

(1977) 09 BOM CK 0031
In the Bombay High Court
Case No : Criminal Reference No. 9 of 1977

The State of Maharashtra

APPELLANT

Vs

Shanti Prasad Jain

RESPONDENT

Date of Decision : 29-09-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 395(2)

Citation : (1979) 81 BOMLR 184 : (1978) MhLj 227

Hon'ble Judges : Kanade, J;Deshmukh, J

Bench : Division Bench

Judgement

Deshmukh, J.—This is a reference by the Additional Chief Metropolitan Magistrate, third Court, Esplanade, Bombay, u/s 395(2) of the Criminal Procedure Code. He has formulated the following three points for decision of the High Court;

(1) Additional Chief Metropolitan Magistrate, Bombay, being invested with all the judicial powers of the Chief Metropolitan Magistrate, whether Additional Chief Metropolitan Magistrate can be considered on par with the Chief Metropolitan Magistrate for the purpose of Section 306 of the Criminal Procedure Code?

(2) Whether in Sub-clause (i) of Clause (a) of Sub-section (5) of Section 306 viz. "... or if the Magistrate taking cognizance is the Chief Judicial Magistrate", the expression "Chief Judicial Magistrate (Chief Metropolitan Magistrate in Bombay)" includes Additional Chief Metropolitan Magistrate?

(3) Whether if the Magistrate taking cognizance of the offence u/s 306 is Additional Chief Metropolitan Magistrate, he like the Chief Metropolitan Magistrate, has to commit the case for trial to the Court of Session under Sub-clause (0 of Clause (a) of Sub-section (3) of Section 306 or whether he has to make over the case for trial to the Chief Metropolitan Magistrate under Clause (b) of Sub-section (5) of Section 306?

2. On behalf of the accused persons a technical objection is raised to the

maintainability of the reference itself. What is alleged is that the criminal case pending on the file of the learned Magistrate was once before this Court as revision applications were filed by the accused persons against the order of the then Chief Metropolitan Magistrate on whose file the case was once pending. The decision of a Division Bench of this Court is reported in *Shriyans Prasad Jain Vs. Shanti Prasad Jain and Others*,

3. While disposing of those criminal applications this Court gave clear direction in para. 67 that the only function of the Magistrate was to follow those instructions and pass appropriate orders. This is a technical objection. The objection on merits is that the Additional Chief Metropolitan Magistrate cannot be equated with Chief Judicial Magistrate for the purpose of Section 306, Criminal Procedure Code and the relevant clause under which the learned Magistrate must act, as rightly pointed out earlier, is Clause (b) of Sub-section (3) of Section 306. The learned Magistrate's reasoning was that he having all the powers of the Chief Judicial Magistrate or the Chief Metropolitan Magistrate the relevant clause for passing the final order would be Clause (a) and not (b). The learned Magistrate was then promoted as a Chief Metropolitan Magistrate (then the Chief Presidency Magistrate). He felt that having done the major work in a longish case, he would be in a better position to complete the recording of the approver's statements. Hence by an administrative order u/s 528 of the old Code he withdrew the case from the file of the Court of the third Additional Chief Metropolitan Magistrate and took it on his own file.

4. While he was recording the evidence of the other witness, prosecution made an application that the provisions of the new Code applied to the present proceedings and the case should be forthwith transferred to the Court of Session. This application was rejected by the learned Magistrate. On hearing arguments of other side he felt that he had to complete the recording of the statements u/s 337 of the old Code and he had also the right to assess the evidence u/s 173 and pass an appropriate order. That order led to two separate applications being filed, which were disposed of by the above mentioned reported judgment.

5. While disposing of those applications it was held that the new Code applies and Section 306 must be given its effect. Accordingly, it was held that the only Magistrate who could have the jurisdiction to record the statements of the approver was the Magistrate who took cognizance. The cognizance is taken only once and that was done by the third Additional Chief Metropolitan Magistrate's Court. The pending case before the Chief Metropolitan Magistrate was therefore withdrawn and was transferred to the file of the third Additional Chief Metropolitan Magistrate. While doing so a direction was given that the Additional Chief Metropolitan Magistrate, third Court, Esplanade, Bombay, will take steps for completing the recording of the statement of the approver under Sub-section (4) of Section 306 and thereafter pass an appropriate order under Clause (b) of Sub-section (5) of Section 306 of the new Code. It is because of such a direction that the learned Magistrate finds that some difficulty arises in the implementation of

this order.

