
(1985) 02 BOM CK 0014
In the Bombay High Court

Sopan Namdeo Hadke

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-02-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227, 228, 91

Citation : (1985) CriLJ 1642

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Judgement

V.S. Kotwal, J.

1 to 6. (After stating the question of procedural law which fell for adjudication vis-a-vis the scope of provisions contained in Sections 91, 227 and 228 of the Code of Criminal Procedure and (be facts of the case, His Lordship proceeded,)

7. A cursory reference to some of the relevant provisions of the Code may become necessary to resolve the controversy. In that behalf, the marked and sharp change in the procedure of the Sessions trial in the new Code becomes apparent from the one prescribed in the old Code which has been replaced in the year 1973. In so far as case instituted on a police report for an offence exclusively triable by the Court of Session the old Code prescribes a different procedure for committal. u/s 207-A the committing Magistrate is seized of the matter once the police report is forwarded u/s 173 of the Code. It was necessary for the prosecution previously to adduce the evidence at least of the direct witnesses before a committal order could be passed which has now been completely dispensed with under the new Code. Consequently, under that provision under Sub-section (2) the Magistrate was enjoined to summon the witnesses as being necessary at the instance of the prosecution. The accused on his appearance was required to be furnished with the necessary documents referred to in Section 173. Sub-section (4) envisages that the Magistrate to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence with discretion vesting in the

Magistrate to allow any evidence of other category if found necessary which was a discretionary, one which however was not available as regard the direct evidence, The accused shall be at liberty to cross-examine the said witnesses. Under Sub-section (6) then arose the obligation of the learned Magistrate to consider the documents referred to in Section 173 as also the evidence recorded under Sub-section (4) and he was given discretion to examine the accused if found necessary to explain certain circumstances and was then enjoined to hear the prosecution and defence. After this exercise if the Magistrate felt that the entire bunch of evidence and documents disclose no grounds for committing the accused for trial then he is to discharge by supplementary reasons. Under Sub-section (7) the alternate plank enjoined the Magistrate to frame a charge for the concerned offence after considering the said evidence and the documents and hearing the parties. Thereafter the accused was to explain the charge as he is required to give list of witnesses to examine in his defence at the trial. It is thereafter that Sub-section (10) provides that there was obligation on the Magistrate to commit the accused to the Sessions Court to face the trial with short reasons for committal. The witnesses to be examined in defence at the Sessions trial were to be summoned by the Magistrate to appear before the Sessions Court provided the Magistrate felt that the list of witnesses was more vexatious than genuine. It is thereafter that the Sessions Court comes into picture as per the provisions contained in Chapter XXIII pertains to trial referred to the Court of Session. A charge is required to be framed afresh which is to be explained to the accused and his plea is recorded. When there is a plea of not guilty then the stage is set for a trial when the evidence is led by the prosecution after completion of which the accused is called upon to enter into his defence and it is at that stage the accused used to get a right to examine any witnesses in his defence. It is thereafter that on hearing both the parties that the final verdict was required to be given.

8. There is a drastic change and departure of this procedure in the new Code. Chapter XVI relates to commencement of proceedings before the Magistrate. u/s 204 the Magistrate has to issue process when there is sufficient ground for proceeding. u/s 207 the copies of relevant documents are to be furnished to the accused. Then comes into picture Section 208 envisaging that a case otherwise than police report, it appears to the Magistrate issuing process against the accused that that offence is triable exclusively by the Court of Session. The Magistrate shall furnish various documents to the accused which include the statements recorded under sections 200 and 202 examined by the Magistrate, statements u/s 161 recorded by the police agency as also statements and confessions, if any, u/s 164 and the third category is referred to as "Any documents produced before the Magistrate on which the prosecution proposes to rely".

9. Section 209 is the next logical provision in the chronological order under which the Magistrate can commit the accused to the Court of Session when it appears to him that the offence is triable exclusively by the Court of Session. It is

relevant to note that emphasis is about the satisfaction of the Magistrate vis-a-vis the offence being triable by the Sessions Court without any reference to the accused. Subject to the provisions relating to bail he can remand the accused to the custody and then transmit the record to the Court of Session and notify the Public Prosecutor. The construction of the provisions of Section 207 and scope of a committal proceeding in the context of the jurisdiction of the committing Magistrate have been elaborately considered by this Court in Criminal Appln. No. 1051 of 1980 with Criminal Appln. No. 1062 of 1980 *Dr. Dattatraya Samant v. State of Maharashtra* and *Arun Mahadeo Naik v. State of Maharashtra* respectively decided on August 27, 1980 : reported in 1981 Cri LJ 1819 and therefore it need not be re-stated.

