

(2007) 03 MAD CK 0060

In the Madras High Court

Case No : Suo Mottu Criminal R.C. No. 1550 of 2005

Inspector of Police

APPELLANT

Vs

R. Jeeva Jothi and Others

RESPONDENT

Date of Decision : 06-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 170, 190, 2, 207, 207A
Penal Code, 1860 (IPC) — Section 147, 148, 149, 214, 307

Citation : (2007) CriLJ 3003

Hon'ble Judges : R. Regupathi, J

Bench : Single Bench

Advocate : V. Parthiban, for the Appellant; P. Kumaresan, Assistant Public Prosecutor, Ratnakaran, (A-1), Rajendran, (A-2) and Muthukannian, (A-3 to A-6), for the Respondent

Judgement

R. Regupathi, J.—The suo mottu criminal revision petition has been taken on file by this Hon''ble Court, on coming to know about the irregularities committed by the learned Judicial Magistrate, Thiruthuraipoondi, while conducting an enquiry in a case in Crime No. 701 of 2003 on the file of the Inspector of Police, Vedaranyam Police Station. The Inspector of Police, Vedaranyam Police Station, on conclusion of the investigation of the case, filed a final report against these six accused for an offence under Sections 147, 148, 149, 214, 307, 307 r/w 114, 307 r/w 149, 450 IPC.

2. The case of the prosecution is that the husband of the complainant was done to death by the first accused along with his henchmen and a case in S.C. No. 3 of 2003 was pending. The case was posted for trial on 21.07.2003. On 15.07.2003 all the accused under the leadership of the first accused, alleged to have visited the residence of the complainant for offering illegal gratification of Rs. 6,00,000/- to the complainant and her mother, in consideration of concealing the offence and to help the accused by not deposing against them.

3. A-1 was armed with iron rod and a bag containing cash. A-2 and A-3 was with

a bag containing cash and knife, respectively. A-4 to A-6 were the members of the unlawful assembly. When the offer was refused by the complainant, it is the case of the prosecution that on the instructions of A-1, A-4 alleged to have made an attempt at the uncle of the complainant with his knife, which was ward off. However, he sustained cut injury on his right hand. It is alleged that such an attack has been made with a view to commit the murder of the witnesses.

4. 14 witnesses have been examined during the course of the investigation and a final report has been filed on 19.10.2004 before the learned Judicial Magistrate, Thiruthuraiipoondi. The learned Judicial Magistrate took cognizance of the offence on 22.02.2005 after deleting the Sections 307 and 450 IPC. Charges were framed by the learned Magistrate on 26.04.2005 and four witnesses were examined on 11.08.2005. Though A-1 to A-5 deferred cross examination of the witnesses, they were cross examined by the counsel for A-6. On the same day, the learned Assistant Public Prosecutor filed a petition u/s 323 Cr.P.C stating that on the basis of the evidence of P.W.1 and P.W.2 an offence under Sections 307 and 450 IPC are made out, which is an offence triable by the Court of Sessions and prayed for committal of the case to the Court of Sessions. The learned Magistrate on 15.09.2005 passed a detailed order, refusing to entertain such a prayer and further, passed severe strictures against the Assistant Public Prosecutor for moving such an application during the course of the trial.

5. The learned Assistant Public Prosecutor preferred a complaint before the Hon'ble High Court and after receiving the report from the District Judge, Nagapattinam, the present suo mottu revision has been taken on file by this Hon'ble Court. Notice was sent to the complainant and accused.

6. Learned Counsel appearing for A-1, A-3 to A-6 submits that they are prepared to take up the trial even if the case is committed to the Court of Sessions. However, A-2, who is a practising Advocate appears in person and submitted that no materials are available on record to commit the case to the Court of Sessions and the procedure adopted by the learned Magistrate is perfect and is in accordance with law.

7. The learned Government Advocate, submits that materials have been collected during the course of the investigation to substantiate the offence under Sections 307 and 450 IPC. After taking cognizance of the offence, the learned Magistrate would have committed the case to the Court of Sessions, but without doing so, after deleting Sections 307 and 450 IPC has chosen to take up the trial by himself. During trial evidence have been adduced to substantiate the offence under Sections 307 and 450 IPC. Learned Magistrate would have committed the case at the time when an application has been moved by the learned Assistant Public Prosecutor with a prayer to commit the case to the Court of Sessions. It was declined on erroneous reasons and the orders passed by the learned Magistrate is liable to be set aside.