6. According to the learned Magistrate, the Additional Chief Metropolitan Magistrate in Bombay is having the same legal status and contents with regard to the judicial powers of dealing with and disposing of criminal cases. That has been the effect of notification u/s 17 of the new Code. That makes the third Additional Chief Metropolitan Magistrate, the Chief Metropolitan Magistrate who is referred to in Code as the Chief Judicial Magistrate. If that is the position he occupies, the case is already pending before the Chief Metropolitan Magistrate in terms of the provisions of Section 306. That being so, the case ought to be committed to the Court of Session as Clause (a) of Sub-section (3) of Section 306 is attracted. Clause (b) thereof is not attracted. Since this Court gave a specific direction that an appropriate order under Clause (b) be passed, the Magistrate points out the difficulty felt by him. While doing so he also points out that the question is neither raised nor decided in the previous proceedings and on the assumption as stated before the Court, the Court has merely incorporated a direction without applying its mind as to whether the Additional Chief Metropolitan Magistrate is other than the Chief Metropolitan Magistrate. He has no doubt pointed out that there is a reference in paragraph 12 of the report to the arguments of the learned counsel for the two different accused who had filed those applications before this Court. It has been observed in paragraph 12 by way of argument of Mr. Bhatt who appeared for original accused No. 1 that the Chief Judicial Magistrate as defined in the new Code means for the purpose of area of Greater Bombay the Chief Metropolitan Magistrate, and since he is the Magistrate taking cognizance for the Additional Chief Metropolitan Magistrate, third Court the case was accordingly pending before the Chief Metropolitan Magistrate as a transferee Court. This case will be governed by Clause (b) and will have to stay with the Chief Metropolitan Magistrate for the purpose of trial by him.

7. With this part of the argument Mr. Desai representing accused No. 2 was in agreement and argued that that would be the position, if this Court came to the conclusion that the new Code applied. These are all the references in the previous order in the reported judgment with regard to the position of the Additional Chief Metropolitan Magistrate. The learned Magistrate therefore points out that this point has not been decided at all and it is still open to be decided. Since, however, there are some positive directions of this Court, he would not take a view contrary to the directions. In the circumstances he made this reference.

8. A preliminary objection to the maintainability for this reference raised by Mr. Ashok Desai for accused No. 2 and supported by the other counsel appearing for the other accused persons is that this point is already covered and expressly decided by the earlier reported judgment. To entertain the present application would amount to review the judgment made by, this Court. Such, power does not exist in the criminal Court. We would first dispose of this technical objection

before we deal with the matter on merits.

9. Mr. Desai argued that the point having been concluded earlier, this Court cannot revise or review its own order. It has been so held by a Division Bench of this Court in *State of Bombay v. Geoffrey Manners* (1950) 53 Bom.L.R. 117. According to the learned Judges, there is no provision in the Criminal Procedure Code, 1898, that the judgments delivered by the High Court in its criminal appellate jurisdiction should be dated and signed in the manner stated in Section 367 of the Code, and the provisions of Section 369 which suggest that before a judgment is signed: it could be altered or reviewed, do not apply to such judgments. The moment therefore the judgment is delivered and in pursuance of which a writ is issued, the judgment becomes final and cannot be reviewed, The learned Judges, however, had to add that it would be open to the High Court to review or alter its judgment, given in exercise of its criminal appellate jurisdiction, after it has been recorded and a writ issued in pursuance thereof, where there is an error apparent on the face of the record or an obvious mistake about the facts which if not corrected, would lead to miscarriage of justice. Where, therefore, a new defence is sought to be taken and a new argument sought to be advanced, it would not be legitimate for the Court to review or alter the judgment on that ground.

10. Following the principles of this case, another Division Bench in *A.H. Satranjiwala v. The State* (1970) 74 Bom. L.R. 742 held that once a criminal appeal has been disposed of on merits by a Judge or a Bench of the High Court having jurisdiction to do so and there is no violation of the principles of natural justice, the judgment and order disposing of the appeal is final and is not liable to be reviewed or interfered with by the High Court u/s 561A of the Criminal Procedure Code, 1898

11. A review of a previous judgment is possible when it is shown that there has been an abuse of process of the Court or that the matter is disposed of in violation of the principles of natural justice, in which case it would amount to it being disposed of without jurisdiction. This, according to Mr. Desai, is a very limited scope of review, if at all; when the matter has been heard and disposed of by this Court.

