss. 392, 394 and 397 I.P.C) had not been made out, and that all that had been made out was a separate house trespass punishable under S. 448 or 451 I.P.C. theft in a building under S. 380 I.P.C. and causing simple hurt under S. 323 I.P.C. The brief point of the learned Sessions Judge was that the threat with the knife was only to settle the account of the third accused and not for committing the offence of theft of the cash or the account book. Similarly the hurt also was not caused for committing theft. The learned Judge felt that in the interests of justice the case should be enquired into further, the remaining witnesses also being examined. The case was, in his opinion, one directly covered by proviso (b) to S. 437 Criminal P.C. Since the police considered the case to be sufficiently grave, the learned Judge directed that the further enquiry should be done by a Magistrate of the First Class, as indicated by *Anantanarayanan J in Hirudayasami Udayar v. Ramaswami Nainar*, 1961 Mad WN (Crl.) 26.

5-A. As already state, this revision petition has been preferred by the three accused. The first point taken by the learned counsel Sri T.M. Kasturi, is that the learned Judge had no jurisdiction at all to order further enquiry into the offences under Ss. 451, 380 and 323 I.P.C. when he had agreed that the offence under S. 397 I.P.C triable exclusively by the court of Session had not been made out. This question turns upon the scope of proviso (b) to s. 437 Crl P.C. But it is necessary, for the sake of completeness, to quote the relevant portions of Ss. 436 and 437 I.P.C. Section 436:--.

On examining any record under S. 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrate subordinate to him, to make, and the District Magistrate may himself make or direct any subordinate Magistrate to make further enquiry into any complaint which had been dismissed under S. 203 or sub-sec (3) of S. 204, or into the case of any person accused of an offence who has been discharged. Section 437:

When, on examining the record of any case under S. 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Sessions and that an accused person has been improperly discharged by the inferior court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge, or District Magistrate, improperly discharged:

Provided as follows:

(a).....(b) that is such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the deceased, such Judge or Magistrate may direct the inferior court to enquire into such offence.

6. Now, there can be no doubt that with respect to the offence under S. 397 I.P.C. mentioned in the charge-sheet, the learned Sub Magistrate had grossly exceeded his powers and usurped the functions of the Sessions Court, indulging in special pleading for the accused. Some of the propositions of law laid down by the Magistrate are, indeed, startling I am mentioning this only to show that the learned Sessions Judge examined the record primarily from the point of view of S. 437, Crl. P.C. and therefore, he was entitled to invoke proviso (b) thereto, It may be noted that proviso (b) speaks of "some other offence" which, having regard to the main provision, would prima facie mean an offence not triable exclusively by the court of Sessions. It may be noted that the main provision contemplates the Sessions Judge or the District Magistrate directly passing an order of committal instead of directing a fresh enquiry, and in that sense S. 437 goes further that S. 436, which only empowers the Sessions Judge or the District Magistrate to pass an order for further enquiry Proviso (b) to S. 437 is a proviso to the main portion of S. 437 in the sense that, instead of passing a direct order to committal, the Sessions Judge or the District Magistrate may direct further enquiry where the evidence shows that "some other offence", that is, offence other than one triable exclusively by the court of Session has been committed. In the case of such "other offence" there could not be any question of direct commitment, and that is why the further enquiry is contemplated. It is not necessary, or even possible to consider the full scope of proviso (b) and whether it will apply to any situation other than that which has arisen in the present case. It is sufficient to say that the wording of the proviso is apt to cover the present case and to empower the learned Sessions Judge to pass the order which he has done.

7. Sri T. M. Kasturi contends, however, that the words "some other offence" can only mean an offence triable by the court of Sessions, but other than the particular offence exclusively tribal by the court of Session and mentioned in the charge-sheet and for which the enquiry was held. In other words, the offence enquired into here was one under S. 397, I.P.C. triable exclusively by the court of

Session, and if the Sessions Judge found that some other offence triable exclusively by the court of Session had been committed, he could have acted under the proviso, but since the offences which he thought had been committed were not offences exclusively triable by the court of Session, but triable by a Magistrate also, the proviso would not apply. The learned counsel justifies this interpretation by pointing out that the main provision of S. 437 deals with a case triable exclusively by the Court of Session, and that, therefore, the content of the proviso must also relate only to an offence triable exclusively by the Court of Session. I, however, see no reason why either as a matter of construction or on the reason of the thing, such a limitation should be placed on the words "some other offence" occurring in the proviso. The words are so general that they are sufficient to embrace offences, as in this case, like the ones under Ss. 451, 380 and 323, I.P.C. not triable exclusively by the court of Session.

8. A further important circumstance that compels me to hold against the learned counsel's submission is that the acceptance of that submission would involve the result that there is a lacuna in the Code in respect of the situation which has arisen in this case, and that even though on the merits it has to be held that the learned Sub-Magistrate has acted perversely and his order has resulted in injustice to the prosecution in respect of the offences under Ss. 456, 380 and 323, I.P.C. without a fair enquiry, the court is powerless to interfere and rectify the mistake. The Court should not adopt a construction which would result in such a lacuna.