10. It is thereafter that the Court of the Committing Magistrate recedes in the background and emerges on the scene the Sessions Court with the procedure prescribed in Chapter XVIII. It is apparent from the examination of this provision and the committal proceeding that the necessity and requirement to lead evidence in the committal proceeding has now been completely dispensed with and the Magistrate on the basis of the documents and the record on being satisfied that the offence exclusively triable by the Sessions Court is made out has to commit. After the said record is lodged in the Court of Session the accused appears before the Sessions Court and then Public Prosecutor has to open his case by describing the charge and indicating the framework of the evidence that he proposes to adduce in favour of the charge. Then comes into picture the two relevant provisions which follow this provision namely Sections 227 and 228 which are concentrated on the question of framing of the charge. u/s 227 the Sessions Court is enjoined to consider the record of the case and the documents submitted therein and after hearing the submissions of both the parties if (he learned Judge considers that there is no sufficient ground for proceeding against the accused then he has an obligation in law to discharge the accused giving the reasons for the same. If the situation is otherwise then Section 228 comes on the surface under which after consideration of the said documents and hearing the parties if the learned Judge is of the opinion that there is ground for presuming that the accused has committed the offence then the question of discharge is wiped out and two other questions emerge on the forefront, the one is whether the offence is exclusively triable by the Court of Session in which event he has to frame a charge against the accused or in the alternative if the offence disclosed is not exclusively triable by the Court of Session still he has to frame a charge, transfer the case for trial to the learned Chief Judicial Magistrate and it is thereafter that the concerned Magistrate has to try the accused for the said offence. In case the charge is framed by the Sessions Court for an offence exclusively triable by the Court of Session then the stage be set for trial on that forum and the further provisions follow. The plea of the accused is recorded and plea of not guilty warrants a trial. The prosecution evidence is then recorded and the accused has to cross-examine the witnesses. Then there is a further obligation after the prosecution evidence is over inasmuch

as the learned Judge considers that there is no evidence that the accused has committed the offence he has to record an order of acquittal which is thus being done without calling upon the accused to enter in his defence. If however he did not do so then the accused is called upon to enter on his defence and is permitted to adduce any evidence in support of that defence. It is thereafter that the parties are once again heard and the final verdict is given. The distinct departure and distinction in the procedure under the old and the new Code is manifest and requires no re-stating.

11. It may not be out of place to refer to some other provisions including Section 173 of the Code in the wake of this controversy which will require to be transplanted even in these provisions under Sections 227 and 228. Thus for instance, the police officer taking charge of the investigation on completion thereof is required to furnish to the Magistrate after taking cognizance of a report giving the necessary details which gets the label as the charge-sheet. The documents which are required to be furnished along with the report are prescribed in Sub-section (5) of Section 173 which include all documents or their extracts on which the prosecution proposes to rely other than those which are already sent to the Magistrate during the investigation as also the statements recorded u/s 161 of the Code and the persons whom the prosecution proposes to examine as their witnesses. Sub-section (6) of Section 173 gives a further discretion to the Investigating Officer under which he can append a note requesting the Magistrate to exclude that part of statement or document which in his opinion need not be given to the accused for certain reasons in which event that part can be excluded unless of course the learned Magistrate is satisfied about its validity. A further investigation is stipulated u/s 168 with which we are not much concerned.

12. This provision of Section 173 gives a clear idea as to what documents are to be furnished to the Magistrate along with the charge-sheet and the dominant part is that the police agency has to furnish only those documents on which the prosecution proposes to rely and it is further high-lighted that even in respect of the statement u/s 161 the documents are to be furnished vis-a-vis those witnesses whom the prosecution intends to rely. u/s 207 of the Code the Magistrate has to furnish copies of such documents which are forwarded by the police agency to the Magistrate which are brought into existence u/s 154, 161 or 164 of the Code and which in a bunch form the subject-matter of the provisions of Section 173. It is on the examination of all these documents which are so forwarded that the learned Magistrate has to arrive at an ex facie satisfaction as to whether the offence exclusively triable by the Court of Session is disclosed in which event the accused is committed. In that process he has to forward the papers which are styled as record of the case and the documents and articles which are to be produced in evidence meaning thereby that first it is only that bunch of documents on which the prosecution intends to rely is to be forwarded to the Magistrate. It is this bunch of documents the copies of which are to be supplied to the accused. It is this bunch of documents which is to be considered

