
(2016) 08 GAU CK 0042
In the Gauhati High Court
Case No : Criminal Reference No. 1 of 2016

In re	Vs	APPELLANT
State of Assam		RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 28

Citation : (2016) 5 GauLJ 468 : (2016) 4 GauLT 666 : (2016) 5 NEJ 148

Hon'ble Judges : Mr. Ajit Singh, C.J. and Mr. N. Chaudhury, J.

Bench : Division Bench

Advocate : Mr. A.M. Bora, learned counsel, for the Appellant/Accused; Ms. Shamima Jahan, learned Additional Public Prosecutor, Assam and Mr. S.S. Dey, learned Standing Counsel, Gauhati High Court, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Ajit Singh, C.J.—This Reference under Section 395(2) of the Code of Criminal Procedure, 1973 (in short "Code") has been made by the Assistant Sessions Judge, Tinsukia, for a decision of this High Court on the following question of law -

Whether the restriction on Assistant Sessions Judge from passing a sentence of imprisonment for a term exceeding 10 years under Section 28(3) of the Code would act as an impediment to conduct trial or would vitiate the trial, so conducted by the Assistant Sessions Judge, in respect to case relating to offence punishable with imprisonment above 10 years ?

2. Facts giving rise to this Reference are these. On 14.10.2013, around 7 p.m., prosecutrix was returning along with one Deven Mura to her house after attending Karam Puja at Jalponia Tea Estate. On way, three accused persons, namely, Bikash Gohain, Manash Jyoti Gohain and Manoranjan Baruah restrained and assaulted them. The accused persons then first committed gang rape on the prosecutrix in the forest and thereafter in the play field. The prosecutrix lodged

the First Information Report on 15.10.2013 at Police Station Tinsukia. The Police, after investigation, filed a charge sheet against the accused persons for offences under Section 376D and 366 of the Indian Penal Code. The Judicial Magistrate, 1st Class, Tinsukia, thereupon completed the necessary formalities and committed the case to the Court of Sessions for trial. The Sessions Judge, in turn, registered the same, as Sessions Case No. 242(T) of 2014 and vide order dated 13.11.2014, transferred it to the Assistant Sessions Judge for trial.

3. On 13.11.2014, the Assistant Sessions Judge, Tinsukia framed charges under Section 366 and 376D of the Indian Penal Code against the accused persons, to which, they pleaded not guilty. The accused persons were, therefore, put to trial. During trial, the Assistant Sessions Judge recorded the evidence of 13 witnesses and even examined the accused persons under Section 313 of the Code. At no point of time, objection to competency to try the offences was taken by the accused persons. The accused persons, in fact, finally argued the case so that judgment is passed by the Assistant Sessions Judge.

4. The Assistant Sessions Judge, vide judgment dated 5.7.2016, convicted two accused persons, namely, Bikash Gohain and Manash Jyoti Gohain under Section 376D of the Indian Penal Code and acquitted them of the charge under Section 366 of the Indian Penal Code. The Assistant Sessions Judge also acquitted the 3rd accused, Manoranjan Baruah of the charges. The Assistant Sessions Judge however did not pass the sentence on the ground that Assistant Sessions Judge was not empowered under Section 28(3) of the Code to pass the minimum sentence of 20 years as envisaged under Section 376D of the Indian Penal Code. The Assistant Sessions Judge, therefore, directed that the records be placed before the Sessions Judge, Tinsukia for passing appropriate sentence as per law.

5. On being convicted by the Assistant Sessions Judge, Bikash Gogoin and Manash Jyoti Gohain were taken into custody on 5.7.2016. They were then directed to be produced before the Sessions Judge, Tinsukia. But the Sessions Judge, Tinsukia, vide order dated 20.7.2016, returned the records to the Court of Sessions Judge holding that the "procedural defects" could not be cured by the Court of Sessions and that the Court of Sessions could not pass any sentence on the basis of judgment passed by the Assistant Sessions Judge. It is in this background, the Assistant Sessions Judge has preferred this Reference.

