

(1977) 09 GUJ CK 0009
In the Gujarat High Court

Narendra Amratlal Dalai

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 14-09-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 106, 19, 228, 29, 3
Penal Code, 1860 (IPC) — Section 408, 477A

Citation : (1978) CriLJ 1193 : (1978) GLR 165

Hon'ble Judges : Dhirajlal Pragji Desai, J

Bench : Single Bench

Judgement

D.P. Desai, J.—In peculiar circumstances, this petition has come to be filed. In fact, at the bar, a grievance was made as regards practice in vogue in some Courts of sending a criminal case from the Metropolitan Magistrate's Court to the Sessions Court and from the Sessions Court to the Chief Metropolitan Magistrate's Court and from there again, to the Metropolitan Magistrate's Court. This exactly seems to have happened in the present case, with the result that, as stated by the learned Advocate for the petitioner at the bar, the petitioner had to execute fresh bail and surety bond four times.

2. The following facts will be quite eloquent on this grievance and they now call for true and correct interpretation of the relevant provisions bearing upon the powers of the Magistrate and the Chief Metropolitan Magistrate (which interpretation would cover Judicial Magistrate and Chief Judicial Magistrate also) as regards sending of cases from one Court to another on the ground that the sentence which could be imposed by the Magistrate would not be adequate.

3. The petitioner was a cashier and he was charge-sheeted before the Metropolitan Magistrate, Second Court, Ahmedabad, with two separate offences, viz. criminal breach of trust punishable u/s 408 and falsification of accounts punishable u/s 477-A of the Indian Penal Code. Those two cases were numbered separately as Criminal Cases Nos. 1894 and 1896 of 1978. The amount involved as per the prosecution allegation in both the cases was about Rs. 6 lacs. The

learned Metropolitan Magistrate being of the opinion that he cannot pass adequate sentence in the case, committed the case to the Court of Session for the City of Ahmedabad. This was done in spite of the fact that the maximum sentence for the aforesaid two offences was imprisonment for seven years and in spite of the provisions of Section 29 of the Code of Criminal Procedure, 1973 (new Code), which conferred power on the Chief Metropolitan Magistrate to impose the sentence of seven years. Therefore, at least, this case could have been sent to the Chief Metropolitan Magistrate under the provisions of Section 325 of the new Code. Instead, the learned Metropolitan Magistrate straightway committed the case to the Court of Session. Even the Sessions Court could not have imposed a sentence of more than seven years for these two offences. Before this order of commitment was passed, both the above cases were amalgamated into one case and then, that case was committed to the Court of Session. It was numbered as Sessions Case No. 7 of 1977 in the Sessions Court. When that case came up for hearing after framing charge before the Sessions Court, the learned Sessions Judge having found that both the offences were punishable with the maximum sentence of seven years, acted u/s 228(1)(a) of the new Code. He framed a charge as contemplated by that section for offences punishable u/s 408 and Section 477A of the Indian Penal Code and sent the case for trial to the Chief Metropolitan Magistrate. Speaking with respect, the Chief Metropolitan Magistrate rather adopted an unusual course, purporting to exercise powers as regards "distribution of business", conferred upon him u/s 19 of the new Code. By his Office Order No. A (VI) 11/77, he transferred the case to the Court of the Metropolitan Magistrate, Second Court. The result was that the petitioner found himself in the same Court again, which had sent him to the Sessions Court. This is really unhappy and it has impelled this Court to construe the relevant provisions so as to see that, in future, an accused person is not unduly tossed from one Court to another, by exercise of powers, conferred upon the Court, with regard to sending of the case to another Magistrate or the Sessions Court, on the ground that the accused cannot be adequately punished by the concerned Magistrate.

4. The narration of facts will not be complete without stating that, after sending of this case to the Metropolitan Magistrate, Second Court, the petitioner applied to the Chief Metropolitan Magistrate by Transfer Application No. 14 of 1977 stating that the case should be transferred back to the Chief Metropolitan Magistrate's Court, pointing out therein that the order was passed by the Sessions Court u/s 228 of the Code and the Chief Metropolitan Magistrate has to try this matter. This application was heard by the learned Chief Metropolitan Magistrate, who, by his order dated July 19, 1977, dismissed the same. He held that the word "shall" showing the mandatory nature of the provisions of Section 228(1)(a) which required the case sent to him by the Sessions Court to be tried by him, should be construed as "may". Then he relied upon his powers u/s 19 of the Code as regards distribution or allocation of business by him amongst the Metropolitan Magistrates. It is against this order that the petitioner has come to

this Court by way of this petition.

