
(1974) 08 PAT CK 0027
In the Patna High Court

Gauri Shankar Prasad Singh and Others APPELLANT
Vs
The State of Bihar and Another RESPONDENT

Date of Decision : 13-08-1974

Acts Referred:

Cattle Trespass Act, 1871 — Section 24
Penal Code, 1860 (IPC) — Section 304, 307, 323, 324, 325

Citation : (1975) CriLJ 1946 : (1975) 8 PLJR 326 : (1975) PLJR 326

Hon'ble Judges : S.N.P. Singh, J;Nagendra Prasad Singh, J

Bench : Division Bench

Judgement

Nagendra Prasad Singh, J.—This revision application is directed against an order, dated the 10th July, 1970, passed by the learned Munsif-Magistrate on a petition filed on behalf of the prosecution to adopt commitment procedure in the case which was pending against the petitioners before him. The learned Munsif Magistrate, by the impugned order, has decided to hold commitment inquiry under Chapter XVIII of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Code"). Although the charges levelled against the petitioners are not exclusively triable by a Court of Session, the learned Munsif-Magistrate has decided to hold commitment inquiry in the instant case inasmuch as its counter-case initiated at the instance of petitioner No. 4 against opposite party No. 2 Musafir Singh and others has already been committed to the Court of Session.

2. Opposite Party No. 2 Musafir Singh made a statement on the 22nd December, 1969, at 4.15 p. m., before the Assistant Sub-Inspector of Police of Mashrak police-station in the State Dispensary at Mashrak stating, inter alia, as follows : On the same day, at about 1 or 2 p. m., he, after having harvested his paddy crops, was storing them in his khalihan, when petitioners 1 to 4, along with others, came there and demanded their share and started throwing the paddy bundles, on which Musafir Singh protested. Then they assaulted him and his father with lathi and chhuri. Petitioner No. 1 was armed with a chhuri, petitioner No. 2 was armed with a pachbera and others were armed with lathis. Petitioner

No. 3 assaulted him with a lathi on his head. There were assaults on both sides with chhuri and lathis. He also named the witnesses.

3. On the basis of the said statement, a case under Sections 323 and 324 of the Indian Penal Code was registered by the Police. A copy of the said first information report is annexure "1" to the revision application.

4. It appears that petitioner No. 4 Ramadhar had -also made a statement in the same dispensary on the same day at 3.55 p. m. before the same Assistant Sub-Inspector stating, inter alia, as follows : On the same day, at about 2 p. m., while he was at his khalian weighing his paddy and his brother, petitioner No. 2 was helping him Rajendar Singh, opposite party No. 2 Musafir Singh, Gopi Singh, Rama Singh and others came there and demanded half share in the paddy, on which he said that the paddy belonged to them and they would not give it. At this, opposite party No. 2 and others started lifting the paddy which was stopped by petitioner No. 4. Thereafter, opposite party No. 2 took out a chhuri from his pocket and gave a blow in his stomach. Having received the blow, petitioner No. 4 fell on the ground. Thereafter, Rajendar Singh took out another knife, and gave blows to his brothers, petitioners 1 to 3.

5. On the basis of the said statement a case u/s 307, read with Section 324, of the Indian Penal Code was registered. A copy of the said first information report is annexure "2" to the revision application.

