
(2006) 06 GAU CK 0003
In the Gauhati High Court

Dr. Bijaya Goswami and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 20-06-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 170, 2, 206, 207, 208
Penal Code, 1860 (IPC) — Section 201, 299, 304, 304A, 34

Citation : (2007) 2 GLR 509 : (2006) 4 GLT 703

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Judgement

B.K. Sharma, J.—This criminal petition has arisen out of two orders passed by the learned CJM, Kamrup in respect of committal of a case u/s 209 CrPC. While, by the first order, the learned CJM, Kamrup was of the opinion that the case is not one to be tried u/s 304 (Part-II) IPC, by the second order the case has been committed to the learned Sessions Court, Kamrup, Guwahati holding that the earlier order was an inadvertent mistake. It is the second order, aggrieved by which, the petitioners who are the accused have invoked the jurisdiction of this court u/s 482 CrPC seeking quashing of the said order.

2. Adverting to the facts of the case, the informant, represented by his learned Counsel in this proceeding had lodged an FIR with the Panbazar Police Station on 25.10.2004 alleging that his wife Smt. Monorama Kakati Bhuyan died in the operation theatre on 24.10.2004 due to the criminal negligence on the part of the Doctors involved in the operation. The FIR was registered as Paltan Bazar R.S. case No. 347/2004 u/s 304(A)/34 IPC corresponding to G.R. Case No. 4308/2004.

3. The police took up the investigation of the case and in due course submitted the charge sheet No. 125/05 dated 24.10.2005 recording that a prima facie case u/s 304(II)/34 IPC has been established against the accused/petitioners, and accordingly, they were sent for trial in the court of law under the aforesaid provisions of IPC.

4. The learned CJM, Kamrup by his first order dated 16.2.2006 held that the relevant materials on record established a case u/s 304(A)/34 IPC and that mentioning of Section 304(11) in the charge sheet was an inadvertent mistake on the part of the IO. Accordingly, the charge u/s 304(A)/34 was read over and explained to the accused petitioners to which they pleaded not guilty and claimed for trial. It appears that the informant through his engaged counsel objected to this order and made there submissions opposing the same on the ground that the learned CJM had no option than to commit the case to the Court of Sessions in view of the provisions of Section 209 CrPC. The learned CJM fixed the matter on 9.5.2006 for further consideration.

5. The matter was again taken up for hearing on 9.5.2006 and the learned CJM by his order passed has held that the earlier order dated 16.2.2006 was passed inadvertently inasmuch as the charge sheet having been submitted u/s 304(Part-II), the case should be committed to the Court of Session. Accordingly, he has committed the case to the learned Sessions Judge, Kamrup, Guwahati fixing the matter on 16.6.2006. It is this order, which is under challenge on the following grounds:

(i) The learned CJM could not have reviewed his order dated 16.2.2006 contrary to the provisions of CrPC.

(ii) The first order dated 16.2.2006 being the correct order, there was no occasion for the learned CJM to pass the impugned order dated 9.5.2006.

(iii) The materials on record not having disclosed any offence u/s 304(Part-II), the learned CJM rightly held so by his order dated 16.2.2006 and accordingly he was right in holding the case to be one u/s 304(A)/34 IPC.

(iv) As per the provisions of Section 209 CrPC, the learned CJM is to exercise his judicial function towards recording prima facie satisfaction as to the offence disclosed by the materials on record and not to act mechanically.

6. Elaborating the above grounds of attack to the impugned order dated 9.5.2006, Mr. N. Choudhury, learned Counsel representing the accused petitioners, in his persuasive pursuits submitted that while the learned CJM rightly passed the earlier order dated 16.2.2006, committed a manifest error of law in passing the impugned order dated 9.5.2006. He attacked the order both on technical ground as well as on the ground of merit. Placing reliance on the following decisions, he submitted that the learned CJM could not have reviewed the order, as such review is foreign to judicial proceeding and that the order dated 16.2.2006 having been passed applying the principles underlying Section 209 CrPC, later on the impugned order dated 9.5.2006 could not have been passed. The decisions on which Mr. Choudhury placed reliances are as follows:

Bindeshwari Prasad Singh Vs. Kali Singh, Thakur Ram Vs. The State of Bihar,

Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others,

7. Mr. B.S. Sinha, learned PP Assam, defending the impugned order submitted that the charge sheet having prima facie disclosed an offence u/s 304(Part-II), the learned CJM committed no wrong in committing the case to the learned Sessions Judge, Kamrup. He submitted that the technicalities must not stand on the way to the correct procedure and principle as envisaged u/s 209 CrPC.

