

(1992) 01 KAR CK 0029

In the Karnataka High Court

Case No : Criminal Appeal No. 59 of 1986 and Criminal Revision Petition No. 28 of 1992

State of Karnataka

APPELLANT

Vs

Laxman Yamanappa Dalawai

RESPONDENT

Date of Decision : 17-01-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 228, 229, 347, 377
Penal Code, 1860 (IPC) — Section 408

Citation : (1992) CriLJ 2833 : (1992) ILR (Kar) 747 : (1992) 2 KarLJ 57

Hon'ble Judges : D.P. Hiremath, J; C. Shivappa, J

Bench : Division Bench

Advocate : C.H. Jadhav, Govt. Pleader, for the Appellant; Sri Seshachala, Amicus Curiae, for the Respondent

Judgement

D.P. Hiremath, J.—When the State appeal under S. 377, Cr.P.C. for enhancement of sentence imposed on the respondent-accused was taken up for hearing, it was brought to our notice that the respondent had preferred Criminal Appeal No. 74/85 before the Sessions Court at Bijapur against his conviction and sentence passed by the Additional Chief Judicial Magistrate convicting him for the offence under S. 408, I.P.C. and sentencing him to R.I. for six months and to pay a fine of Rs. 500/-. The contention of the State is that in view of the gravity of the offence and amount involved, the respondent deserves enhanced punishment. When this appeal was pending before this Court, Criminal Appeal No. 74/85 came to be disposed of by the Sessions Court on 26-10-1991 confirming the conviction and sentence passed by the trial Court. The learned Amicus Curiae representing the respondent urged that the procedure adopted by the Sessions Court after the case was committed to it under S. 347 of the Code of Criminal Procedure of 1898 (old Code) was wholly erroneous and without jurisdiction inasmuch as the Sessions Court ought to have tried the case against the respondent under the old Code itself and could not have transferred it to the Court of the Chief Judicial Magistrate. Therefore, according to him, the judgment

rendered by the Court of the First Additional Chief Judicial Magistrate was without jurisdiction, and hence, illegal. If that could be so, then, the judgment of the Sessions Court in Criminal Appeal No. 74/85 becomes non est and inoperative and equally without jurisdiction inasmuch as the very judgment rendered by the Additional C.J.M. was vitiated. In view of this submission made, we thought it necessary to take suo motu action to revise the judgment rendered by the Sessions Court, and accordingly, the criminal revision petition has been registered on suo motu action from this Court. This is how these two matters have come up for disposal by us.

2. The respondent-accused, who was the Secretary of Ganiger Utpadak Sahakari Sangh, Jamkhandi was alleged to have committed breach of trust of Rs. 1,39,217.81 paise between the period from 2-7-1969 to 30-6-1970 and this was discovered when the audit of the accounts of the society were taken. The F.I.R. having been filed by the District Officer, Mysore State Khadi and Village Industries Board, Bijapur to the Sub-Inspector to Jamkhandi Town Police Station, a case came to be registered against the accused for the said offences, investigated and then charge-sheet was filed before the Court of the Judicial Magistrate First Class at Jamkhandi. Having framed charge for the said offence, the learned Judicial Magistrate examined one witness and at that stage the Assistant Public Prosecutor filed an application before him under S. 347, Cr.P.C. to commit the case to the Court of Session as this was the case which ought to be tried by the Court of Session. This application was made on 21-12-1973 i.e. before the coming into force of the Code of Criminal Procedure of 1973. The new Code came into force on 1-4-1974. Thus, when this new Code came into force, the case was pending before the Judicial Magistrate First Class, Jamkhandi. Though it appears at some stage the case was transferred to the Court of Chief Judicial Magistrate and again retransferred to the Court of the same J.M.F.C. as is revealed from the proceedings noted in the order-sheet, it is not of much relevance now. The learned Magistrate passed an order on 17-4-1974 allowing the application of the State under S. 347 of the old Code and committed it to the Court of Sessions at Bijapur. It was registered as Sessions Case No. 90/77 on the file of the Sessions Court. After so registering the case, the learned Sessions Judge on 20-12-1977 passed an order transferring the case to the Court of the Chief Judicial Magistrate holding that the maximum punishment prescribed for the offence under S. 408, I.P.C. being imprisonment of either description for a term which may extend to seven years and fine, the sentence to be awarded would be well within the competency of the Chief Judicial Magistrate. Accordingly, he made an order that the case was transferred to the Court of the Chief Judicial Magistrate, Bijapur. The case was then tried by the Chief Judicial Magistrate on the same charge framed by the Judicial Magistrate First Class and rendered the judgment in question.