6. Both the cases were investigated by the Police, and it appears that a charge-sheet under Sections 307, 326, 324 and 323 of the Penal Code was submitted by the Police against opposite party No. 2 and others in the case lodged, by petitioner No. 4. So far as the case lodged by opposite party No. 2 against the petitioners is concerned, the Police in that case submitted a charge-sheet under Sections 325, 324 and 323 of the Indian Penal Code. On the basis of the aforesaid two charge-sheets, cognizance was taken by the learned Magistrate giving rise to Trial No. 693 of 1970 against the petitioners and Trial No. 654 of 1970 against opposite party No. 2 and others. In due course, commitment inquiry was held against opposite party No. 2 and others and, by order, dated the 30th May, 1970, they were committed to the Court of Session to stand their trial. A copy of the said commitment order is annexure "3" to the revision application. The case against the petitioners proceeded before the learned Munsif-Magistrate. On the 2nd July, 1970, a petition was filed by the Assistant District Prosecutor before the learned Munsif-Magistrate for holding commitment inquiry against the petitioners on the ground that this case was a counter-case to the case instituted by petitioner No. 4 against opposite party No. 2 and others which had already been committed to the Court of Session. The learned Munsif-Magistrate, after hearing both parties passed the impugned order.

7. The petitioners have challenged the legality of the impugned order mainly on the ground that commitment proceedings could not be started in the instant case only on the ground that the accused persons in the counter case had already

been committed to the Court of Session.

8. The revision application was first placed before a learned Single Judge of this Court who has referred it to a Division Bench.

9. On the allegations made in the two first information reports, referred to above, one lodged by petitioner No. 4 and the other lodged by opposite party No. 2, it has to be held that on facts the two cases are counter-versions of the same occurrence, inasmuch as the time, the place and the genesis of the occurrence are, more or less, the same. The accused persons of the one case are the prosecution witnesses in the other. Admittedly, both sides have received injuries. The only controversy is about the manner of the occurrence and as to who were the aggressors - whether the party of the petitioners, or the party of opposite party No. 2.

10. There is no specific provision in the Code for trial of counter-cases, and no hard and fast rule can be laid down for trial of such cases. Of course, as a rule, both the cases can be tried separately adopting the procedure applicable to the facts of each case. But the different High Courts in India have examined the subject and special features of such cases and have made efforts to find out a procedure consistent with the provisions of the Code to eliminate, as far as possible, conflicting decisions in two separate trials regarding the same occurrence. It has always been the efforts of the Courts and the Statute to avoid conflicting judgments regarding the rights and liabilities of the same set of persons on same issues and that is why the principles of *res judicata*, *estoppel* and *autrefois acquit* have been invoked in trial of civil and criminal cases.

11. Learned Counsel for the petitioners has submitted that there is no purpose in committing the accused to the Court of Session only on the ground that a counter-case is pending trial before the Sessions Court, when actually the particular accused is not alleged to have committed an offence which is exclusively triable by a Court of Session. According to the learned Counsel, it will amount to great harassment to the accused for no corresponding benefit to the cause of justice, because, even if both the cases are tried by the Court of Session, the evidence of one case cannot be used as evidence in the other; there is no provision in the Code forbidding two trials even if the cases are counter to one another. This aspect of the matter cannot be challenged, because both the cases have to be tried separately on separate sets of evidence, even if they are tried by the same court and the judgment is to be delivered in both the cases on the evidence adduced in the particular case. Learned Counsel has also challenged the jurisdiction of the learned Munsif-Magistrate in the instant case for adopting commitment procedure in view of Section 254 of the Code, which lays down that, if the Magistrate is satisfied that an accused has committed an offence which he was competent to try and he could adequately punish him, he has to frame a charge against the said accused. Section 254 of the Code is in these words:

254. If, when such evidence and examination have been taken and made, or at

any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

Thus, according to petitioners, a Magistrate can adopt commitment procedure only on two grounds (i) that he is not competent to try the offence because it is triable by a Court of Session, or (ii) that, even if it is triable by him, on the facts and in the circumstances of that case, he cannot adequately punish the accused person. According to learned Counsel, the ground that a counter-case is pending trial before the Sessions Court is not covered by the provisions of Section 254, and, as such, the Magistrate could not conduct an inquiry under Chapter XVIII of the Code on that ground.

12. Section 207 of the Code occurring in Chapter XVIII of the Code runs as follows:

207. In every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court the Magistrate shall,-

(a) in any proceeding instituted on a police report, follow the procedure specified in Section 207-A, and

(b) in any other proceeding, follow the procedure specified in the other provisions of this chapter.