8. Mr. G.M. Paul, learned Counsel representing the informant also defended the impugned order. Referring to the provisions of Section 323 CrPC, he submitted that the learned CJM was within his competence and jurisdiction to commit the case to the Court of Sessions as it appeared to him on the basis of the materials on record that the case should be tried by the Court of Sessions. He also placed reliance on Section 465 CrPC and submitted that there is nothing wrong in reviewing the earlier order by the learned CJM. Referring to the provisions of Sections 227 and 228 CrPC, he submitted that the case having been committed to the learned Sessions Judge, Kamrup, Guwahati, the accused petitioners would get ample opportunity to have their say in the matter of framing of charge and that the accused petitioners should now appear before the learned Sessions Judge, instead of making challenge to the impugned order. He also submitted that this court lacks jurisdiction in the matter. He placed reliance on the decision of the Apex Court as reported in Raj Kishore Prasad Vs. State of Bihar and another,

9. Whatever may be the arguments and counter arguments, in respect of the impugned order and the maintainability or otherwise of the same, the basic question which falls for consideration is as to whether the learned CJM on the face of the charge sheet framing the charge u/s 304(Part-II)/34 IPC, could have, exercising the jurisdiction u/s 209 CrPC, diluted the same going deeper into the matter so as to scrutinize the material on record towards holding that the case was u/s 304(A) and not u/s 304(Part-II) as was done by order dated 16.2.2006. The other incidental grounds of attack in respect of the subsequent order dated 9.5.2006 such as lack of power of review etc. would be of no consequence upon answer to the basic question.

10. There is no manner of doubt that the charge sheet submitted by the IO vide charge sheet No. 125/05 dated 24.10.2005 mentioned the prima facie case u/s 304(II)/34 IPC. However, the learned CJM by his order dated 16.2.2006 upon observation that Section 304(II) IPC is a section foreign to the IPC proceeded to further examine the materials available on record and it was on that basis held that the case in fact was u/s 304(A)/34 IPC. He even held that insertion of Section 304(II) IPC was an inadvertent mistake on the part of the IO. The records do not reveal any such submission made on behalf of the prosecution and/or ascertainment of such purported inadvertent mistake on the part of the IO. It was solely on the basis of the scrutiny of the materials by the learned CJM, Kamrup and his own conclusion that the case was not u/s 304(Part-II) but was one of u/s 304(A).

11. Section 299 IPC deals with culpable homicide. As per the definition of which, whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide (emphasis added). The charge sheet having disclosed a prima facie case u/s 304(Part-II)/34 IPC with the statement of the same having been well established and with the prayer to send the accused petitioners for trial under the said sections, the learned CJM exercising its jurisdiction u/s 209 CrPC had no option than to commit the case to the Court of Sessions, the offence as disclosed in the charge sheet being exclusively triable by the said court only. It is another thing that the Court of Session exercising its jurisdiction u/s 227/ 228 CrPC is empowered either to discharge the accused or to frame charge other than the charge on the basis of which the case is committed to him and if such charge is triable by a court other than the Court of Session, he may transfer the case for trial to the Chief Judicial Magistrate.

12. Before proceeding further, I first deal with the objection raised regarding maintainability of the instant petition u/s 482 CrPC. It is in this context. Learned Counsel for the petitioners placed reliance on the decision of the Apex Court in *Thakur Ram* (supra). In this case, the Apex Court observed that the law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which has to be considered is whether the intervention of the revising authority was sought by the party at an early stage. In the instant case immediately after the impugned order dated 9.5.2006, the accused petitioner has invoked the jurisdiction of this court u/s 482 CrPC. Section 482 CrPC gives wide power and jurisdiction to the High Court by way of inherent powers to make such orders as may be necessary to give effect to any order under the Code, i.e., CrPC, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. Thus, irrespective of the legality or otherwise of the impugned order dated 9.5.2006 on technical ground, this court on the basis of the materials on record is empowered to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. Thus, I am of the considered opinion that the objection raised regarding maintainability of the criminal petition is not sustainable.

13. As regards the plea of lack of review jurisdiction so as to pass the impugned order dated 9.5.2006 by way of reviewing the earlier order dated 16.2.2006, suffice is to say that since this court has exercised its jurisdiction u/s 482 CrPC, this aspect of the matter need not detain us, for, the ultimate test is what should be the correct proposition of law and procedure in the given facts and circumstances of the case. In the case of *Bindeshwari Prasad Singh* (supra) the Apex Court has held that the Magistrates do not possess inherent power and, thus, cannot review or recall any order passed by them. This case need not detain us on the issue as the matter is to be decided finally irrespective of the technical pleas and that such technical pleas should not defeat the real judicial

test involved in the present proceeding.

