
(1993) 07 PAT CK 0019

In the Patna High Court

Case No : Death Reference No. 2/92 (R), Criminal Appeal Nos. 200, 202, 212/92 (R), and Government Appeal No. 2/93 (R)

Laxmi Paswan, Mungeri alias Sitaram Sao and Lallu Ram

APPELLANT

Vs

The State of Bihar
 The State of Bihar Vs Laxmi
Paswan and Girja Singh and Others

RESPONDENT

Date of Decision : 28-07-1993

Acts Referred:

Citation : (1993) 07 PAT CK 0019

Judgement

Narinder Singh Rao, J.—The above death reference as also the appeals against conviction and acquittal have arisen out of the same judgment. As common questions of law and facts are involved in the same, these have been heard together and are being disposed of by this common judgment.

2. Lami Paswan, Mungeri alias Sitaram Sao, and Lallu Ram appellants stand convicted u/s 396 of the Indian Penal Code on the finding that they had, along with their co-accused Chunghru Machhua and Rajesh Singh as also Lalit Sanga (subsequently turned approver), on 8-1-1992, after conspiring and kidnapping Smt. Gayatri Devi, wife of informant Sri Anand Swaroop Gupta, Advocate, Ranchi, robbed her of an amount of about Rs, two lacs and then committed her murder. Although they were also convicted under Sections 364 and 120B of the Indian Penal Code, but no separate sentence were awarded to them under those charges. Laxmi Paswan appellant, the alleged prime culprit, has been sentenced to death, and Mungeri alias Sitaram Sao and Lallu Ram appellants to undergo imprisonment for life. Feeling aggrieved, they have preferred their respective above noted appeals, and death reference of Laxmi Paswan appellant is also before us for confirmation of his capital punishment.

3. Along with Laxmi Paswan, Mungeri alias Sitaram Sao, and Lallu Ram appellants, Dinesh Kumar Singh had also faced trial for his allegedly committing the same offences, but he has been acquitted. Girja Singh had also faced prosecution under Sections 120B and 402 of the Indian Penal Code along with

the appellants, but he too has earned his acquittal. State of Bihar has filed aforementioned separate appeals against their acquittal.

Ghunghru Machhua and Rajesh Singh, also alleged participants in the crime, are facing their separate trial.

4. At the outset learned Counsel for the convict-appellants has successfully canvassed before us that as grave illegality has been committed in the trial, conducted on the basis of illegal commitment, the trial is to be held vitiated and the impugned judgment a nullity.

5. Records speak, over which there is no dispute, that during investigations, Lalit Sanga, aged about 16 years, who was allegedly arrested by A. S. I, Sheo Chandra Singh of Crime Control Cell, Ranchi, on 23-1-1992 and was got remanded to Remand Home, Ranchi, from Chief Judicial Commissioner, Ranchi, on the following day. After he (Lalit Sanga) had expressed his desire to become an approver in the case, his statement u/s 306 of the Code of Criminal Procedure (hereinafter referred to as the Code) was recorded by the Chief Judicial Magistrate on 25-1-1992. On 30-3 1992 pardon was granted to Lalit Sanga P.W. on condition of making full and true disclosure about the crime committed. Now, as Lalit Sanga, an alleged participant in the crime, had turned approver, it was mandatory to have examined him as a witness in commitment proceedings and also subsequently at trial. However, as he (Lalit Sanga) was not examined as such in committal Court, the order of commitment is necessarily held to be illegal, and the trial based thereon in total contravention of law.

6. The comparative position of law under the old and new Code with regard to committal proceedings was taken note of in Paragraphs 4 and 5 In re Ramasamy 1976 CLJ 770, and these read:

Under Section 207-A Sub-section (4), in Chapter 18 of the old Code, the Magistrate had to take the evidence of such persons, if any, as might be produced by the prosecution as the witnesses to the actual commission of the offence alleged and if the Magistrate was of the opinion that it was necessary in the interest of justice to take the evidence of any one or more of the other witnesses for the prosecution, he might take such evidence also and the accused was at liberty to cross-examine the said witnesses. Therefore, there was a primary duty on the part of the Magistrate to take evidence before applying Sub-section (6) or (7). As per Sub-section (7), if the Magistrate, after taking such evidence, was of the opinion that the accused should be committed for trial, he should do so. Thus, under the old Code, the Magistrate had no discretion to dispense with the examination of any one of the witnesses to the actual commission of the offence alleged. as produced by the prosecution. But, under the second part of Sub-section (4), it was purely within the discretion of the Magistrate to take the evidence of any one or more of the other witnesses of the prosecution in the interests of justice. So far as the examination of the approver is concerned, Sub-section (2) of Section 337 of the old Code would say that every

person accepting a tender under that section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. The main object of the examination of an approver is to obtain the evidence of such person or persons supposed to have been directly or indirectly concerned in or privy to the offence. Therefore, necessarily all the witnesses to the actual occurrence, including the approver, were being examined u/s 207-A of the old Code.

Section 209 of the present Code deals with commitment of cases to the Court of Session when the offence is triable exclusively by it. Section 306 is the corresponding provision to Section 337 of the old Code. Clauses (a) and (b) of Sub-section (4) of Section 306 of the present Code, correspond to Sub-sections (2) and (3) of Section 337 of the old Code, whereas Sub-section (5) of the present Section 306 corresponds to Sections 2(a) and 2(b) of the old Section 337. Under Sub-section (4)(a), the approver must be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) of Section 306 of the new Code reads that where a person has accepted a tender of pardon made under Sub-section (1) and has been examined under Sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case, commit it for trial to any one of the courts indicated in Sub-section (5), Clause (a). u/s 209 of the present Code, the examination of the witnesses to the actual commission of the offence alleged and also the examination of the other witnesses, as contemplated u/s 207-A of the old Code, have been completely dispensed with. What the present section says is that when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by a Court of Session, he shall commit the case to the Court of Session. In other words, the preliminary enquiries by the Magistrate in cases exclusive triable by the Court Session as contemplated under the old Code are now dispensed with. However, when there is an approver, he shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Therefore, whether the case is to be committed or made over, it is mandatory that the Magistrate taking cognizance of the offence shall examine the person accepting a tender of pardon made under Sub-section (1), viz., the approver, as a witness. In other words, the examination of the approver is a condition precedent for the committal. Therefore, Section 306 should be read in conjunction with Section 209. Any violation of the mandatory provisions of Section 306, Sub-sections (4) and (5), by the Magistrate taking cognizance of the offence, clearly amounts to an illegality which would vitiate the entire committal proceedings.

7. *Uravakonda Vijayaraj Paul Vs. The State and Others*, again mi authority on the point that where in a case exclusively triable by the Sessions Court an accused is tendered pardon and is taken as an approver, his examination as a witness u/s 306, (4) by the Magistrate taking cognizance of the offence is mandatory before

committal of the case to the Sessions Court. The Magistrate cannot dispense with the special procedure u/s 306(4) and commit the case by applying the procedure contemplated u/s 209, under which the examination of any witness is dispensed with and the Magistrate taking cognizance can straightway commit the case to the Sessions Court after complying, with the provisions of Sections 207 and 208. Therefore, the order of committal made without examining the approver as a witness u/s 306(4) is illegal. The examination of the approver as a witness u/s 304) means it should be done in the manner as provided u/s 138, Evidence Act. Section 273 provides that all the evidence taken in the Court should be in the presence of the accused. The provisions of Section 306(4) for examination of the approver are for the benefit of the accused, Therefore, unless the accused are given an opportunity to cross-examine the approver who is examined as a witness, it cannot be said that the mandatory provisions of Section 306(4) are complied with. Therefore, the mere recording of the statement of the approver would not amount to his examination as a witness and, therefore, the provisions of Section 306(4) cannot be said to have been complied with and the committal order made by the Magistrate would be illegal.

8. In the facts 6f State v. Shyantpada Mahato 1980 East Cr C 191, the committing Magistrate had not examined the approver in presence of the accused, but reliance was placed on his statement recorded u/s 164 of the Code. It was held that that statement can never be equated with his examination contemplated u/s 306(4) of the Code which obviously means his examination as a prosecution witness as per provisions of Section 138 of the Evidence Act, As such, the learned Committing Magistrate has committed an illegality and erred in law. This illegality cannot be cured by the approver's subsequent examination as a prosecution and his cross-examination during the trial before the court of Sessions. The provisions of Section 306(4) is mandatory and not directory and so the trial itself has been Vitiated because of the illegality committed. The trial is found to be prejudiced to the accused as the accused were deprived of their right to cross"-examine the approver before the case was committed

9. The above view has again been reiterated in catena of judicial pronouncements of various High Courts and Supreme Court, arid State (Delhi Administration v. Jagjit Singh 1989 CriLJ 96 as also State of Kerala and etc. Vs. Monu D. Surendran and Another etc., can be read with advantage on the point, wherein it has been specifically ruled that approver must be examined as a witness in committing Court and in trial Court also.