12. Undoubtedly that is the correct legal position. It would, however, appear that on the earlier occasion when this matter was heard, one of us (Deshmukh J.) was a party not only to the hearing of that application but to the dictation of the order. The reported judgment makes it clear that the entire concentration was upon the Magistrate, who had the jurisdiction to record the statements of the approver and who could be described as the Magistrate taking cognizance for that purpose. The other point that was agitated was whether the pending case before the then Chief Metropolitan Magistrate ought to be disposed of after April 1, 1974 according to the old Code or the new Code. They were the only questions, that were addressed to the Court and the question whether the Additional Chief Metropolitan Magistrate is or is not to be treated on par with the

Chief Metropolitan Magistrate for certain purposes was neither raised nor decided.

13. It is true that the direction in terms has been given to pass an appropriate order under Clause (b) of Sub-section (5) of Section 306. The reference in paragraph 12 referred to above will show that on a mere assumption that Clause (&) applies to a Chief Metropolitan Magistrate alone the direction seems to have been given. When a point is neither raised nor decided but on the prima jade wording of a section without taking into account the real implication, a formal direction is given at the end of that judgment, it cannot be said that "the Magistrate would not point out the legal difficulties in the implementation of the previous order. It is in this manner that this Court is now apprised of the real legal position and this Court is now called upon for the first time to decide whether Clause (a) or Clause (6) of Sub-section (5) of Section 306 applies to the facts and circumstances of the present case. That requires now a pointed decision as to what is the legal position of the Additional Chief Metropolitan Magistrate vis-a-vis the provisions of Section 306 of the Code of Criminal Procedure. The technical objection thus does not survive and is rejected.

14. It may now be pointed out that the third Additional Chief Metropolitan Magistrate has now completed recording of the statements of both the approvers as required by Sub-section (4) of Section 306. At this stage Sub-section (5) becomes relevant which directs the Magistrate concerned to pass certain orders. That sub-section is as follows:

306. (5) 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 inquiry in the case,-

(a) commit it for trial-

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952, if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

As contemplated by the opening clause of Sub-section (5) both the persons Who had accepted a tender of pardon under Sub-section (1) have now been examined under Sub-section (4) by the Magistrate taking cognizance of the offence. At this stage the above section requires that the Magistrate shall pass an order without making any further inquiry into the matter. Sub-clause (i) of Clause (a) of Sub-section (J) quoted above says that the case has to be committed for trial to the Court of Session, if the offence is triable exclusively by that Court, or if the Magistrate talking cognizance is the Chief Judicial Magistrate.

15. There is no dispute in this case that the offences which are alleged are not

exclusively triable by the Court of Session. The case therefore does not fall within the first part of the above Sub-clause (i). The only question is whether the second part of Sub-clause (i) applies, viz. whether the Magistrate taking cognizance is a Chief Judicial Magistrate. Sub-clause (ii) is not relevant for our purposes. However, Clause (6) on which reliance has been placed by the learned counsel for the accused requires the making over of the case to the Chief Judicial Magistrate "in any other case", and thereafter the Chief Judicial Magistrate is required to try the case "himself. Thus it is pointedly necessary now to decide whether the Magistrate taking cognizance, viz. the third Additional Metropolitan Magistrate is a Chief Judicial Magistrate in the eyes of the new Code. That will decide the course to be adopted by the Magistrate concerned.

16. A very brief survey of the relevant provisions of the Criminal Procedure Code will suggest the types of Courts that are available and their respective jurisdiction and power. Section 6 for instance describes the classes of Criminal Courts besides the High Court and the Courts constituted under any other law other than the Code. Those Courts are the Courts of Session, Judicial Magistrates of the first class and, in, any Metropolitan area, Metropolitan Magistrates; Judicial Magistrates of the second class; and Executive Magistrates. Section 8 defines the territorial jurisdiction. Section 9 deals with the Court of Session and Section 10 deals with the subordination of the Assistant Sessions Judges to the Sessions Judge in whose Court they exercise jurisdiction. Section 11 deals with Courts of the Judicial Magistrates of the first class and of the second class. Section 12 requires and authorises the High Court to appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate in the Districts. Sub-section (2) of Section 12 authorises the High Court to appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High, Court may direct. Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge, and every Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate. This is the provision of Section 15. Section 16 deals with the Metropolitan area and the establishment of as many Courts of Metropolitan Magistrates at such places as the State Government may decide in consultation with the High Court, The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area. Section 17 is an important section, dealing with the appointment of Chief Metropolitan Magistrate as well as Additional Chief Metropolitan Magistrate, Sub-section (1) imposes a duty upon the High Court to appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area. Under Sub-section (2) the High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other for the time being in force as the High Court may direct. It is this sub-section which leads to the creation of the