3. The learned Amicus Curiae has contended that when the case was committed to the Court of Session under S. 347 of the old Code, it was obligatory for the Sessions Court itself to try the case without again transferring it to the Court of

the Chief Judicial Magistrate. A reading of the order of the Sessions Court dated 20-12-77 shows that the Session Court appears to have invoked its general power of transfer without even invoking the provisions of S. 228, Cr.P.C. If the provisions of new Code were attracted, then the Sessions Court, if it came to the conclusion that the case was not the one which should be exclusively tried by the Court of Session, it should have framed charge and then transferred the case to the Court of Chief Judicial Magistrate. We find that no such procedure was adopted by the Sessions Court. It simply transferred the case to the Court of the C.J.M., Bijapur. In this context, the learned Amicus Curiae has invited our attention to a decision of this Court rendered by Nesargi, J., reported in *S. M. Chandrasekhar v. State* (1978) 2 Kar LJ 193. The facts before the Court were almost similar to the facts of the instant case. The learned Judge observed that in view of S. 484(2) of the new Code, the Sessions Judge had no power to try the case under the provisions of the new Code. Application of the procedure as per the provisions of the new Code, and passing an order of commitment as done by the Magistrate in that case was part of such a trial. The Magistrate while passing the order of commitment under S. 323 read with S. 325 of the new Code exercised powers which he was not empowered by law. Hence the proceedings from the stage at which the Magistrate passed the order of commitment would be void. It may be mentioned here that though the application was filed before the Magistrate's Court under S. 347 of the old Code, the Magistrate committed the accused under Ss. 323 and 325 of the new Code. The Sessions Judge framed charge and transferred the case to the C.J.M. for trial. Under these circumstances, it was further held that the Sessions Judge could not have transferred the case to the C.J.M. under S. 228 of the new Code of 1973. S. 228 in the opinion of the learned Judges of the new Code operates only when an accused is committed under S. 209 of the new Code and not either under S. 323 or 325 of the new Code. If there is a commitment of the accused under S. 323 or 325 of the new Code, the Sessions Judge shall have to, in order to try the case, apply the provisions of sections commencing from S. 229 of the new Code. The provisions found in Ss. 227 and 228 would not be applicable to such cases.

4. It was urged in that case that after the First Class Magistrate took cognizance of the offences, the case could be committed to the Sessions Court only under S. 347 of the old Code as the charge-sheet was submitted to the Court on 17-1-1973 after due investigation. The case was thus pending on the file of the Judicial Magistrate First Class when the new Code came into operation and even then the proper order could have been made only under S. 347 of the old Code. This is how the learned Judge at one stage held that it was incumbent on the part of the Magistrate to have held the trial according to old the Code, passing of an order under S. 347 was also a part of the trial and hence his acting under S. 323 of the new Code was not according to law. The learned Judge found that even if it could be held that commitment could be made under S. 323 of the new Code in view of provisions of S. 484(2)(b), Cr.P.C. still the provisions from S. 229 onwards were attracted.

5. In our view this decision with which we are in respectful agreement is squarely attracted in the instant case. It is necessary to note that S. 484 (2)(a) and 2(b) read as follows :-

"(2) Notwithstanding such repeal, -

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), as in force immediately before such commencement, (hereinafter referred to as the old Code), as if this Code had not come into force :

Provided that every inquiry under Chap. XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

(b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the old Code and which are in force immediately before the commencement of this Code, shall be deemed respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code."

A reading of S. 484(2)(a) makes it amply clear that trial, inquiry or investigation shall be continued in accordance with the provisions of the old Code of Criminal Procedure, 1898 as in force immediately before such commencement as if this code had not come into force if such trial, inquiry or investigation was pending when this Code came into existence. That being so, the learned Magistrate First Class acted under S. 347 of the old Code.

6. S. 484(2)(b) is a deeming provision and a reading of S. 223 (or 323) of the new Code would make it clear that S. 347 of the old Code has been bodily lifted from the old Code and inducted under this new section. It therefore follows that the order passed under S. 347 of the old Code must be deemed to have been made under S. 223 (or 323) is nothing but the corresponding provision in the new Code to S. 347 of the old Code. The learned single Judge who decided the case of S. M. Chandrasekhar (1978 (2) Kar LJ 193) (supra) has pointed that such a commitment under S. 223 (or 323) cannot be considered as a commitment under S. 209, Cr.P.C. under even the new Code. Therefore the Session Judge had no power to again transfer it to the Chief Judicial Magistrate but he ought to have tried it himself. The provisions from S. 229, Cr.P.C. would be attracted in the matter of trial of such a case. It is noteworthy that in the case before us the learned Sessions Judge did not even frame of the view that the case Cr.P.C. if he were of the view that the case was not exclusively triable by the Court of Session. That however is now besides the point as we find that if it is a case

which ought to be tried by the Sessions Court by the special provision of the Code the Sessions Judge alone should try it. If the intention of the Legislature was otherwise, direction could have been provided in S. 223 of the new Code to the Sessions Judge either to try himself or to act under S. 228, Cr.P.C. The intention clearly appears to be that the case ought to be tried by the Court of Session. That being so we set aside the judgment of conviction and sentence passed by the learned Magistrate in C.C. No. 1530/77 and further hold that the appeal to the Sessions Court was not competent in view of this illegality committed by the Additional Chief Judicial Magistrate and consequently the judgment of the Sessions Court confirming the conviction and sentence passed by the trial Court also require to be set aside.

7. We cannot part with the case without a word of appreciation to Sri. Seshachala, the learned Amicus Curiae, who has very ably assisted this Court in bringing to our notice the illegality committed by the trial Court in acting without jurisdiction. But for his penetration into the provisions of law, this illegality could have gone unnoticed and unrectified.

8. For the reasons aforesaid we allow Cr.R.P. 28/92 and set aside the judgment of the Sessions Court in Cr.A. 74/85 and remit the Sessions Case No. 90/77 to the Court of Sessions at Bijapur and order retrial of the case by the Sessions Court itself. The case shall be tried and disposed of on merits as expeditiously as possible. Cr.A. No. 59/86 is dismissed as not surviving.

9. Order accordingly.