A bare reference to Section 207 shows that if a case is triable exclusively by a Court of Session, then the Magistrate has to hold inquiry under Chapter XVIII. But this section also invests discretion in the Magistrate to hold an inquiry under Chapter XVIII even in those cases which, in his opinion, ought to be tried by a Court of Session. Another section of the Code relevant in this connection is Section 347 which reads as under:

347 (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session, or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed u/s 346.

Under Section 347 the Magistrate is empowered during any inquiry or trial at any stage of the proceeding to commit an accused to the Court of Session. In that view of the matter, it is not correct to say that a Magistrate has no discretion in the matter and he can commit an accused to the Court of Session only when he has either no jurisdiction, meaning thereby that the accused is triable by a Court

of Session, or he is not able to adequately punish him.

13. Now the question in the instant case is as to whether the said discretion can be exercised on the ground that in the counter-case the accused persons have been committed to the Court of Session. This point has been the subject of consideration by different High Courts as to whether the words "ought to be tried by the Court of Session" u/s 347 vest power in the Magistrate to adopt commitment procedure on this ground. In this connection a reference may be made to a Full Bench decision of the Allahabad High Court in *Rex v. Matoley* AIR 1949 All 1 : 50 CriLJ 59. There in one case the accused persons charged u/s 304 of the Penal Code had been committed to the Court of Session. In the counter-case the accused persons had been charged u/s 323 of the Indian Penal Code, read with Section 24 of the Cattle Trespass Act, and this case was committed to the Court of Session only on the ground that the counter-case u/s 304 had been committed to the Court of Session, Their Lordships considered the power of the Magistrate u/s 254 of the Code and as to whether the words "ought to be tried by the Court of Session", occurring in Section 347 of the Code sanctioned adopting such procedure, and came to the conclusion that there was no illegality in the order. In this connection it was observed as follows:

I find it impossible to read into the language of Section 254 something which is not there, viz. a provision to the effect that when once a charge is framed, the Magistrate must proceed with the trial to its close and not alter his course, even though circumstances may require him to hold an inquiry for commitment of the case to the Court of Session. In many of the above mentioned cases it seems to me - I again speak with the utmost respect - that the real significance of the general provisions contained in Chap. 24 and, in particular provisions of Section 347 has been lost sight of. Then again it appears to me that the provisions of Sections 206 and 207, Criminal P. C., which imply the existence of a power in the Magistrate concerned to commit a person for trial to the Court of Session or High Court, have not been given due consideration in the determination of these questions. It is important to note that the words used in this section give a wide discretion to the Magistrate to commit any person for trial to the Court of Session for any offence triable by such Court.

It was also held in the said Full Bench that the words "triable by such Court" do not necessarily mean an offence which is shown as triable by the Court of Session in column 8 of Schedule II of the Code, because Section 28 of the Code makes it abundantly clear that the Court of Session is empowered to try every offence under the Penal Code.

14. A similar question arose before a Full Bench of the Madras High Court *T.K.M. Alagappa Chetty Vs. Saminathan Chetty and Others*, because conflicting viewpoints had been expressed in different cases on the question as to whether a Magistrate has power to commit an accused person to the Court of Session on the aforesaid ground, and, even if he has power, whether the said power would be exercised on that ground, and it was observed as follows;-

Possibly if the Judge reserves judgment in both cases in order that he may consider both for purpose of arriving at the truth, he is likely to reach a more satisfactory result than by trying each case without reference to any of the facts in the other. But since this procedure is irregular, it cannot receive our support. No hard and fast rule can be laid down. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. Should the Judge however feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter case to the file of another Sessions Judge. What must be made clear is : (1) that the trial must be separate, i.e. before different assessors and separate judgments delivered (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself Unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