8. I have perused the entire materials available on record and heard the

submissions made.

9. Five eye-witnesses have been examined by the police during investigation for the alleged occurrence and on a perusal of the statement, prima facie it appears that the offence under Sections 307 and 450 IPC are made out. Corroborative documentary materials also have been produced. On a perusal of the accident register, the injury sustained by one of the witnesses is narrated. With the materials collected during the investigation, an irresistible conclusion could be reached by the learned Magistrate that prima facie materials are made available to substantiate offence under Sections 307 and 450 IPC. There is no scope and power for deleting these two offences by the learned Magistrate.

10. While accepting a police report u/s 190(b) Cr.P.C, the learned Magistrate is empowered to take cognizance of an offence. u/s 209 Cr.P.C, when it appears to the learned Magistrate that an offence is triable exclusively by a Court of Sessions, it is mandatory that the case shall be committed to the Court of Sessions after observing the formalities prescribed u/s 207 and 208 Cr.P.C.

11. If the materials disclose that the offence is exclusively triable by the Court of Sessions, the Magistrate has got a duty to commit the case to the Court of Sessions. While considering whether the case should be committed to the Court of Sessions or not, the Magistrate has no jurisdiction to weigh the evidence as a trial Court. When the offence is exclusively triable by the Court of Sessions, the Committing Magistrate has no power to discharge the accused, nor has the power to take oral evidence save where specific provisions like Section 306 Cr.P.C enjoin. If prima facie case is made out, he has simply to commit the case. The Magistrate at the stage of 209 Cr.P.C is forbidden to apply his mind to the merits of the materials. In the instant case on hand the learned Magistrate evaluated the materials and discharged the accused for the offence u/s 307 and 450 IPC. After deletion, taken the case on his file and conducted the trial, which is prohibited under law.

12. Instead of elaborating the history, objects and reasons, procedure to be followed by the Magistrate, I can safely rely on a judgment of the Hon'ble Supreme Court in this regard. In a case reported in 1994 SCC Cri. 772 Raj Kishore Prasad v. State of Bihar and Anr. it has been held as follows:

8. ...Proceedings before a Magistrate u/s 209 CrPC are patently not trial proceedings and were never considered so at any point of time historically. There has never been any doubt on that account. Before the amendment of the Code of Criminal Procedure in the present form, commitment proceedings had the essential attributes of an inquiry and were termed as such. How do they continue to be so is the core question to determine and spell out the powers of the Magistrate u/s 209 CrPC. If proceedings u/s 209 CrPC continue to be an inquiry, Section 319 CrPC would be obviously attracted, subject of course to deciding whether the material put forth by the investigation could be termed as "evidence", as otherwise no evidence is recordable by a Magistrate in such

proceedings.

9. While enacting the Code of Criminal Procedure, 1973, the prefatory note before Parliament containing "Objects and Reasons" gave out the changes proposed to be made with a view to speed up the disposal of criminal cases. Item (a) specifically provided

the preliminary inquiry which precedes the trial by a Court of Session, otherwise known as committal proceeding, is being abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences.

10. The Law Commission beforehand in its 41st Report while recommending change on the subject opined as follows:

17.11 Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the Court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we propose in regard to such offences, the provision in this respect can take a simple form and can be placed in this chapter as forming part of the commencement of proceedings before Magistrates. It will be convenient to refer to this process as "commitment of the case to the Court of Session" although the procedure is radically different from the commitment proceedings at present provided in Chapter 18.

(ii) 214. (Section 209)- "Preliminary inquiries by Magistrates in cases exclusively triable by the Court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of inquiry provided for by the amendments made in 1955 and contained in Section 207A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems. Preliminary inquiries are, therefore, being dispensed with in cases triable by a Court of Session. However, to perform certain preliminary functions like granting copies, preparing the records, notifying the public prosecutor, etc. provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit the case to the Court of Session. As regards private complaints in cases triable exclusively by a Court of Session the inquiry into the complaint by the Magistrate under the existing Section 202 will serve the purpose of a preliminary scrutiny." SOR Gaz. of India 10-12-1970, Pt. II, Section 2, Extra., p. 1309 (1320).

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 Session. 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 Session, 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 Session is in order, so that it can proceed straightaway with the trial and that nothing is lacking in content, as per requirements 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 Court", because of the prelude 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 CrPC 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 Session.