6. The learned counsel for the accused persons has argued that since the Assistant Sessions Judge was not competent to impose the minimum sentence of 20 years as envisaged under Section 376D of the Indian Penal Code, he was also not competent to conduct the trial and hence, the entire trial was void ab initio and liable to be set aside. The learned counsel, in support of his submission, has referred to a decision of the Bombay High Court in Prabhakar L. Pawar v. State of Maharashtra, 2012 CrL. L.J. 4726. He has also cited the decision of the Supreme Court in Rama Narang v. Ramesh Narang, (1995) 2 SCC 513. Ms. Shamima Jahan, learned Additional Public Prosecutor, Assam, in reply, has defended the validity of trial. She, in support of her submission, has cited the decision of the

Andhra Pradesh High Court in *Jasti Punnnarao v. State of Andhra Pradesh*, 1985 CrL.J. 16. Senior counsel Sri S.S.Dey endeavoured to assist the court in answering the Reference by taking us through the relevant provisions of the Code.

7. In order to appreciate the issue at hand, we shall examine the relevant provisions of the Code. Section 6 of the Code provides for the classes of criminal Courts. It reads as under: "6. Classes of Criminal Courts.- Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

(i) Courts of Session;

(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates."

8. Section 7 of the Code deals with the territorial Divisions. and according to its sub-section 1, every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts.

9. Section 9(1) of the Code mandates the State Government to establish a Court of Session for every sessions division. Under sub-section (2) every Court of Session has to be presided over by a Judge, who shall be appointed by the High Court. Sub-Section (3) also empowers the High Court to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. Thus, "Court of Session" would ordinarily mean not only the Court of Session but also the Court of Additional Sessions Judges and Assistant Sessions Judges. And, once an Additional Sessions Judge or an Assistant Sessions Judge is appointed by the High Court to exercise jurisdiction in a Court of Session, they become part of Sessions Division and can try cases triable by the Court of Session.

10. The jurisdiction of Additional Sessions Judges or Assistant Sessions Judges to try cases is however subject to the provision of Section 194 of the Code which reads as under:-

"194. Additional and Assistant Sessions Judges to try cases made over to them. - An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."

A bare reading of the above quoted Section 194 of the Code makes it clear that an Additional Sessions Judge or Assistant Sessions Judge can try only such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try. This

Section does not lay down any specific criteria to be followed for making over the cases for trial to the Assistant Sessions Judge. It also does not provide embargo in making over only such cases for trial wherein offences are punishable with the maximum sentence of 10 years imprisonment.

11. Section 26 of the Code deals with Courts by which offences are triable. It reads as follows:

"26. Courts by which offences are triable - Subject to the other provisions of this Code,-

(a) any offence under the Indian Penal Code (45 of 1860), may be tried by-

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable;

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by-

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable."

12. Section 28 of the Code provides for the sentences which High Courts and Sessions Judges may pass. The Section reads as under:-

"28. Sentences which High Courts and Sessions Judges may pass.-

(1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years."

13. A joint reading of the above quoted Sections 26 and 28 of the Code shows that all offences under the Indian Penal Code are to be tried by the High Court or Court of Sessions or any other Court by which such offence is shown in the First Schedule to be triable. And, although a High Court or a Sessions Judge or an Additional Sessions Judge may pass any sentence authorised by law, an Assistant Sessions Judge is restricted from passing a sentence of death or imprisonment for life or of imprisonment for a term exceeding 10 years. In the First Schedule, all the offences under the Indian Penal Code are classified by what courts they