Additional Chief Metropolitan Magistrate and to the definition of their jurisdiction in terms of the High Court Notification.

17. The next important section to which our attention has been drawn by the learned defence counsel is Section 19, Sub-section (7) of Section 19 lays down that 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. Sub-section (2) vests power in the High Court to define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate. Sub-section (3) authorises the Chief Metropolitan Magistrate from time to time to 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.

18. So far as the powers of the above Courts are concerned one may refer to Section 29 in chap. III of the Code. Sub-section (/) of Section 29 says that the Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years. Sub-section (2) lays down that a Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both. Sub-section (5) lays down that a Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both. Sub-section (4) makes it clear that the Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

19. A survey of the above provisions shows that the Chief Judicial Magistrate in the Districts has been equated with) the Chief Metropolitan Magistrate in the metropolitan area. What precisely is the position of an Additional Chief Metropolitan Magistrate. It has to be remembered that the only expression used in the various provisions of the section is Chief Judicial Magistrate. Section 3, which deals with the construction of references lays down in Clause (d) of Sub-section (7) that any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area. It is, therefore, clear that for the purposes of convenience of reference the designation particularly used is Chief Judicial Magistrate and wherever, that expression is used it is to be construed as the Chief Metropolitan Magistrate so far as. the metropolitan area is concerned. In reference to a Magistrate, the reference is to a Metropolitan Magistrate in a metropolitan area and to a Judicial Magistrate, first class, in any other area. This is the provision of Clause (c) of Sub-section (1) of Section 3.

20. In addition to the above provisions, one must take into account the

notifications issued by the High Court under Sections 17 and 19 of the Code. Both the notifications have been issued on August 27, 1975. The notification u/s 17(2) says that the Additional Chief Metropolitan Magistrate shall exercise all the powers of the Chief Metropolitan Magistrate Bombay under the Code of Criminal Procedure, 1973 except the powers under Sub-section (3) of Section 19 and Section 410 of the Code which shall be exercisable by the senior most Additional Chief Metropolitan Magistrate only during the absence on leave or for other cause of the Chief Metropolitan Magistrate when no appointment to the post of the Chief Metropolitan Magistrate for the period of such absence has been made. It is therefore clear that barring the two exceptions, the Additional Chief Metropolitan Magistrate has been vested with all the powers of the Chief Metropolitan Magistrate under the Code.

21. We may point out that Sub-section (3) of Section 19 authorises the Chief Metropolitan Magistrate to 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. This appears to be purely an administrative function of the Chief Metropolitan Magistrate. So far as Section 410 is concerned the Chief Judicial Magistrate is authorised to withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and thereafter inquire into or try any such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. This is provided by Sub-section (1). Sub-section (2) of Section 410 authorises any Judicial Magistrate to recall any case made over by him under Sub-section (2) of Section 192 to any other Magistrate and may inquire into or try such case himself.

22. There is no doubt that Section 410 deals with the power which is partly judicial and partly quasi-judicial. Section 412 requires reasons to be recorded when a case is being transferred or withdrawn under the provisions of Sections 408, 409, 410 or 411.

23. Looking to the scheme of the Code and the types of Courts that are provided, it is clear that in any District, the Chief Judicial Magistrate as well as the Sessions Judge have the right to withdraw a case from one Court and transfer it to the other. These transfers are necessary because under the normal distribution of work to the various Courts some difficulties may arise from time to time. They may be purely of the departmental nature or they may be in the form of grievance of parties. In either case it is but logical that one officer should be vested with such powers. An Additional Chief Metropolitan Magistrate is not vested with these powers. Short of these two sections all the powers of the Chief Metropolitan Magistrate have been conferred upon the Additional Metropolitan Magistrate.

