

(2009) 03 CAL CK 0099
In the Calcutta High Court
Case No : CRR No. 1911 of 2008

Dipansu Sekhar Das

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 244, 245, 246, 246(2), 246(6)
Penal Code, 1860 (IPC) — Section 465, 468, 471

Citation : (2010) 1 Crimes 457

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : D. Achariya and S. Ghorai, for the Appellant; S.S. Roy, for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—On the complaint of the opposite party No. 2 the petitioner was being tried before the learned CJM, Tamluk in connection with C.R. Case No. 812 of 2003 to answer the charges u/s 465/468/471 IPC. It was a complaint case triable through warrant procedure. The procedure for trial has been laid down in Section 244, 245 and 246 of the Cr.P.C. The learned Magistrate recorded evidence before charge of three witnesses including the complainant. 22nd August, 2007 was the date fixed for consideration of charge. On that day the learned Magistrate found that on the basis of the evidence before charge a prima facie case u/s 465 IPC could be made out. Offence u/s 465 IPC is triable through summons procedure. Other offences alleged and in respect of which the learned Magistrate could not find out any evidence prima facie were triable through warrant procedure. The learned Magistrate in such circumstances examined the accused u/s 251 Cr.P.C. in view of the offence u/s 465 Cr.P.C. being triable through summons procedure, and an order to that effect was made on 22nd August, 2007. Then the learned Magistrate proceeded to cross examine the witnesses. Three witnesses were cross-examined in full on 28th February, 2008. At that stage complainant took out a petition u/s 246(6) of the Cr.P.C. for

examination of three persons, namely Sudhangsu Sekhar Das, Himangsu Sekhar Das and Bibhangsu Sekhar Das on the ground that their evidence is necessary for just decision of the case. Learned Magistrate upon hearing the learned Counsels for both the parties and upon careful perusal of the materials on record was of the view that examination of these three persons is necessary to arrive at a just decision of the case. Then by allowing the petition of the complainant which was purportedly filed u/s 246(6) of the Cr.P.C. the learned C.J.M. fixed 13th June, 2008 for examination of the said three persons. It is this part of the order dated 29th of March, 2008 allowing the prayer of the complainant for examination of the three persons which is now under challenge at the instance of the accused --- petitioner.

2. Mr. Debabrata Acharya, learned advocate for the petitioner raised two-fold submissions. The first submission is that the learned Magistrate was not sure as to whether he was trying the offence under summons procedure or warrant procedure. Trial commenced according to warrant procedure in terms of which three witnesses were examined before charge. The complainant did not examine any further witness before charge. The learned Magistrate found that no prima facie case was made out except the one u/s 465 IPC which by itself is triable to summons procedure. The learned Magistrate adopted a novel method by converting the case from warrant triable to summons triable and instead of framing formal charge u/s 465 IPC he resorted to the provision of Section 251 Cr.P.C. and examined the accused under that Section with respect to the charge u/s 465 of the Cr.P.C. This is said to be illegal. The second submission which has been strenuously made is that allowance of the prayer u/s 246(6) Cr.P.C. was improper. It is the accused who has to elect as to which of the witnesses he wants to cross examine and provision of Sub-section (6) of Section 246 cannot be taken aid of by the complainant.

3. I have heard Mr. S.S. Roy, learned advocate appearing for the State of West Bengal. None appears for the opposite party No. 2, complainant who did not appear despite service effected on 24-06-2008. Sub-section (6) of Section 246 is as follows:

The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and reexamination (if any), they shall be discharged.

4. This Sub-section (6) of Section 246 has to be understood with reference to the preceding sub-sections. Sub-section (1) speaks of framing of charge after evidence before charge has been recorded or at any previous stage of the case. Sub-section (2) deals with reading and explaining the charge to the accused. Sub-section (3) deals with recording of plea of guilt in case the accused enters with a plea of guilt. Sub-section (4) gives the liberty to the accused to tell the Magistrate as to whether he wishes to cross examine any witness or which are the witnesses whose evidence has so far been recorded before charge he wishes to cross-examine. Then Sub-section (5) provides that after the wish is expressed the witnesses named by the accused shall be first cross examined and

discharged and then Sub-section (6) provides that the remaining witnesses will then be cross examined. A plain reading of the provision of Sub-section (6) provides that the remaining witnesses mean the witnesses whose evidence was recorded before charge but whose cross-examination was deferred at the desire of the accused and those remaining witnesses would come for cross-examination after the cross examination of the other witnesses is over as per the wish of the accused.