A Bench of the Bombay High Court in *Emperor Vs. Banappa Kallappa Ajawan*, took more or less a similar view, where it was observed:

The question of the proper procedure to be followed in such cases, where rival factions which have taken part in a riot are both prosecuted is one of considerable importance. The two factions must obviously be prosecuted separately, since the common intention of each of the two parties to the riot would be different and they could not be tried in a single case. There is of course no objection in law to both the cases being tried by separate Judges with the help of separate juries or assessors, but such a procedure is always open to the risk of the two Courts coming to conflicting findings, and, occasionally, as in the present case, it may result in very serious injustice, one side or the other being wrongly convicted. In our opinion the most desirable procedure in such cases would seem to be that both the cases should be tried by the same Judge though with different assessors or juries. The first case should be tried to a conclusion and the verdict of the jury or the opinion of the assessors taken. But the judge should postpone judgment in that case till he has heard the second case to a conclusion, and he should then pronounce judgments separately in each case. He would of course be bound to confine his judgment in each case to the evidence led in that particular case and would not be at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case. It would be obviously necessary that he should try the two cases in quick succession one after the other.

15. The Lahore High Court also in *Ujagar Singh v. Emperor* AIR 1936 Lah 356 : 37 CriLJ 510 took the view that the evidence in the two counter-cases" should be recorded separately by the same Court and judgments should be pronounced in

both the cases after the conclusion of the two trials. A Bench of the Calcutta High Court in *Khitish Chandra Bose Vs. Nanuram Maklania*, refused to interfere with the judgment of the Magistrate who, after recording the evidence in the two counter cases, delivered one common judgment, although pointing out that separate judgments should have been delivered. Their Lordships indicated that each case should have been tried separately one after the other and there could not be any objection to the Magistrate postponing the judgment in the earlier case until he had heard the second case. The Privy Council in AIR 1927 26 (Privy Council) had to consider the question regarding the legality of a judgment of the High Court where two counter-cases had been disposed of by a common judgment, and it was decided as follows:

In a case of that kind it is almost impossible to keep the cases wholly separate. Although they were tried separately, the High Court gave one judgment, but treated the cases as two cases which had been separately tried. It is said that they imported considerations from one case into the other. When one looks at it, to some extent that was inevitable and to some extent it did so happen. There was however, a body of separate evidence which was applicable to each case and that in itself was enough for the conviction; so that, although technically it might have been better to keep the evidence entirely distinct, and to have delivered two separate judgments, no injustice has followed from what was done.

16. This Court has also considered this aspect of the matter, and in this connection reference may be made to the case of *Hasim Mian Vs. Sunder Paswan and Others*, where M. P. Verma, J. indicated the same procedure of trying the two cases separately and delivering judgments separately, if practicable on the same day. In *Radha Raman Mandal v. Gulabi Mandal* 1971 PLJR 521 and *Jogindra Singh v. The State of Bihar* 1972 PLJR 78 two learned Judges of this Court came to the conclusion that in appropriate cases the case should be committed to the Court of Session on the ground that the counter-case is pending trial before the Sessions Court.

17. Learned Counsel for the petitioners has, however, relied on a Single Judge decision of this Court in *Arjun Singh Vs. Gangotri Singh and Others*, , and a Bench decision of the Andhra Pradesh High Court in *Re : Ummadi Pulla Reddi* AIR 1956 AP 17 : 1956 CriLJ 24 as also on the decision of this Court in *Dina Nath Panday v. Ram Chandra Choudhury* Criminal Revision No. 2279 of 1971, disposed of on the 14th March, 1974 (Pat). In the aforesaid Patna case *Arjun Singh Vs. Gangotri Singh and Others*, the prayer to commit the second case to the Court of Session was rejected, firstly, on the ground that, on facts, it was difficult to hold that the two cases were counter to each other, and, secondly, that the rule that two counter-cases should ordinarily be tried by one and the same Court was not a rule which could conveniently be universally adhered to. In the Andhra Pradesh case, the learned Judges, while observing that they were bound by the aforesaid Full Bench decision of the Madras High Court in *Mounagurusami Naicker*, took the view that it did not follow from the aforesaid Full Bench judgment that two