24. In addition to the notification u/s 17, the High Court has also issued on the same day a notification under Sub-section (2) of Section 19. By this notification the Additional Chief Metropolitan Magistrates appointed under Sub-section (2) of

Section 17 are made subordinated to the Chief Metropolitan Magistrate Bombay and their subordination shall be deemed to be of the same kind and extent as the subordination of the Metropolitan Magistrate, Bombay, to the Chief Metropolitan Magistrate Bombay, under Sub-section (/) of Section 19. Sub-section (7) lays down that 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. The subordination of the Metropolitan Magistrate is purely administrative as indicated in Section 19(5), which authorises the Chief Metropolitan Magistrate to make rules and give special orders, consistent with the Code as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate.

25. The above survey now gives a complete picture of the nature of the Courts of the Magistrate and their respective "judicial powers and their subordination, if any, to certain higher officers. These provisions clearly show that so far as the disposal of judicial business is concerned, the Additional Chief Metropolitan Magistrate have all the powers of the Chief Metropolitan Magistrate. The Metropolitan Magistrates who are equated to the Judicial Magistrates, First Class, have undoubtedly less powers in the matter of disposal of criminal business. They can impose a substantive sentence upto three years only or a fine upto Rs. 5,000. So far as Chief Metropolitan" Magistrate, Additional Chief Metropolitan Magistrates and Chief Judicial Magistrates are concerned, they are entitled to impose a sentence upto seven years and there is no limitation on fine. Undoubtedly, therefore, the Court of the Chief Judicial Magistrate is a superior Court as compared to the Court of the Judicial Magistrate, First Class. This also means that the Court of the Chief Metropolitan Magistrate or the Additional Chief Metropolitan Magistrate is superior to the Court of the Metropolitan Magistrate in the metropolitan area.

26. The question that now requires consideration is whether for the purpose of Section 306(5), the Additional Chief Metropolitan Magistrate is to be equated with the Chief Metropolitan Magistrate which is the same thing as the Chief Judicial Magistrate. Mr. Desai relied upon the judgment of the Supreme Court in *Ajaib Singh v. Gurbachan Singh* AIR[1965] S.C. 1619 . In that case the Additional District Magistrate had detained a person under the Defence of India Act and Rules thereunder, and the question was whether he had such authority on the basis of a notification of Government delegating the powers of detention to a District Magistrate. The point considered was whether an Additional District Magistrate appointed under Sub-section (2) of Section 10 of the old Code acquires the delegated powers under the Defence of India Rules. This judgment as also the next judgment in *Hari Chand Aggarwal Vs. Batala Engineering Co. Ltd.*, turn upon the construction of the provisions of the Defence of India Act under which the power of detention could not be delegated to an officer below the rank of a district Magistrate. Whether an Additional District Magistrate

appointed under Sub-section (2) of Section 10 of the old Code and having all the powers of a District Magistrate under that Code or under any other law for the time being in force would make him officer of the rank of District Magistrate was the question. It has been pointed out in both these judgments that the Additional District Magistrate is subordinate to the District Magistrate in many respects. That being so, his rank is below the rank of the District Magistrate. Since delegation was permitted only upto an officer of the level of District Magistrate and not beyond, the provisions of Section 10 of the old Code would not give all the powers to the Additional District Magistrate which a District Magistrate himself had or would not raise the status of the Additional District Magistrate to that of the District Magistrate. On that approach the Supreme Court rejected the submissions of the State that the Additional District Magistrate acquires the power to pass detention orders in view of the provisions of Section 10(2) of the Criminal Procedure Code, 1898.

27. As against that the Supreme Court itself pointed out in the case of *The Central Talkies Ltd., Kanpur Vs. Dwarka Prasad*, that the Additional District Magistrate having all the powers of the District Magistrate was a competent officer for the purpose of granting permission to file a civil suit under United Provinces (Temporary) Control of Rent and Eviction Act even without a special authorisation from the District Magistrate. On the wording of the Rent Control Act it was obvious that a District Magistrate was to issue the authorisation. If an Additional District Magistrate is appointed and vested with all the powers of the District Magistrate under the Code as well as any other law for the time being in force, the Additional District Magistrate would be competent to grant permission as he can be treated as a District Magistrate for all purposes of the Code as well as any other law for the time being in force. The question of law does not arise in such a case but the question of having certain rights and powers is the only relevant consideration. Even though therefore the Additional District Magistrate may be otherwise subordinate to the District Magistrate in an administrative or departmental way, so far as the exercise of powers of the District Magistrate are concerned he is on par with him and as such without a special authorisation! from the District Magistrate he was competent to deal with the application u/s 3 of the United Provinces (Temporary) Control of Rent and Eviction Act, for granting permission to file a civil suit.