14. In the case of Rajender Kumar Jain (*supra*), the Apex Court dealing with the provisions of Section 209 CrPC observed as follows:

In the second place it may not be accurate to say that the Committing Magistrate has no judicial function to perform under the 1973 Code of Criminal Procedure. Section 209 of the Criminal Procedure Code, 1973 obliges the Magistrate to commit the case to the Court of Session when it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions. Therefore, the Magistrate has to be satisfied that an offence is *prima facie* disclosed and the offence so disclosed is triable exclusively by the court. If no offence is disclosed the Magistrate may refuse to take cognizance of the case or if the offence disclosed is one not triable exclusively by the Court of Sessions he may proceed to deal with it under the other provisions of the Code. To that extent the Court of the Sessions overrule the first submission of Shri Ram Panjwani. We do not agree with the view taken by the High Court Andhra Pradesh in *A. Venkatramana v. Mudam Sanjeeva Ragudu*, that the court of committing Magistrate is not competent to give consent to the Public Prosecutor to withdraw from the prosecution.

15. In the same vein, this court in the case of *Sri Jainal Mia (supra)*, while holding that it is not open to a committing Magistrate u/s 209 CrPC to try to satisfy itself that a *prima facie* case on merits has been made out and that such jurisdiction vests in the Sessions Judge u/s 227 CrPC, further observed that such exercise cannot be like a despatch clerk on the analogy that if that was the function which was sought to be assigned to the Magistrate under the new Code, the Parliament could have well provided that in a case exclusively triable by a Court of Sessions, the charge sheet shall be submitted in that court. It is on the basis of this case, learned Counsel for the petitioners strenuously argued that it is this exercise as envisaged u/s 209 CrPC, which was carried out by the learned CJM while passing the order dated 16.2.2006 and, thus, he ought not to have reviewed the same by the impugned order dated 9.5.2006 so as to mechanically commit the case to the Court of Sessions.

16. This court in another case as reported in 1990 CrL LJ 6 *State of Assam v. Hit Ram Deka* held that if an offence is triable exclusively by the Court of Sessions, the Magistrate has no power to discharge the accused, but he shall have to commit the case in accordance with the provisions of Section 209 CrPC. Referring to Section 209 CrPC under the new Code, it was held that the old procedure of committal inquiry in Sections 206 to 220 under the old Code was abolished. As soon as the accused appears before the Magistrate or is brought before him and it appears to the Magistrate that the offence for which the accused has appeared or is brought before him is exclusively triable by the Court of Sessions, the case shall be committed to the court of Session. This court in the said case noticed the apparent distinction with regard to the commitment under the old Code and the new Code and observed as follows:

6. If an offence is triable exclusively by the Court of Sessions, the Magistrate under the 1973 Code has no power to discharge the accused, but he shall have to commit the case in accordance with the provision of Section 209. Once the accused is charge sheeted to face trial for an offence exclusively triable by the Court of Sessions, the Magistrate shall have no other option but to commit the case to the Court of Sessions for trial. Even if it appears that distinct offences have been committed in the course of the same transaction. Some triable by the Magistrate and some exclusively triable by the Court of Sessions, the case involving all the offences shall have to be committed to the Court of Sessions for trial. In a case on a police report or otherwise where some offence triable by the Magistrate alleged to have been committed by one set of accused and some other offences exclusively triable by the Court of Sessions alleged to have been committed by another set of accused, in the same occurrence or in the course of some transaction, the Magistrate cannot split the case but shall have to commit the case as a whole to the Court of Sessions for trial. Once a Magistrate commits a case, on the basis of charge sheet submitted by police, to the Court of Sessions, it does not prevent the Magistrate to commit the case on complainant with regard to the same occurrence or offence and also no detail inquiry is necessary in such complaint case before passing the committal order, but the Sessions Judge shall consolidate the two committal orders and treat them as one case.

7. u/s 209 the magistrate is merely to ascertain whether the case, as disclosed by the charge sheet, appears to him to be an offence triable exclusively by the Court of Sessions. It is not open to him to satisfy himself that a prima facie case has been made out on merit. If on a plain reading of materials on record it appears to the judicial mind of the Magistrate that there exists an offence triable exclusively by a Court of Sessions, then he has no option but to commit the case to the Court of Sessions. The committing court cannot apply its mind to find out whether there is a prima facie case for a charge to go into trial. The Code has vested this power exclusively to the Court of Sessions under Sections 227 and 228 either to discharge or charge the accused to transfer the case to the Magistrate if in his opinion the offence is not exclusively triable by Court of Sessions.