5. The provisions which are relevant upon the controversy raised in the present case are Sees. 19, 228 (1) and (2), 323 and 325 of the Code. They read as under:

19. (1) The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purpose of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

(3) The Chief Metropolitan Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate.

xx xx xx xx 228. (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate, shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

xx xx xx xx 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 Session, he shall commit it to that Court under the provisions hereinbefore contained.

xx xx xx xx 325. (1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond u/s 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under Sub-section (1). in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

The words "Chief Judicial Magistrate" occurring in Section 228(1)(a) and Section 325 have reference to "Chief Metropolitan Magistrate" and the word "Magistrate" occurring in Sections 323 and 325 has reference to Metropolitan Magistrate in view of the provisions of Section 3(1)(d) and Section 8(1)(a) of the Code. It may also be pointed out that, u/s 29 of the new Code, the Chief Metropolitan Magistrate can pass any sentence authorized by law except a sentence of death or imprisonment of life or of imprisonment for a term exceeding seven years and the Metropolitan Magistrate can pass a sentence of imprisonment for a term not exceeding three years or fine not exceeding Rs. 5.000/- or both.

6. The first question which arises for consideration is, is it open to a Judicial Magistrate or a Metropolitan Magistrate, in a case where he feels that the accused ought to receive a punishment different in kind from, or more severe than, that which he is empowered to inflict, to commit the case straightway to the Court of Session u/s 323 instead of exercising his powers in that connection u/s 325? A bare reading of the two sections will show that Section 323 is general in nature, whereas Section 325 provides for specific category of cases. In case of a Magistrate, therefore, where he feels that the accused ought to receive a punishment different in kind or more severe than that which he can impose, his only course is to resort to Section 325. That being a specific provision must govern the case. This is a well-known rule of interpretation. But then, it may well be said, though it has not been argued before this Court, that the Magistrate may feel that the given case before him deserves punishment exceeding seven years, which the Chief Judicial Magistrate or, for the matter of that, the Chief Metropolitan Magistrate, cannot award. Therefore, in such a case, it may be said that the Magistrate or the Metropolitan Magistrate can exercise his powers to commit the case to the Court of Session u/s 323 of the Code. Of course, it must be re-emphasised that, in the present case, that contingency never arose, and still, the learned Magistrate committed the case to the Court of Session, without applying his mind to the provisions of Section 325 of the new Code. But. this possible contention must also be dealt with by a process of interpretation, so that, there may not be any uncertainty left as to the scope of the powers of a Magistrate or a Metropolitan Magistrate who wants to act on the ground that the accused before him ought to receive a punishment different in kind from, or more severe than the one which he is competent to inflict. It Is, at this stage,

that we can refer to Section 29 of the Code, according to which a Magistrate of First Class or a Metropolitan Magistrate can award sentence, not exceeding three years, or fine not exceeding Rupees 5,000/-, or both. The approach that the Magistrate or Metropolitan Magistrate should adopt in such cases is, whether the accused before him ought to receive punishment of more than three years, or a fine of more than rupees five thousand. He is not required to consider whether the punishment called for in the case before him is seven years or more than seven years and, on that consideration, to send the case to the Chief Judicial Magistrate or Chief Metropolitan Magistrate in one case and to the Sessions Court in other. There is no indication of legislative intent giving such free play in the exercise of power to a Magistrate or Metropolitan Magistrate in a case which deserves sentence higher than the one he could inflict. In fact, Sub-section (1) of Section 325 itself gives an indication that the relevant factor for consideration is, whether the punishment which ought to be received by the accused in the case before him should be more severe than the punishment which he is competent to inflict. Therefore, this is the only criterion which he has to follow, without worrying himself on the question whether the punishment larger than that within the competence of the Chief Judicial Magistrate or Chief Metropolitan Magistrate is required to be inflicted. If this is the correct criterion which the Magistrate or Metropolitan Magistrate should consider in such a situation, it is obvious that he cannot commit the case to the Court of Session directly. He must hear the evidence for the prosecution and the accused, form an opinion that the accused is guilty, and then, also form an opinion that the accused should receive a punishment, different in kind, or more severe than that which he is competent to inflict. Having formed and recorded those two opinions, he has to submit the proceedings to the Chief Judicial Magistrate or to the Chief Metropolitan Magistrate, as the case may be, to whom he is subordinate. Therefore, on a correct interpretation of the relevant provisions, no Magistrate can straightway commit a case to the Court of Session, u/s 323, on the ground that the punishment that the accused should receive ought to be different in kind and more severe than that which he is competent to inflict. He has got to follow the procedure u/s 325 of the Code and there is no other alternative left for him in such a case. It follows as a necessary consequence that, after following the procedure u/s 325, if he comes to the opinion contemplated by Sub-section (1) thereof, he has to submit the proceedings to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate, as the case may be.