are triable. This Schedule, nowhere distinguishes the court of Additional Sessions Judge or the Assistant Sessions Judge from that of Court of Session. Also, there are many offences in the First Schedule classified to be triable by the Sessions Court and for such offences, no minimum sentence of imprisonment, particularly, less than 10 years, are prescribed. This is because it is not necessary that every case made over to the Assistant Sessions Judge may end up in conviction or in cases regarding the offences, where no minimum sentence of imprisonment is prescribed, the Assistant Sessions Judge may pass any sentence of imprisonment not exceeding 10 years. Also Section 28 of the Code does not say that offence which prescribes the minimum sentence of 10 years of imprisonment cannot be tried by the Assistant Sessions Judge or is not triable by the Assistant Sessions Judge. It only restricts an Assistant Sessions Judge from passing a sentence of imprisonment for a term exceeding 10 years. Section 28 is a procedural provision and must be liberally interpreted. It thus becomes clear that if a case is made over by the Sessions Judge or the High Court under Section 194 of the Code to the Assistant Sessions Judge for trial, the latter is competent to try the same, provided the offence is triable by the Sessions Court irrespective of the prescribed minimum sentence of imprisonment. And, in the event of Assistant Sessions Judge holding the accused guilty of an offence, which deserves a sentence of imprisonment for a term exceeding 10 years, he shall send the case to the Sessions Judge, who is authorised by law to pass any sentence. This view was also taken by the Andhra Pradesh High Court in the case of Jasti Punarnao (*supra*).

14. In the case of Prabhakar L. Pawar (*supra*) the accused had challenged the jurisdiction of an Assistant Sessions Judge for trying his case in respect to offences under Sections 326 and 307 of the Indian Penal Code. A Division Bench of the Bombay High Court held Section 28 of the Code as substantive provision of law which imposes a bar on the Sessions Judge in assigning cases to the Assistant Sessions Judge where sentence of imprisonment above 10 years can be awarded. We, however, in the light of our discussions in foregoing paragraphs, respectfully disagree with the view taken by the Bombay High Court. Also, in the case at hand, the trial has already been concluded without any objection to jurisdiction of the Assistant Sessions Judge. As already mentioned above, the accused persons after being examined under Section 313 of the Code had finally argued that case so that judgment be passed by the Assistant Sessions Judge and one co-accused has been acquitted of the charges under Sections 366 and 376D of the Indian Penal Code.

15. In the case of Ram Narang (*supra*), the Supreme Court was confronted with the issue of disqualification under Section 267(c) of the Companies Act, 1956, of a person, in being appointed as a Managing Director of a Company, who had been convicted by a court of an offence involving moral turpitude. In such a situation, the Supreme Court held that unless the punishment to which the accused person is sentenced is set out in the judgment it remains incomplete. The Supreme Court held that a judgment becomes complete after the sentence is

awarded and then only one can prefer an appeal under Section 374 of the Code along with a prayer for suspension of execution of sentence under Section 389(2) of the Code. In the present case, judgment of conviction will be completed only after passing of sentence of imprisonment by the Sessions Court. The case of Ram Narang therefore does not help the accused persons.

16. To sum up, it is thus held that:

On a case being made over for trial by a Sessions Judge, in exercise of power under Section 194 of the Code to a Assistant Sessions Judge, the Assistant Sessions Judge is competent to try the same, irrespective of the fact whether the Assistant Sessions Judge is competent to impose the minimum sentence authorised by law or not. The Assistant Sessions Judge can also deliver judgment in such cases and in the event of conviction, if it is unable to impose the minimum sentence, the case record is to be placed before the Sessions Judge to conduct hearing on sentence and pass appropriate sentence in accordance with law.

17. The Criminal Reference is accordingly answered.

18. Before parting with the records, it is deemed appropriate to direct the Assistant Sessions Judge, Tinsukia to forthwith, place the record of Sessions Case No. 242(T) of 2014 before the Sessions Judge, Tinsukia. The Sessions Judge, Tinsukia, on receipt of record, would proceed to conduct hearing on sentence and thereafter impose appropriate sentence in respect of the convicted accused persons, in accordance with law.

19. Let a copy of this order be transmitted to the Court of the Sessions Judge, Tinsukia and Assistant Sessions Judge, Tinsukia, immediately.