28. One more judgment was brought to our notice by Mr. Khambata in which a similar approach has been adopted by a Division Bench of this Court in *State Vs. Bhimsha Chanbasappa Kore*, . The question before the learned Judges was whether the Additional District Magistrate appointed by the State under Sub-section (2) of Section 10 of the Criminal Procedure Code can exercise all the powers of the District Magistrate including the grant of sanction u/s 29 of the Arms Act to prosecute a person u/s 19(f) of that Act. From the judgment it is not clear as to what was the nature of the notification issued by the State Government while vesting the powers in the Additional District Magistrate. However, the trend of the discussion shows that all the powers of the District

Magistrate must have been vested -in the Additional District Magistrate and as such he was treated as competent enough to exercise the jurisdiction of awarding sanction to prosecute for an offence under the Arms Act.

29. It can therefore be safely concluded that the provisions of the old as well as the new Code indicate that there can be a principal Court with certain jurisdiction and an additional Magistrate or a Court of an Additional Magistrate can be charged with all the powers of the principal Magistrate. So far as the exercise of the judicial powers are concerned, both stand on the same footing and one cannot be said to be either inferior or subordinate to the other. The administrative subordination for certain other purposes does not affect the status or the judicial powers of the Additional Court vis-a-vis the principal. The same type of litigation can be handled by both and the power to impose punishment are identical. The appeals from their orders lie to the same Court. These conclusions will have to be borne in mind when we now proceed to consider the provisions of Section 306, Sub-section (5).

30. Before we do that, it would be worthwhile to have a look at the provisions of Section 337 of the old Code to which the present Section 306 is a successor section. Sub-section (1) deals with the power of tendering pardon to an accomplice. Sub-section (2) deals with the examination of the accomplice as a witness in the Court of Magistrate taking cognizance of the offence as also his examination in a subsequent trial, if any. Sub-section (2A) of that section lays down that in every case where a person has accepted a tender of pardon and has been examined under Sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be. Sub-section (2B) is not relevant for our purposes.

31. It may be remembered that so far as the old Code is concerned, the only Courts known for the purpose of trying offences were the Courts of the Judicial Magistrate, First Class and the Sessions Court. The fact that the accused is required to be committed to the Court of Session when prima facie evidence of the commission of an offence is available in a case where the approver's evidence has been recorded shows that the trial was always intended to be in a superior Court. As compared to the Court of Magistrate, the Court of Session would undoubtedly be higher and the superior Court. The present Section 306(7) which deals with the provisions of granting tender of pardon to accomplice lays down that tender of pardon to such person shall be on condition of his making a full and true disclosure etc. Sub-sections (2) and (3) deal with the applicability of the section as also recording of reasons to tender pardon. Present Sub-section (4) is comparable to the previous Sub-section (2) of Section 337 of the old Code. The present Sub-section (5) is comparable to the previous Sub-section (2A) of Section 337. Under present Sub-section (4) the person accepting tender of pardon has to be examined as a witness in the Court of the Magistrate taking

cognizance and also in the subsequent trial, if any, and unless he is already on bail, he has to be detained in custody until the termination of the trial. Then follows the controversial Sub-section (5).

32. It may be remembered that so far as the administration of District was concerned under the old Code, we had the Courts of the Judicial Magistrate, First Class, and those of the Sessions Judge. Under the new Code there is as if a three tier arrangement of Courts. There are Judicial Magistrates, First Class, then Chief Judicial Magistrate and the Sessions. Judges in the Districts, In the metropolitan area like Bombay there is the Metropolitan Magistrate, then the Additional Chief Metropolitan Magistrate and the Chief Metropolitan Magistrate who would together represent the second tier of Courts and the City Sessions Court, Bombay. So far as the judicial powers vested in these Courts are concerned, already we have shown that the Courts of the Metropolitan Magistrate have lesser power of punishment than those of the Courts of Additional Chief Metropolitan Magistrate or Chief Metropolitan Magistrate. Undoubtedly both these Courts are subordinate and inferior to the Sessions Court and between them the Courts of the Chief Metropolitan Magistrate and those of the Additional Chief Metropolitan Magistrate are vested with higher powers and to that extent must be described as superior Courts.