7. Now, suppose, before a Chief Judicial Magistrate, or a Chief Metropolitan Magistrate, the case involves an offence of a gross nature and the sentence which he ought to award must exceed seven years, what is the Chief Judicial Magistrate or the Chief Metropolitan Magistrate to do? Sub-section (3) of Section 325 in such a case enables the Chief Judicial Magistrate to pass such order in the case as he thinks fit and is according to law. He can, therefore, commit the case submitted to him u/s 325(1) to the Court of Session u/s 323 of the new Code. The word "Magistrate" occurring in Section 323 in this connection should be held

to include a "Chief Judicial Magistrate", or a "Chief Metropolitan Magistrate" as well. It must be made clear, however, that this interpretation does not affect the power of a Magistrate or a Metropolitan Magistrate to commit u/s 323 of the new Code a case to the Court of Session wherein a question other than the quantum of punishment, which ought to be received by the accused, is involved. It is cases other than the punishment which ought to be received by the accused as contemplated by Section 325(1) in which a Magistrate or a Metropolitan Magistrate can have resort to Section 323 of the new Code. This resolves the first controversy arising from the facts of this case. Viewed in the light of this interpretation, the learned Metropolitan Magistrate, Second Court, was wrong in straightway committing this case to the Court of Session ignoring the provisions of Section 325(1) of the new Code. I am told that he did not even record the evidence, much less entertain an opinion, contemplated u/s 325(1), and, straightway, committed the case to the Court of Session, on the strength of the evidence, disclosed from the police papers.

8. The case having come before the Sessions Court, the learned Sessions Judge was right in the facts of this case in exercising its power u/s 228(1)(a) in framing the charge u/s 408 and Section 477A of the Indian Penal Code and transferring the case for trial to the Chief Metropolitan Magistrate. Offences under both the provisions were triable by a Magistrate of the First Class, and looking to the amount involved in the two cases which have been amalgamated, there was reasonable ground for the learned Judge to entertain an opinion that a sentence of more than three years can as well be called for in the present case if the accused has been found guilty and is convicted of the aforesaid two offences. But then, a very unusual step was taken by the learned Chief Metropolitan Magistrate after receipt of the case papers by him by transferring the said case back to the Metropolitan Magistrate, Second Court, ignoring the mandate contained in the latter part of Section 228(1)(a) which said that "...the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report." It is obvious that the power exercisable by the learned Chief Metropolitan Magistrate u/s 19 of the Code with regard to "distribution of business" among the Metropolitan Magistrates was an administrative power. He could not have exercised this administrative power in the facts of the present case in the face of a legislative command contained in Section 228(1)(a) of the new Code. But, in rejecting the application of the petitioner, the learned Chief Metropolitan Magistrate said with regard to the word "shall" occurring in Section 228(1)(a) as under:

Merely from the fact that the word "shall" is used, it cannot be said that the provision is mandatory and so the Chief Judicial Magistrate must himself try the said case. The section may be interpreted by construing the word "shall" as to mean "may", depending upon the circumstances of the case, relevant provisions and the evil which these provisions wanted to avoid. It can be also seen from Section 228 of the Criminal Procedure Code that that section enables the Sessions Judge to transfer the case to the Chief Metropolitan Magistrate, but the

emphasis is not on the point that the trial must be done by him personally but the emphasis is on the procedure to be adopted at the trial of such cases.Such transfer does not take away or restrict the administrative powers of the Chief Metropolitan Magistrate to transfer the case to any of his subordinate Magistrates...". There is no good reason given by the learned Chief Metropolitan Magistrate why the word "shall" occurring in Section 228(1)(a) of the new Code should be construed as "may". The section speaks of transfer to a designated Magistrate, viz. the Chief Judicial Magistrate and not to any Magistrate or Court subordinate to the Sessions Court. Normally a case committed to the Sessions Court pertains to a serious offence, or arises out of an incident in the course of which a serious offence or offences are committed. The legislative intent, therefore, is that the Sessions Judge has to transfer this case to the Chief Judicial Magistrate who would be an experienced and senior officer of the Magistracy working in his district; and the said officer should try the case. The emphasis is both on the point of Chief Judicial Magistrate trying the case and the procedure to be followed at the trial. It is, therefore, clear in the present case that on its transfer after framing charge by the Sessions Judge, the learned Chief Metropolitan Magistrate was bound to try the offence as laid down by the provisions of Section 228(1)(a). The office order passed by him administratively, sending back the case to the Metropolitan Magistrate, Second Court, cannot stand, in view of the legislative mandate contained in Section 228(1)(a). In fact, Section 19(3) of the new Code contemplates rules or special orders to be made by the Chief Metropolitan Magistrate as to the distribution of business to be consistent with Code. The order made by him on the interpretation of Section 228(1)(a) is inconsistent with that provision and, therefore, is not valid. It is thus clear that the present case is required to be tried by the learned Chief Metropolitan Magistrate.

9. In the result, the petition is allowed and the order passed by the learned Chief Metropolitan Magistrate, dated July 19, 1977 rejecting the application of the petitioner for transfer of the two Criminal Cases to his Court, is set aside. Criminal Cases Nos. 1894 of 1976 and 1896 of 1976 which stood transferred to his Court by reason of the order passed u/s 228 by the learned Sessions Judge in Sessions Case No. 7 of 1977 are ordered to be re-transferred to the Court of the learned Chief Metropolitan Magistrate with a direction that he shall try the offences involved in these two cases as contemplated by Section 228(1)(a) of the new Code. Rule is made absolute in these terms. Ad interim stay of the proceedings will stand vacated.