17. In the aforesaid case, the expression "it appears to the Magistrate" finding place in Section 209 CrPC has been held to be not dependent upon the fact of sufficiency or insufficiency of the material. The particular observation in this regard is quoted below:

8. The expression "it appears to the Magistrate" does not connote satisfaction of the Magistrate. The normal connotation of the word appears "is seem" or "to be in one's opinion". Mere opinion of the Magistrate must prevail. It does not depend upon the fact of sufficiency or insufficiency of the material. There is no scope for a formal inquiry except to comply the formalities of Section 207 or 208, as the case may be, and shall formally commit the case to the Court of Sessions.

9. Furnishing copies of document u/s 207 or 208, as the case may be, and passing the order of committal u/s 209 are all judicial functions and not administrative. So, the proceeding before the Magistrate, from the time the accused is produced or appeared before him, furnishing copies to the accused u/s 207 or 208, and till the commitment order is passed, is an enquiry as contemplated by Section 2(g) of the Code. But the scope of this enquiry is very limited confining only to the matters in the sections. Enquiry u/s 209 shall confine only with regard to production or appearance of the accused, furnishing documents to the accused and committing the case to the Court of Sessions. The Magistrate shall have no option nor discretion to assess the merit as to the availability of materials for a prima facie case or offence for commitment.

18. In the case of Joginder Singh and Another Vs. State of Punjab and Another, the Apex Court observed that the commitment is of "the case" and not "the accused" whereas under the old Code it was "the accused" who was committed and not "the case". Thus, when a case is committed to the Court of Sessions in respect of an offence the Court of Sessions takes cognizance of the offence and not the accused. In Sanjay Gandhi Vs. Union of India (UOI) and Others, the Apex Court observed that it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested on him under the earlier Code, but has been eliminated under the new Code. Therefore, he cannot go into the merits even for a prima facie satisfaction to frustrate the Parliament's purpose in remoulding Section 207A of the old Code into its present non-discretionary shape. The Apex Court stated, thus:

Secondly, it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in remoulding Section 207A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Sessions. Assuming the facts to be correct as stated in the police report, if the offence is plainly one u/s 201 IPC the Magistrate has simply to commit for trial before the court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. Shri Mulla submits if the Magistrate's jurisdiction were to be severely truncated like this the prosecution may stick a label mentioning a Sessions offence (if we may use that expression for brevity's sake) ex facie innocence. There is no merit in this contention. If made-up facts unsupported by any material are reported by the police and a Sessions offence is made to appear, it is perfectly open to the

Sessions Court u/s 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused.

19. In the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, dealing with the question as to how the Magistrate is to deal with the accused forwarded to him with the police report u/s 170 CrPC and the police report discloses an offence exclusively triable by the Court of Sessions, the Apex Court observed that no order committing the accused to the Court of Sessions can be made u/s 209 unless the Magistrate fully complies with the provisions of Section 207. The statutory obligation of supplying the various documents set out in Section 207 read with Section 209 CrPC is a judicial obligation and it is not an administrative function. It is a judicial function, which is to be discharged in a judicial manner. The whole emphasis of the Apex Court was on the procedural part in respect of supplying the documents, etc., and thereafter the role of the Magistrate to commit the case to the Court of Sessions if the same is triable by the said court only.

20. The decision on which, the learned Counsel for the informant has placed reliance, i.e., Raj Kishore Prasad (supra) really clinches the basic issue with which we are concerned. Although that was a case relating to addition of another person as accused in addition to one facing commitment, the basic issue as to the power and jurisdiction of the Magistrate u/s 209 CrPC has also been answered. Referring to the Law Commission Report by which change in respect of procedure of commitment was recommended, the Apex Court observed as follows:

11. The present Section 209 is, thus, the product of the aforesaid expert deliberation followed by legislative exercise. It is, thus, to be seen prominently that preliminary inquiries then known as "committal proceedings" have been abolished in cases triable by a Court of Sessions. The functions left to be performed by the Magistrate, such as granting copies preparing the records, notifying the Public Prosecutor, etc., are, thus, preliminary or ministerial in nature. It is of course true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Sessions, rather than being an adjudicator. It is, thus, manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate, thus, is only to see that the package sent to the Court of Sessions is in order, so that it can proceed straightaway with the trial and that nothing is lacking in content, as per requirement of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of "inquiry" as defined in Section 2(g) of the Code of Criminal Procedure, which defines that "inquiry means every inquiry, other than a trial conducted under this Code by a Magistrate or a court", because of the preclude of its being "subject to the

context otherwise requiring". As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209, Cr.P.C. is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Sessions.