9. The learned counsel has, however, invited my attention to Note 13 to the Commentary to S. 437 in the AIR Commentary.

The "other offence" which in the opinion of the Session Judge or District Magistrate has been committed, must be one exclusively triable by a court of Session, otherwise the court cannot order an enquiry into that offence under this section.

As authority the case in *Kallu v. Emperor*, AIR 1934 Oudh 327 is cited. That case, however, does not support the proposition laid down in the Commentary. That was the case where the charge-sheet was laid under S. 304-A I.P.C. before the learned First Class Magistrate. It will be noted at the outset that the offence under S. 304-A is triable both by a First Class Magistrate and by the Court of Session, so that it is not an offence triable exclusively by the court of Session. A charge was framed by one Magistrate and he was succeeded by another magistrate. There was a de novo trial and an order of discharge was passed by the succeeding Magistrate. Since the charge had been framed, really the order should have been one of acquittal. But, even apparently, the succeeding magistrate thought that because there was a de novo trial the previous charge had been also wiped out. The learned District Magistrate, acting under Sec. 437 CrI. P.C., ordered further enquiry. Against this a revision petition was preferred to the High Court. Nanavatty J. set aside the order of the District Magistrate and ordered the proceedings against the accused to be dropped. The reason was

that, though the order of the trying Magistrate was in form one of discharge, it was really an order of acquittal, and the District Magistrate could have no power to set aside the order of acquittal and order further enquiry. It is only the High Court which can do so under S. 439, Crl. P.C.

The other reason given was that, S. 304-A I.P.C. was not an offence triable exclusively by the court of Session and therefore S. 437 Crl. P.C. did not apply, and the test to be applied was the one which would apply in a case triable by the Magistrate and in such a case the Magistrate was empowered to discuss the evidence, in such a case the Magistrate had power to appreciate the evidence and come to a conclusion on the truth or falsity thereof, whereas, in the case of an offence triable exclusively by the court of Session, he could not usurp that power of appreciating the evidence, but must commit the case to the Court of Session if there was a *prima facie* case. Now, in the particular case, the learned District Magistrate had not shown how the order of the trying magistrate was liable to be set aside according to this standard of wider power of the Magistrate. So far as I can see, this decision does not lay down anything to support the proposition laid down in the Commentary, and repeated before me by Sri. T. M. Kasturi, that the words "other offence" in the proviso (b) to S. 437 Crl. P.C. must mean offences exclusively triable by the Court of Session.

10. The learned counsel cited the decision in *Bajinath Pandey v. Gouri Kanta Mandal*, ILR (1893) Cal 633, a decision under the provisions of the Criminal Procedure Code, Act X of 1882. A complaint was made before a magistrate, including a charge of dacoity, triable exclusively by a Court of Session. The Magistrate found that no case of dacoity had been established *prima facie*, but framed charges under Ss. 380 and 448 I.P.C. theft in a building and criminal trespass triable by him. He heard the whole evidence and acquitted the accused under S. 258 Crl. P.C. and sanctioned prosecution of the complainant. The complainant applied to the Sessions Judge for revocation of the sanction. The Sessions Judge felt that a proper enquiry had not been made into the case of dacoity and ordered further enquiry. Against that a revision petition was preferred to the High Court. The learned Judges held that the Sessions Judge had exceeded his powers as he had virtually set aside the order of acquittal in respect of charges triable by the Magistrate. It will be noted that the present case is distinguishable on the facts from the case quoted because the learned Sub Magistrate here did not purport to try the case even for the offence under Ss. 451, 380 and 323 I.P.C. and acquit them. I should not, however, be taken as having assented to the decision in so far as it does not specifically consider one aspect of the matter, namely, the power of the Sessions Judge to order further enquiry in a case triable by the court of Session if he felt that in respect of that charge, the Magistrate had exceeded his powers.

11. I am, therefore, of the opinion that the order of the learned Sessions Judge directing further enquiry under Ss. 448 or 451, 380 and 323 I.P.C. cannot be assailed on the ground of want of jurisdiction.

12. The next question is whether his order was proper on the merits and should be interfered with. On this aspect of the matter, the learned counsel has invited me to consider the question from the point of view that, the learned Sessions Judge had agreed that the evidence had not made out a prima facie case under S. 397, I.P.C. but had made out only a case under Ss. 451, 380 and 323 I.P.C. and that consequently the Magistrate had wider powers of appreciating the evidence and discharging the accused in the light of the discrepancies mentioned by him. As a proposition of law, I doubt whether such an approach could be made, because the fact remains that the learned Magistrate did not purport to proceed on any such basis that he was enquiring into the offences triable by him exclusively. Secondly, his order is couched in such unsupportable terms that it cannot be said by any means to be a fair or impartial enquiry even of the charges under Ss. 451, 380 and 323, I.P.C. I feel that it is not desirable that I should say anything about it more at this stage, because it would still be open to the Magistrate, who is to make the further enquiry, to discharge or acquit the accused, if, on a fair consideration of the evidence, he finds that no case had been made out against the accused for framing charges or for convicting, as the case may be.

13. I feel that there is no jurisdiction for me to interfere and accordingly. I dismiss the petition.