12. This Court in *State of U.P. v. Lakshmi Brahman*¹ took a view which prima facie does not seem to be in accord with our views afore-expressed. It was held as follows: (SCC pp. 382-83, para 13)

The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry and the inquiry culminates in making the order of commitment. Thus, from the time the accused appears or is produced before the Magistrate with the police report u/s 170 and the Magistrate proceeds to enquire u/s 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. We find it difficult to agree with the High Court that the function discharged by the Magistrate u/s 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code.

From the text of the judgment it is clear that the Statement of "Objects and Reasons" reflecting legislative policy as to the quality of "inquiry" was not laid before this Court as well as the report of the 41st Law Commission recommending abolishing of "inquiry" before the Magistrate, which was responsible for the change. Had the Bench been apprised of the historical perspective, we have no doubt in our mind that the comprehension of the word "inquiry" as meant for Section 209 CrPC would have been the same as gathered by us on becoming cognizant of the legislative scheme for early disposal of cases triable by a Court of Session.

13. In the case on hand, after framing of charges, trial has been taken up. P.W.1 to P.W.4 consistently has given evidence that on the instigation of A-1 , A-4 stabbed P.W.2 and when P.W.2 warded of such an assault, sustained injury on his right hand. The knife was snatched from the accused and thereafter the accused ran away from the scene of occurrence. On a perusal of the evidence on record, prima facie materials are available to substantiate the offence under Sections 307 and 450 IPC.

14. u/s 323 Cr.P.C, after commencement of enquiry or trial, if the Magistrate finds at any stage of the proceedings before signing the judgment that the case is one which ought to be tried by a Court of Sessions, he shall commit it to the Court of Sessions. In the instant case, though it was not done while taking cognizance by the learned Magistrate at least on a perusal of the evidence of P.W.1 to P.W.4 and finding that prima facie materials are available to constitute an offence under Sections 307 and 450 IPC, would have committed the case. Commitment of a case could be done through two different channels. Even if it was not done during cognizance u/s 209 Cr.P.C it would have been done u/s 323 Cr.P.C, which reads as follows:

323. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Sessions, he shall commit it to that Court under the provisions hereinbefore contained [and thereupon the provisions of Chapter XVIII shall apply to the commitment so made].

15. A petition has been filed by the learned Assistant Public Prosecutor on 11.08.2005 u/s 323 Cr.P.C. In the order impugned, the learned Magistrate has observed that filing of such a petition u/s 323 Cr.P.C itself will be an interference in his administration of justice, that such a petition has been filed only for the purpose of protracting the proceedings, that nothing is available to substantiate the offence under Sections 307 and 450 IPC, that filing of such an application will amount to contempt of Court and filed only for the purpose of harassing and to threaten the accused. The learned Magistrate has questioned the locus standi of the learned Assistant Public Prosecutor for filing such petition, that such a petition u/s 323 Cr.P.C could be filed only on conclusion of the trial. After passing strictures recommended Departmental action against the learned Assistant Public Prosecutor.

16. On a perusal of the entire records on hand in the instant case, I find that the approach of the learned Magistrate is erroneous and ill-conceived right from the inception. While taking cognizance of the offence, if prima facie materials are available, it is the bounden duty of the learned Magistrate to commit the case to the Court of Sessions. When substantial materials are available to constitute an offence under Sections 307 and 450 IPC, I am unable to understand, how the learned Magistrate has deleted these two Sections of graver offences.

17. After recording the evidence, he would have corrected himself. On a perusal

of the evidence of P.W.1 to P.W.4, prima facie materials are available for the offence under Sections 307 and 450 IPC. To perpetuate the irregularity committed, the learned Magistrate refused to accept the prayer of the learned Assistant Public Prosecutor made by filing a petition u/s 323 Cr.P.C.

18. The reasonings of the learned Magistrate are erroneous, illegal and reflects total non-application of mind. It is unfortunate that such an incompetent Magistrate has condemned the legitimate filing of the petition by the learned Assistant Public Prosecutor and directed that proceedings should be initiated against Assistant Public Prosecutor. Since a separate departmental proceedings has been initiated against the learned Magistrate, I do not want to further elaborate in this regard.

19. In view of the observations made and the facts and the circumstances of the case, the order impugned dated 15.09.2005 is set aside and the present learned Magistrate is directed to proceed with the case in accordance with law to commit the case to the Court of Sessions without causing any further delay, after issuing notice to the parties concerned. The petition is ordered accordingly.