5. Irrespective of the question whether evidence of the three witnesses was necessary for just decision of the case or not ---- the question that has been answered by the Magistrate in the affirmative --- it appears to me that the provision of Sub-section (6) of Section 246 of the Cr.P.C. does not appear to be applicable to the circumstances of the case on two-fold grounds. When the learned Magistrate converted the case from warrant procedure to summons procedure and examined the accused u/s 251 Cr.P.C. after finding out from evidence before charge that the other offences which were triable according to warrant procedure were not prima facie made out, the trial ought to have been proceeded or should be proceeded with according to summons procedure. Consideration of an application u/s 246(2) does not arise when rightly or wrongly trial has been conducted along the route of summons procedure in the mid way after deserting the warrant procedure following recording of evidence before charge. When once the trial has been taken via the summons procedure then consideration of an application under Sub-section (6) of Section 246 of the Cr.P.C. is completely misnomer. There is another aspect of the matter. In fact, though the application was filed by the defacto-complainant u/s 246(2) of the Cr.P.C. what was prayed for was examination of three persons besides examination since already done of the witnesses named in the petition of complaint. It was simply a prayer for permission to examine certain other witnesses whose evidence according to the complainant was essential but who were not examined before charge. This was the prayer in pith and substance which was allowed by the learned Magistrate. Whether the learned Magistrate was right in allowing the prayer for examination of three persons is a different question but invoking of Sub-section (6) of Section 246 was unwarranted once the trial was diverted to summons procedure which has been dealt with in Chapter XX of the Cr.P.C.

6. As to the first point whether diversion of the trial from one procedure to another procedure amidst the trial is permissible or not, upon recording of evidence of the witnesses it was found by the learned Magistrate that prima facie material could only be found out with respect to the allegation u/s 465 of the IPC which is an offence triable according to summons procedure; and in that view of the matter accused was examined u/s 251 without framing a formal charge. Now, if in respect of offence triable according to summons procedure the Magistrate instead of examining the accused u/s 251 Cr.P.C. records a formal charge and reads the charge and explains the same to the accused and records the plea of the accused there is no illegality.

7. Therefore, if the Magistrate is of the opinion that the summons case should be tried as a warrant case in the interest of justice no illegality is committed. But when a complaint case triable under the warrant procedure is thoroughly tried under summons procedure it is an illegality. The question now is whether it is an illegality when the Magistrate after recording evidence before charge is of the opinion that no prima facie evidence has transpired with respect to the alleged offences which are triable according to warrant procedure and only one offence indicated in the petition of complaint is prima facie made out which is triable according to summons procedure proceeds to examine the accused u/s 251, Cr.P.C. In my mind, as the Magistrate found out that only one offence could be made out prima facie which can be proceeded according to summons procedure there is no illegality. It was argued that if the case would have been tried according to warrant procedure then the petitioner could have prayed for discharge u/s 245 of the Cr.P.C. This argument is completely misplaced. None of the witnesses who were examined before charge was cross examined before charge though the defence was entitled to cross-examine the said three witnesses before charge. Again, no prayer was made by the defence for discharge of the petitioner on the ground that no case at all was made out.

8. Therefore, by examining the accused u/s 251 Cr.P.C. after recording of evidence before charge no prejudice has been caused to the accused and in absence thereof the trial cannot be said to have been vitiated by any illegality.

9. The reasoning finds support from a decision of Allahabad High Court in Kishori Lal Vs. Mahadeo and Others, . In this decision it has been observed that if a case is tried as a warrant case but it is found that it should have proceeded under the summons procedure the Magistrate can use this procedure in the midst of the case but the Magistrate should indicate the same by an order.

10. Now, the question is whether once the route of the trial has been taken along the summons procedure there is scope for examination of any witness whose name did not transpire in the petition of complaint as a listed witness. There is no difference in procedure with respect to trial of summons cases based on police report and those based on complaint. The procedure is one and the same as dealt with in Chapter XX of the Cr.P.C. Section 254 of the Cr.P.C. relates to recording of evidence of the prosecution witnesses as may be produced in support of the prosecution. Sub-section (2) of Section 254 provides that the Magistrate may on the application of the prosecution or the defence issue summons to any witness directing him to attend or to produce any document or other thing. Though, there is no provision for filing any supplementary list of witnesses, there is also no bar to a Magistrate accepting it. Section 311 of the Cr.P.C. is a wide discretion of the learned Magistrate through which only for just decision of a case any person may be called as a witness for examination or for reexamination. Section 255(1) also enables the Magistrate to cause production of any further evidence of his own motion. Therefore, the Magistrate is not without any power to allow the prayer of the prosecution or of the complainant to

examine any such witness whose name does not appear either in the charge sheet or in the petition of complaint in the list of witnesses.

11. Now, the question is whether the order of the learned Magistrate granting leave to examine some three witnesses is legal or not. As the power vests with the Magistrate the Magistrate used the power having regard to the facts and evidence of the case. Once the discretion has been exercised by observing that for just conclusion of the case three witnesses should be examined this Court must not sit on this discretion of the Magistrate and disturb that order by exercising jurisdiction u/s 482 of the Cr.P.C.

12. With the observation as above the application is dismissed.

13. A copy of this judgment shall be sent to the learned CJM, Tamluk for information and necessary action.