33. With the above history of this section in mind, we may now read the two Clauses (a) and (b) logically to find out what seems to be the intention of the Legislature. When the examination of the accomplice is over, the inquiry has to be stopped in the first instance and no further inquiry is contemplated. The Magistrate concerned is immediately required to pass an order either under Clause (a) or Clause (b) without any further inquiry. Now, Clause (a) directs that the case be committed for trial to the Court of Session, if the offence is exclusively triable by that Court. This part of the provision does not require much explanation. When the offence is exclusively triable by the Court of Session, it is reasonable that whatever be the status of the Magistrate dealing with the case at the stage of the inquiry, the order of committal has to be passed and there can be no option. Since the case has now got to go to a proper Court for trial, the Court to which the case is to be sent must be one with jurisdiction. In case of offences exclusively triable by Court of Session, irrespective of the type of the Magistrate the committal has got to be to that Court. However, the difficulty arises with the second portion of Sub-clause (a) of Clause (b). That provision requires that the case shall be committed to the Court of Session again if the Magistrate taking cognizance is a Chief Judicial Magistrate. Here it would be apparent that the same principle seems to be underlying the provisions which lay under the provisions of Sub-section (2) of Section 337 of the old Code, viz. that after the recording of the statement of the approver, the case should go for trial to a Court, which is superior to the Court of the Magistrate concerned.

34. Going now to Clause (b), we find that the requirement is that "in any other case", the case is to be made over to the Chief Judicial Magistrate. This clause

takes into account the Court of a Magistrate, which is not a Chief Judicial Magistrate and therefore requires that Magistrate to hand over the case to the Chief Judicial Magistrate. Apart from going further into the implications as to who is a Chief Judicial Magistrate, the intention obviously seems to be that after the approver's statement is recorded, the trial shall take place in the Court, which is superior in status or which has larger experience than the Court which recorded that statement. This underlying concept seems to be common in all the three circumstances which are taken into account. The first position is indisputable where the offence is itself, exclusively triable by the Court of Session, committal to the Court of Session must follow as a matter of course.

35. Going to the last case, where the Magistrate is one other than the Chief Judicial Magistrate, he has to hand over that case to the Chief Judicial Magistrate. If the Court concerned is Chief Judicial Magistrate himself, irrespective of the nature of the offence, the case has to be committed to the Court of Session. We are, therefore, inclined to think that the Legislature intends to hand over the case for trial to another Court of superior experience and better status.

36. To-day's Chief Judicial Magistrate under the new Code is nothing but a Section 30 Magistrate of the old Code. Where a particular Magistrate could be vested with powers u/s 30 (old Code) according to the requirements of the case, that Magistrate would be of the designation of the Chief Judicial Magistrate has now become a permanent part of the judicial administration. In our view, therefore, the Legislature's intention undoubtedly was and continues to be to-day that in the cases of approvers where the recording of statement is done by the Court taking cognizance, the trial must take place in a Court of superior experience and better status.

37. If this is so, can we say that an Additional Chief Metropolitan Magistrate, who has all the powers of the Chief Metropolitan Magistrate so far as the judicial functions are concerned, be treated in any different way? In fact the permissive provisions of the Code which authorise the High Court to appoint one or more Additional Chief Metropolitan Magistrate, assume that more Courts may be required due to the increase of the litigation which require infliction of punishment upto seven years. In other words, more Courts of that jurisdiction parallel to that of the Chief Metropolitan Magistrate are required by the state of litigation and enough number of such Magistrates are to be provided by the High Court for disposal of business. The Chief Metropolitan Magistrate and the Additional Chief Metropolitan Magistrate are thus Courts of the same status having the same and identical jurisdiction so far as the trial of criminal cases is concerned.

38. If that is so, the effect of directing the transfer of a case which involves an approver, from the Court of the Additional Chief Metropolitan Magistrate to the Court of Chief Metropolitan Magistrate would defeat the very purpose and run counter to the principle underlying the provisions of Section 306(5) (fr). On the

contrary the intention of the Legislature can be best carried out by reading the expression "Chief Judicial Magistrate" in that sub-section to include also the "Additional Chief Judicial Magistrate". While reading that sub-section in relation to Bombay Metropolitan area it will mean that the expression "Chief Metropolitan Magistrate" also includes the "Additional Chief Metropolitan Magistrate".