16. Thus, we come to hold that the power u/s 209, CrPC to summon a new offender was not vested with a Magistrate on the plain reading of its test as well as proceedings before him not being an "inquiry" and material before him not being "evidence". When such power was not vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Sessions itself awaiting the case on commitment, merely on the specious ground that the Court of Sessions can, in any event, (sic) the accused to stand trial, alongwith the accused meant to be committed for trial before it. Presently it is plain that the stage for employment of Section 319 Cr.P.C. has not arrived. The order of the Court of Sessions requiring the Magistrate to arrest and logically commit the appellant alongwith the accused proposed to be committed to stand trial before it, is patently illegal and beyond jurisdiction. Since the Magistrate has no such power to add a person as accused u/s 319 Cr.P.C. when handling a matter u/s 209, Cr.P.C, the Court of Sessions, in purported exercise of revisional powers cannot obligate it to do so. The question posed at the outset is answered accordingly in this light. When the case comes after commitment to the Court of Sessions and evidence is recorded, it may then in exercise of its powers u/s 319, Cr.P.C. on the basis of the evidence recorded by it, if circumstances warranting, proceed against the appellant, summon him for the purpose, to stand trial along with the accused committed, providing him the necessary safeguard envisaged under Sub-section (4) of Section 319. Such course is all the more necessary in the instant case when expressions on merit have extensively been made in the orders of the Magistrate, the Court of Sessions and that of the High Court. Any other course would cause serious prejudice to the appellant. We order accordingly.

21. The preliminary enquiry prescribed under the old Code found to have served no useful purpose and on the contrary involved a great deal of infructuous work causing delay in the trial of serious cases. The procedure instead of solving problems created fresh problems. In a case exclusively triable by a Court of Sessions, the preliminary enquiry, was, therefore, dispensed with in the new Code. However, provisions have been made for performing certain preliminary functions like granting copies, preparing the record, notifying the public prosecutor, etc. If the committing Magistrate has no power to discharge the accused, he has also no power to alter the charge unless it is shown that a wrong section has been quoted.

22. In the "instant case, the learned CJM, Kamrup initially proceeded with the matter on the notion that Section 304(II) is foreign to IPC. Thereafter, he went on to scrutinize the materials on records so as to come to the conclusion that the case was u/s 304(A)/34 IPC. As has been held in the aforesaid cases, no duty was enjoined on the learned CJM within the parameters of Section 209 CrPC to embark upon an enquiry as to the real test of the charge to be framed against the accused petitioners. The provisions of Section 304 are conveniently referred to as Part-I and Part-II. It is in this context, the charge sheet referred to Section 304 as Section 304(11). The relevant provisions have been quoted above. If upon investigation and furnishing of report, the IO was of the opinion that the prima facie offence disclosed is u/s 304(Part-II), it was not within the jurisdiction of the learned CJM to scrutinize the materials like that of the task enjoined towards framing of charge to conclude that the offence constituted is one u/s 304(A).

23. Possibly, realizing the inherent lack of jurisdiction, the learned CJM, Kamrup passed the impugned order dated 9.5.2006 correcting himself to the correct procedure envisaged u/s 209 CrPC. As to whether such a course of action could have been taken by him by way of review of his own order, need not detain us as the matter has been discussed in detail relating to true import and purport of Section 209 CrPC. Eventually, with the passing of the impugned order dated 9.5.2006, the learned CJM has upheld the principles underlying Section 209 CrPC. Even after committal of the case to the learned Sessions Judge, Kamrup, Assam, the accused petitioner will get ample opportunity to plead that they are entitled to get discharge and/or it is not a case u/s 304 (Part-II) but is one u/s 304(A). This power and jurisdiction vested on the learned Sessions Judge u/s 227/228 CrPC cannot be divested of in the manner and method as was sought to be done by the learned CJM by passing the order dated 16.2.2006. However, he has corrected himself by passing the impugned order dated 9.5.2006 and I am of the considered opinion that no interference is called for to the same. This process I have adopted exercising the power u/s 482 CrPC to secure the ends of justice.

24. The criminal petition is answered in the above manner. The learned Sessions Judge, Kamrup shall now proceed with the matter in accordance with law. The accused petitioners shall appear before him. Needless to say that they will be entitled to all the protections of law as envisaged under the relevant provisions of law.

25. The criminal petition stands disposed of in terms of the above order.

26. Before parting with the case records, I place on record my appreciation for the services rendered by Mr. K. Agarwal, learned advocate towards assisting the court.