
(1971) 11 OHC CK 0019
In the Orissa High Court
Case No : Criminal Revision No. 163 of 1971

Sarbeswar Biswal

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-11-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 173, 201A(7), 207A, 207A(3), 207A(4)

Penal Code, 1860 (IPC) — Section 147, 148, 149, 23, 302

Citation : (1971) 37 CLT 1283

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : J. Swain, for the Appellant; Standing Counsel, H. Kanungo and H.N. Kanungo, for the Respondent

Judgement

B.K. Patra, J.—One Biswanath Jena was found murdered at about 12 noon on 5-12-1969. Sarbeswar Biswal, the Petitioner in this case, lodged information about the murder at the Polio Station at about 2-40 P.M. that day (G.R. Case No. 1478 of 969). On the next day at about 5 P.M., one Janardan Padhan lodged information at the Police Station that at about 12 noon on 5.12.1969, the Petitioner (Sarbeswar Biswal) and seven others came armed and assaulted Janardan (G.R. Case No. 1479/69). Both these cases were investigated by the Police. In G.R. Case No. 1478/69, a charge sheet u/s 302, Indian Penal Code and Borne other allied sections was submitted against Sarbeswar Swain. A charge-sheet under Sections 147/341/323/ 324/149, Indian Penal Code was filed against the Petitioner and seven others in G.R. Case No. 1479 of 1969. After necessary enquiry, Sarbeswar Swain was committed to the Court of Sessions to stand his trial. The very same Magistrate took up for trial the other case G.R. 1479 of 1969 against the Petitioner and seven others. After perusing the necessary papers filed u/s 173, Code of Criminal Procedure, the Magistrate framed charges under Sections 147 arid 323, Indian Penal Code against the accused persons to which they pleaded not guilty and claimed to be tried. Thereafter, prosecution

witnesses were summoned to be examined in Court. On 16-1-1971, out of the three prosecution witnesses present, only one witness, namely, the informant in the case was examined and the Prosecuting Inspector declined to examine the others at that stage. The case was adjourned for orders to 18.1.1971. Order was not ready on the 18th and the case was adjourned to the next day and on the 19th, the learned Magistrate passed orders framing charges against the accused persons under Sections 147/323, Indian Penal Code and committed them to the Court of Sessions to stand their trial on the ground that it is a counter case to G.R. Case No. 1478/69 in which the accused persons had already been committed to the Court of Sessions and that for better appreciation of the evidence and in the interest of justice, it is necessary that the accused persons in G.R. Case No. 1479 of 1969 (the case of the Petitioner and seven others) should also be tried by the Sessions Court. It is to quash this order of commitment that the present revision application has been filed by Petitioner.

2. Although several grounds are mentioned in the petition, the grounds that are pressed are the following:

(1) Offences under Sections 147 and 33, Indian Penal Code not being triable by a Court of Sessions, the Magistrate erred in committing this case to the Court of Sessions.

(2) Although there were six eye witnesses to the occurrence, the Magistrate examined only one and did not record any reasons as to why the other witnesses were not examined.

It is contended that the commission and omissions referred to above resulted in great prejudice to the accused persons.

3. Undoubtedly, as the events recorded earlier would show, the trial of the case commenced by following the procedure laid in Section 251-A, Code of Criminal Procedure for trial of warrant cases instituted on police report. This is evident from the fact that at the commencement of the trial, presumably on perusal of papers submitted u/s 173, Code of Criminal Procedure charges were framed against the accused persons and a date was fixed for examination of prosecution witnesses. It is only on 16.1.1971 that the learned Magistrate appears to have decided, obviously at the instance of the prosecution, to follow the procedure laid in Section 207-A, Code of Criminal Procedure to commit the accused for trial by the Court of Sessions. Doubtless, offences under Sections 147 and 323 are triable by any Magistrate. But Section 347, Code of Criminal Procedure provides that:

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 Sessions or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions herein before contained.