by the learned Magistrate for warranting committal and lastly it is only the same set of documents which is formed into a record that is transmitted by the Magistrate to the Court of Session when the accused is committed. This would, therefore, mean that right, from the inception till the end the same record travels first from the police agency, then to the Magistrate's Court and ultimately to the Court of Session. The nature of record is thus referable to Section 173 whereas a choice is given to the Investigating Officer even to delete some portion with the approval of the learned Magistrate and also restrict to those documents on - which the prosecution proposes to rely upon.

13. It is in the context of this situation that the terminology in Sections 227 and 228 is to be examined. In other words when it is mentioned in those provisions that the Sessions Court has to consider the record of the case and the documents submitted therewith it is referable only to that record and documents which is first lodged by the police to the Magistrate and then transmitted by the Magistrate to the Court of Session forming a record of the case with the documents accompanying the said record. In other words the documents referred to in Section 227 de hors of the word "Record" have got to be a restricted meaning referable only to those documents which find mention in Sections 173, 207 and 209 of the Code.

14. It is apparent from these provisions that there is no warrant in the procedure permitting the accused to lead any evidence in the committal proceeding. In fact the prosecution required to lead any evidence has also been dispensed with. In reality, no evidence is required to be led in the committal proceeding. Further the Magistrate's obligation to frame a charge at the time of committal is also wiped out and that has been transferred to the Sessions Court. It is worth noting that in the procedure prescribed for warrant cases in Chapter XIX there is some identical undercurrent vis-a-vis reference to the documents which are to be considered by the learned Magistrate for the purpose of framing of the charge. In other words, Sections 233, 235 and 240 refer to the same set of documents as flow out of the provisions of Section 173 on whose consideration and on examining the accused if so required and on hearing the parties the Magistrate can discharge the accused if the charge appears to be groundless or otherwise can frame a charge if there is ground for presuming that the accused has committed an offence. The same consideration at least vis-a-vis the obligation of the Sessions Court would apply in the context of the examination of the material and the documents. In effect, therefore, that throughout the documents and the record which are required to be considered are restricted to these documents only on which the prosecution intends to rely. Correspondingly there is no provision allowing the defence to lead any evidence either in the committal proceeding or in the Sessions Court before the scheduled point of time that is before he is called upon to enter on his defence after the entire prosecution evidence is over. This is more so, as in such cases the process of collecting the material and then its screening before filing of charge-sheet is left to the investigating agency. The amalgam of all these provisions and features would

make it abundantly clear that there is no warrant in law in the procedure under which the Sessions Court can consider any other material or document for the purpose of framing of the charge or even for the purpose of discharging the accused. The contention that consideration of only such documents as claimed by the prosecution is not restricted in Sections 227 and 228 deserves no merit. The absence of qualification word "only" hardly changes the complexion as the import is more firm impliedly accepting that only that material can be considered.

15. There is a contrast in the procedure prescribed for committal proceeding on a case instituted otherwise than on police report which, however, need not detain us in this proceeding, though the said contrast also would reinforce the conclusion in respect of cases filed on the basis of police report.

16. The net result of this analysis would be that under the procedural law the accused does not get a right to invite the Court to consider any other additional material than the one collected by the police, lodged with the Magistrate and forwarded to the Court of Session, on which the prosecution wants to rely for the purpose of claiming a discharge.