10. No judicial pronouncement to the contrary has been cited from the side of the State or the informant. Placing of reliance of Iqbal Singh Vs. State, etc., and V. Krishnan v. State of Tamil Nadu 1987 CriLJ 1012 from their side is of no help td them. These cages pertained to the commission of offences under Prevention of Corruption Act, wherein Special Judge is to follow the procedure of the trial of warrant cases by Magistrate, No commitment proceeding are Proceeding are envisaged in such cases and therefore, these reported decisions are

distinguishable from the fact of the case in hand

11. For reasons stated above, it having been found that the trial conducted in the case is against the mandatory provisions of law, being based on illegal commitment, and thus having been vitiated, the next point for determination is as to whether the case be remitted to the Court of Chief Judicial Magistrate for dealing with the commitment proceedings afresh in accordance with law and procedure. Submission of learned Counsel for the convict-appellants that as the latter have already undergone the ordeal of the trial, the case be not remanded, is not tenable. *Sochiram Vs. Emperor*, on which reliance has been placed, was a case, in which prosecution had failed to adduce necessary evidence which would have justified the conviction of the accused. It was held that the case should not be remanded by giving another opportunity to fill the gaps deliberately left by the prosecution. Similarly, the facts of *Mohinder Singh Vs. The State*, are distinguishable. In that case, the fact was taken note of that the convict had been in a state of suspense over his sentence of death for more than a year, and remanding of the case was deemed unfair for that reason, but while holding that where, there has been no fair and proper trial, even the Supreme Court in appeal will, in ordinary circumstances, remand the case for a fresh trial...The other relied case *Parbati Devi Vs. State of U.P. and Ram Narain*, was u/s 427. of the Indian Penal Code, in which the occurrence had taken place in 1967, complaint filed in September, 1968 and the FIR lodged in November, 19, 68, The dispute was of trivial nature and there was inordinate delay in conclusion of the trial. For that reason, although illegality was found in the trial, but the case was not remanded.

On the other hand, the instant case invokes the murder of Gayatri Devi which had taken place on 8-1-1992, Subsequent to completion of investigation, charge-sheet was submitted resulting in commitment proceedings, although illegal and then trial culminating in October, 1992. There was thus no delay in the completion of trial, and having regard to all facts and circumstances of that case, the same requires to be remanded.

12. In view of what has been stated above death-reference No. 2, of 1992 (R) is declined, and appeals of Laxmi Paswan, Mungeri alias Sitaram, Sao, and Lallu Ram appellants [Criminal Appeal Nos. 200, 202 and 212 of 1992 (R) respectively] are allowed. Their conviction and sentence are set aside. Government Appeal No. 2 of 1993 (R) against the acquittal of Girja Singh and Dinesh Singh is allowed, and their acquittal set aside. The case is remanded to the Court of Chief Judicial Magistrate, Ranchi, who will hold fresh commitment proceedings and shall examine Lalit Sanga approver in the same as a prosecution witness and further deal with the matter in accordance with law and procedure.

13. The conviction and sentences of Laxmi Paswan, Mungeri alias Sitaram Sao, and Lallu Ram appellants having been set aside, they shall hereinafter be treated as under trials. Girja Singh and Dinesh Singh whose acquittal in the case has been set aside, are ordered to be taken into custody for their being sent to jail as

under trials. Lalit Sanga, the approver, is also required to be taken into custody, and shall remain in custody during the course of fresh trial as per requirement of the law.

14. The lower Courts records are ordered to be returned forthwith. The Chief Judicial Magistrate, Ranchi shall proceed in the matter afresh in the light" of observations made above in dealing with the commitment proceedings.

S.K. Chattopadhyaya, J.

15. I agree.