The expression "under the provisions hereinbefore contained" has been interpreted to mean provisions contained in Chapter XVIII of the Code relating to inquiry into cases triable by Court of Sessions. This, however, does not mean that the Magistrate must being ever gain from the beginning. All that he has to do when he decides that the case ought to be committed is to inform the accused and see that the provisions of Chapter XVIII are complied with so far as they have not been complied with up to the stage at which he decides that there ought to be a commitment. There is nothing on the record to indicate that this was done by the Magistrate, and to that extent, there has been failure on the part of the Magistrate to discharge his duty. This failure, however, does not appear to me to have caused any material prejudice to the accused. Sub-section (7) of Section 201-A, Code of Criminal Procedure, provides that if the Magistrate after taking such evidence as is referred to in Sub-section (4) and considering the documents referred to in Section 173, and after the accused is given an opportunity of being heard, is of opinion that the accused should be committed for trial, he should frame the charge. In this case, witness for the prosecution had been examined, and after perusing the papers referred to in Section 173, Code of Criminal Procedure, the Magistrate framed the charge. In these circumstances, therefore, I feel that the Petitioner has not been materially prejudiced by reason of the fact that the accused persons had not been specifically informed of the fact that the Magistrate instead of trying the case himself intended to commit the accused for trial to the Court of Sessions.

4. The second ground argued on behalf of the Petitioner is of considerable importance and rests upon the correct interpretation of Sub-section (4) of Section 207-A of The Code. Sub-section (3) of Section 207-A says that at The commencement of the committal inquiry, the Magistrate should ensure that the documents referred to in Section 173 have been furnished to the accused. Then occurs Sub-section (4) which reads thus:

The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the Actual commissions of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of anyone or more of the other witnesses for the prosecution he may take such evidence also.

This sub-section is in two parts. The first part clearly indicates that the prosecution is not obliged to produce all the witnesses to the Actual commission of the offence alleged, for examination at the stage of preliminary inquiry. The prosecution is clearly given a discretion to choose if it so desires only, only some of these eye witnesses and produce them for examination. But the Magistrate is bound to examine all such witnesses as are produced by the prosecution. Under the second part of the sub-section the Magistrate has got the discretion to examine one or more of the remaining witnesses for the prosecution, if he is of opinion that it is necessary in the interests of justice to take the evidence of anyone or more of The other witnesses for the prosecution.

These other witnesses will necessarily include such of the witnesses to the Actual commission of the offence who have not been produced by the prosecution and also The witnesses who are to give circumstantial evidence. It cannot, therefore, be contended that u/s 207-A, the prosecution is bound under the first part of Sub-section (4) to examine all the witnesses to the actual commission of the offence and that if the prosecution fails to do so, the Magistrate his bound under the second part of the same sub-section to examine them. Such an obligation on the part of the Magistrate cannot be read into the language of the sub-section. The first part undoubtedly lays an obligation on the part of the Magistrate, but it is only an obligation to examine such of the witnesses to the actual commission of the offence as the prosecution chooses to produce before him. The second part only confers a power and a discretion on the Magistrate to examine on his own account witnesses other than those examined by the prosecution, if he considers it to be necessary in the interests of justice to do so. The magistrate must undoubtedly apply his mind to the question as to whether some more or other of the prosecution witnesses than the prosecution has produced ought to be examined in the interests of justice and he must exercise the powers and the discretion conferred on him judicially.

5. The question, however, is whether it (sic) mandatory for The Magistrate in The case where in exercise of the judicial discretion vested in him under the second part of Sub-section (4) he does not consider is necessary to examine any other witnesses to record his reasons for coming to such a conclusion and whether the failure to record such reasons vitiates the commitment. The learned Advocate for the Petitioner contends that non-recording of reasons vitiates commitment and relies in support of his contention on a decision of this Court in *State Vs. Sibe Singh*, . The relevant portion of the judgment on which reliance is placed runs thus:

On analysis, the position is clear that if any of the eye witnesses to the Actual commission of the offence are produced by The prosecution, the Magistrate is bound to take their evidence. Even if the prosecution does not produce the witnesses to the Actual commission of the offence, the Magistrate may decide for himself if he is to examine any or all of those witnesses in the interest of justice. If after recording reasons, be comes to the conclusion that no such witness need be examined, it is open to him to direct commitment on other materials referred to in Sub-section (6).