17. There are certain other shades to this aspect. The first is that if such a course is made permissible to the defence at the threshold then the anomalous situation is likely to arise inasmuch as on one hand on a proper screening by the: Investigating agency there is sufficient prima facie material to hold that there are sufficient grounds to proceed against the accused just as in the instant case there are several eye witnesses supported by various circumstances directly implicating the petitioner. A conflict mainly allowed to be created on account of the defence plea of alibi which however cannot be done the evidence is actually led and the witnesses are confronted with that situation and they are tested on merits by examination. Or otherwise the effect would be that the bulk of ex facie evidence will have not only to be distrusted but discarded wholesale only on the basis of the material sought to be produced by the defence and thereby impliedly recording a finding that the witnesses are not worthy of any credence. In other words, the prosecution case will have to be thrown over-board and the acceptance of the defence wholesale on the basis of the material tendered by the defence which ex facie is in contrast and in conflict with the legally admissible material produced by the prosecution. In other words, one set of material which is legitimately admissible at that stage will have to be discarded completely and wiped out on the basis of another set of material which at that stage cannot have a patent form and in any event cannot be made foundation for that exercise. The prosecution must be given an opportunity to meet that situation and the challenge levelled by the defence as in a given case in spite of such a plea the prosecution can successfully be entitled to demolish that plea of alibi and establish their own case on merits and out-come of this kind which is legitimately permissible by law cannot be short-circuited by this process.

18. Secondly, it is manifest that the case at this stage propagated by the defence is only in the shape of a plea and it is well settled that the plea of alibi is not

enough merely to be canvassed but it is to be substantiated the burden being cast on the defence. By such a process the defence are calling upon the Court to accept the documents with the implicit faith and not only to entertain the plea of alibi but to record a finding may be impliedly that the said plea is substantiated to the hilt by the defence and that too without recording any evidence at that stage as it is conceded that there is no provision to lead any evidence at the threshold by the defence for the limited purpose of substantiating the said plea. The other side of the coin is that in a given case some of such documents may require a formal proof and that is also being impliedly asked to be dispensed with. Further the proof of the said documents as also their genuineness and truthfulness is asked to be presumed though it is required to be proved and that too without giving an opportunity to the prosecution in that field. Otherwise in a fit case the prosecution can well expose the falsehood of the said documents.

19. Considering all the facets of the controversy, in my opinion, there is no substance in the contention sought to be raised on behalf of the defence about the proposed procedure in the context of the provisions of Sections 227 and 228 of the Code of Criminal Procedure.

20. Once this premise is accepted then the other question relating to the provisions of Section 91 under which the documents are sought to be called for really pales in the background. The prosecution do not dispute the right of the defence to call for any such documents. However, the divergence is regarding the point of time when it can be legitimately done. Assuming that the defence are allowed to get those documents on record at the threshold, if those documents cannot be looked into till the evidence is led for the reasons already assigned, there is no propriety of getting those documents merely for being lodged on record without their user at least for the time being. The entitlement of the defence of the accused and the jurisdiction of the Court to call for any such documents for the purpose of a trial is apparent from the prescription in Section 91. However, in view of the finding on the main aspect if the documents cannot be used till the accused is called upon to enter on his defence u/s 233 of the Code of Criminal Procedure in the Sessions Court at which point of time he is entitled to lead defence evidence, then there is no propriety of granting the said request u/s 91 at this stage. However, a proviso meeting a certain contingency will have to be carved out. In a given case and for that matter even in this case an occasion may arise when the accused may be required to cross-examine the prosecution witnesses especially the police officers when they tender evidence in the Sessions case touching the question about his own complaint of other incident and the documents on record of the police station, if the concerned police officers have any knowledge of the same and if they are of course the competent witnesses to depose to that aspect. It is not possible to speculate in that field. However, if such a contingency arises, and in a given case many times a contingency does arise where prosecution witnesses are required to be confronted with certain documents with which they are integrally associated and which are not in the custody of the accused, then the defence can certainly rely

on the provisions of Section 91 and get the documents produced on record though those would be used at the appropriate stage and point of time to confront the witnesses. This requirement may come into play in view of the settled principle that a document normally cannot be used adverse to the interest of the witness if he is the author or associated with it unless he is confronted with the same and he is given an opportunity in that behalf. However, even in such a contingency the same need not be summoned to be produced before framing of the charge but can be so produced at a later opportune stage. In any event, the fact remains that even in such exceptional contingency these documents even if produced cannot be considered before framing of the charge and its user can be made available to the defence only during the course of the trial when the evidence is being led to specifically confront a particular witness, or otherwise normally the user of these documents would come into play only after the entire prosecution evidence is led and especially when accused leads evidence in his defence as on most occasions a document is required to be produced by the witness who will have to be examined at the trial. He cannot be interposed in the midst of the prosecution witnesses and similarly the documents cannot be incorporated during the course of the prosecution evidence itself unless for the contingency as envisaged herein above.

(The rest of the judgment is not material to this report - Ed.)