counter cases should be tried together; the view of the Full Bench simply indicated that counter-cases have to be tried by the same Judge and a workable rule was indicated. In my opinion, the judgment of the Andhra Pradesh has in no way taken a contrary view or indicated any special procedure. The learned Judges considered only the harassment side of the accused who had been charged with offences which were not exclusively triable by the Court of Session. In the case of Dina Nath Panday (Criminal Revision No. 2279 of 1971 : 1974 BBCJ 571 PAT his Lordship referred to the aforesaid two decisions in Hasim Mian Vs. Sunder Paswan and Others, and distinguished them on the ground that, on the facts of the particular cases, their Lordships were of the opinion that for the ends of justice both the cases should be tried by the same Judge. With utmost respect to his Lordship, in my opinion, the three judgments of this Court, namely, those reported in Hasim Mian Vs. Sunder Paswan and Others, have decided the question regarding propriety and power of the Magistrate to commit an accused to the Court of Session who had been charged with offences which were not exclusively triable by the Court of Session, on the ground that its counter-case was already pending trial before the Court of Session,

18. As I have indicated earlier, there is nothing in the Code to indicate that any special procedure for trial of such cases has to be adopted; but the courts have tried to find out a reasonable via media keeping in view the provisions of the Code and ends of justice. It is true that if an accused triable by a Magistrate is committed to the Court of Session on the ground that the counter case had been committed to, and was pending trial before, the Sessions Court, it is bound to cause some harassment to the accused concerned. On the other hand, if the cases are tried by two separate Courts, in some cases there is the possibility of two conflicting judgments regarding the same occurrence which is against the basic principles of criminal jurisprudence and a reflection over the power of the Court to decide the correct version of the occurrence. There cannot be two correct versions of the same occurrence contradictory to each other. Of course, as had been observed in most of the cases referred to above, the finding in each case has to be recorded on the evidence adduced in that particular case; but it cannot be denied that the same Court, having heard both the cases, will be in a much better position to deliver judgments in both the cases on the evidence adduced in both the cases separately. As has been observed in the aforesaid judgments, this is primarily a matter to be looked into by the legislature to prescribe some special procedure consistent with the Code for trial of such cases. But, in absence of any such legislation, I think there is no illegality in trial of the two counter-cases by the same Court; rather, it is more convenient, equitable and a workable rule. Once this position is accepted that usually the counter-cases should be tried by the same Court one after the other, in my opinion, in view of the aforesaid provisions of Sections 207 and 347 of the Code, there is no restriction on the power of the Magistrate to commit an accused of a case charged with offences, which can be tried by Mm and in which he can adequately punish, if he finds him guilty. The ground that the second case should be tried by

a court of Session, can be a relevant ground in appropriate cases for the purpose of holding that it "ought to be tried by such (Sessions) Court." I must, however, make it clear that a Magistrate, before he decides to adopt the procedure under Chapter XVIII of the Code in a case which he is himself competent to try and in which he can adequately punish the accused, if found guilty, he must be sure that both the cases are counter to each other and the ease in which he is exercising his discretion calls for such an order and the harassment likely to be caused to the accused of that case by undergoing a sessions trial can be overlooked in the interest of justice. In many cases it is found that, although there is a fight between the two factions giving rise to two cases, yet they are not counter-versions of the same occurrence. One case may be the genesis of the other case. In such cases the aforesaid power should not be exercised and they should be tried by two courts separately in as much as in such cases it is bound to cause prejudice and harassment to the accused who could be tried by the Magistrate himself.

19. In the result, there is no merit in this application. It is, accordingly, dismissed.

S.N.P. Singh, J.

20. I agree.