39. In this process of thinking one further difficulty is raised by the learned defence counsel by referring us to the ending portion of Clause (6) quoted above. What Clause (b) requires is that, in any other case, the case is to be made over to the Chief Judicial Magistrate who shall try the case "himself. Shri Desai argued that the legislative fiat is that on a making over of the case to the Chief Judicial Magistrate he has to try the case himself. He cannot hand over this case to any one else. If the interpretation proposed above were to be accepted; it may lead to the following consequences: Metropolitan Magistrate may make over the case to the Chief Metropolitan Magistrate where there is an approver as the case of such a Magistrate obviously falls under Sub-section 5(6). Having received the proceedings of a case like this, can the Chief Metropolitan Magistrate transfer that case to the file of any of the Additional Chief Metropolitan Magistrate for disposal. That would be an action contrary to the direction of the ending portion of Clause (b) of Sub-section (5). Mr. Desai therefore built up an argument on that clause and said whether it is a Metropolitan Magistrate or an Additional Chief Metropolitan Magistrate the case must be transferred to the file of the Chief Metropolitan Magistrate who alone has to try that case.

40. We have given our anxious consideration to this argument. We have pointed out earlier the provisions of Section 337(2/4) of the old Code. But for this direction a Chief Judicial Magistrate in the District or a Chief Metropolitan Magistrate in Bombay could under the provisions of his normal administrative powers or the powers relating to the administration of distribution of business have transferred this case to the file of any other Judicial Magistrate, First Class, or a Metropolitan Magistrate for disposal. The Legislature does not want to have that consequence, as the Court of trial must be a Court of superior experience. The ending portion of Clause (b) merely means that the trial now must take place in the Court of the Chief Judicial Magistrate or the Chief Metropolitan Magistrate or any other allied Court of the same status which could be described as if trial by himself. If the expression "Chief Judicial Magistrate" includes in it an Additional Chief Judicial Magistrate and like-wise if the term Chief Metropolitan Magistrate includes an Additional Chief Metropolitan Magistrate, the trial either by the Chief Metropolitan Magistrate or one of his Additional amounts to trial by himself. No anomaly seems to be created by the ending portion of Sub-section (5) (b), if the real intention of the Legislature is understood against the background of the legislative history of this section.

41. We are thus satisfied that the Additional Chief Metropolitan Magistrate who has made this reference must be deemed in law to be the Chief Metropolitan

Magistrate for the purpose of Sub-section (5) of Section 306. If that is so, he has to pass an order under Clause (a) of Sub-section (5) of Section 306 and more particularly under the second part of Sub-clause (0 of Clause (a) of Sub-section (5). The direction given earlier in the reported judgment of which this is an offshoot, was not given after deciding this aspect of the matter. It was prima facie assumed that the Court of the third Additional Chief Metropolitan Magistrate to whom the papers were to go for recording the approver's statement was a Magistrate other than the Chief Metropolitan Magistrate and as such he may have to act under Clause (b) of Sub-section (5). For the reasons, which we have already recorded earlier, this does not mean to a review of the judgment but it only amounts to a decision on a point. Now that it is pointedly raised and mere direction for decision is neither judgment nor final order of this Court, and we do not think there could be any difficulty in rectifying such an error, which is apparent on the face of the record.

42. We accordingly allow this reference and answer the points raised by the Additional Chief Metropolitan Magistrate as follows:

Point No. 1 .. Answer : Yes Point No. 2 .. Answer : Yes Point No. 3 .. Answer : Commit the case to the Court of Session under Section 306(5)(a)(i) of the new Code.

Rule made absolute.

At this stage, the learned defence counsel Messrs. Dalvi, Ashok Desai and A.M. Desai respectively for accused Nos. 1, 2 and 7 and 8 orally apply for a certificate for filing an appeal to the Supreme Court of India under Article 134(7)(c) of the Constitution. The application is refused. However, it is directed that on receipt of papers the learned Magistrate will not pass orders of commitment in terms of this order till November 7, 1977. He will dispose of the case, thereafter according to law.