This decision follows an earlier decision of this Court in *Chintamani Thapa and Others Vs. State of Orissa*, . In both these cases, there were eye witnesses to the occurrence, but the prosecution did not examine any of the eye-witnesses and the magistrate after perusing the papers u/s 173, Code of Criminal Procedure committed the accused to the Court of Sessions. The commitment orders were-quashed in both the cases on the ground that reasons were not recorded by the Magistrate as to why he did not examine any of the witnesses to the Actual commission of the offence. In support of this view, the learned Judice relied upon

the decision of the Supreme Court in *Kirpal Singh v. State of Uttar Pradesh* AIR 1955 S.C. 712. In that case, the accused was convicted on a charge of murder and was sentenced to death. The High Court upheld the conviction and the sentence and the appeal by special leave to the Supreme Court was also dismissed. That was a case where in spite of the fact that there were several eye-witnesses to the occurrence, the committing Magistrate committed the accused to the Court of Sessions without recording the evidence of all the eye witness. Deprecating the procedure their Lordships observed in para 7 that-

The Magistrate has in the inquiries relating to charges for serious offences like murder the power and indeed a duty in the interest of the accused as well as in the larger interest of the public to record the evidence of other witnesses who throw light on the case examination of witnesses to the actual commission of the offence should in inquiries for committal on charges for such serious offences be the normal rule. The prosecutor is expected ordinarily to examine in the Court of the committing Magistrate all witnesses to the Actual commission of the offence : if without adequate reasons be-fails to do so, the Magistrate is justified and in enquiries on charges for serious offences is under a duty to call witnesses who would throw light upon The prosecution case. xx xx xx.

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Exercise of that discretion must be judicial; it is not to be governed by any set rules or standards, but must be adjusted in the light of circumstances of The case.

xx xx xx A Magistrate failing to examine witnesses to The Actual commission of the offence because they are not produced, without considering whether it is necessary in The interest of justice to examine such witnesses, in our judgment, fails in The discharge of his duties.

Their Lordships had nowhere expressly stated that the Magistrate should record his reasons for not examining the other eye-witnesses. There is nothing in Sub-section (4) of Section 207A, Code of Criminal Procedure casting any such duty on the Magistrate. It is true that when law requires that in every case of commitment, the Magistrate should consider for himself whether it is necessary in the interest of justice that he should examine any of the witnesses not produced by the prosecution and when the commitment is called in question before superior Courts, the latter should be in a position to know whether or not the Magistrate had exercised his discretion judicially and this would be possible only if the Magistrate leaves a, record embodying the result of his consideration. But there is nothing in the decision of the Supreme Court to indicate that failure on the part of the Magistrate to record the reasons would vitiate the order of commitment. If that was their Lordships' view, the appeal before the Supreme Court in *Kirpal Singh's* case would, have succeeded on the ground that the trial which was not proceeded by a proper order of commitment was no trial under the Code. But as already indicated, *Kirpal Singh's* appeal was dismissed. This, in

my opinion, is sufficient to indicate that failure on the part of the Magistrate to record reasons for not examining other eye-witnesses to the occurrence does not vitiate the order of commitment.

6. In this connection, I may refer to an earlier decision of this Court in *Mango Lohors and Ors. v. the State* AIR 1965 Orissa 214. That was a case of commitment of the accused persons to stand their trial on charges under Sections 148, 149, 436 and 302, Indian Penal Code. There were eye witnesses to the occurrence. But none of them was examined before the Magistrate, who after examining the documents u/s 173, Code of Criminal Procedure came to hold that a case for committal had been made out against the accused persons. There is nothing to indicate that the Magistrate anywhere recorded reasons for not examining any of the witnesses in exercise of his power under the second part of Sub-section (4) of Section 207A, Code of Criminal Procedure. The accused persons challenged the legality of the commitment order on the ground that no occurrence witnesses were examined before the committing Court. The learned judge rejected this contention and refused to quash the order of commitment. This decision does not appear to have been brought to the notice of the learned Judge who decided the two subsequent cases in *Chintamani Thapa and Others Vs. State of Orissa*, and *State Vs. Sibe Singh*, .

7. The charge against the Petitioners in the present case is only under Sections 147 and 23, Indian Penal Code. As already indicated, this is in the nature of a counter case to the main case of murder which has already been committed to the Court of Sessions. It is, therefore, that the learned Magistrate thought it fit to commit this case also to the Court of Sessions, although the Case against the Petitioner could have been tried by any Magistrate. One of the eye-witnesses to the alleged occurrence was also examined by the prosecution and his evidence make out a prima facie case against the Petitioner. In my opinion, therefore, the commitment of the Petitioner to stand his trial in the Court of Sessions appears to be justified and cannot be quashed merely on the ground, that the Magistrate has not recorded reasons for not examining the other eye-witnesses to the occurrence.

8. In the result, I find no merit in this application which is accordingly dismissed.