

(1986) 02 AP CK 0007

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No. 561 of 1983 and Criminal Revision
Petition No. 556 of 1983

Uravakonda Vijayaraj Paul

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 03-02-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 209, 273, 306, 306(4)
Evidence Act, 1872 — Section 138
Penal Code, 1860 (IPC) — Section 149, 34

Citation : (1986) CriLJ 2104

Hon'ble Judges : K. Jayachandra Reddy, J

Bench : Single Bench

Advocate : T. Chandrasekhara Reddy, for the Appellant; Addl. Public Prosecutor,
for the Respondent

Judgement

1. The question of law that arises for consideration in this revision is : Whether under S. 306(4) of the Cri PC the examination of an approver as a witness by the Committing Magistrate is mandatory before he passes the order of Committal ? The question arises under the following circumstances.

2. Eight accused in P.R.C. No. 8 of 1981 on the file of the PrII. Judicial Magistrate of First Class, Hyderabad East and North were charge sheeted for offences punishable under Ss. 147, 364, 302 read with Ss. 34 and 149 of the IPC for abduction and murder of one Katham Anjaneyulu on December 5, 1980. The approver Originally the eighth accused Palla Narasimhareddy was tendered pardon and his statement was recorded on November 6, 1982 and the Magistrate committed the case to the Court of Session. The same was numbered as S.C. No. 18 of 1983 on the file of the Addl. Sessions Judge, Rangareddy District, before whom questioning the order of committal the fifth accused filed a petition seeking to set aside the committal order but the same was dismissed holding that the approver was examined and therefore there was compliance of S. 306(4) of the Cri.P.C. As against that the present revision is filed.

3. The learned counsel for the petitioner contends that under S. 306(4) of the Cr.P.C. examination of the approver as a witness is mandatory and only after such examination, the Magistrate taking cognisance can commit the case to the Court of Session for trial. It is also submitted by the learned counsel for the petitioner that in the instant case the approver was not examined as a Witness on November 6, 1982 but only his statement was recorded by the Committal Magistrate and as a matter of fact the case was not even posted to that date and therefore the lower Court has wholly erred in holding that the approver was examined as a witness as required under S. 306(4) of the Cr. P.C.

4. To appreciate the point involved, it becomes necessary to extract the relevant provisions. The corresponding provision to S. 306(4) of the Cr.P.C. in the old Code is S. 337. S. 337(2) of the (Old) Cr.P.C. reads thus :

"Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any".

S. 337(2-A) of the (Old) Cr.P.C. reads thus :

"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."

In the (amended) Cr.P.C. 1973 (Act II of 1974) the same provision is incorporated as S. 306 and the relevant provision reads as under :

"306. Tender of pardon to accomplice.

(1) to (3)

(4) Every person accepting a tender of pardon made under sub-section (1) -

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of trial.

(5) Where a person has accept a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of that 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 (46 of 1952), if the offence is triable exclusively by the Court;

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

5. A careful reading of S. 306(4) of the Cr.P.C. leaves no room for doubt whatsoever that after accepting tender of pardon the approver should be examined as a witness in the Court of the Magistrate taking cognizance and S. 306(5) of the Code of Criminal Procedure lays down that the Magistrate taking cognizance of the offence shall without making any further enquiry, commit the case for trial only after the approver has been examined under S. 306(4) of the Cr.P.C.

6. S. 207 of the (Old) Cr.P.C. is the general provision to be followed in inquiries and S. 207-A of the (Old) Cr.P.C. lays down the procedure to be adopted in proceedings instituted on police-report by a committal Court. S. 207-A of the (Old) Cr. P.C. contemplates examination of one or more witnesses and then commit the case. Under S. 209 of the new Cr.P.C. the examination of any witness is dispensed with and under the said provision the Magistrate taking cognizance can straightway commit the case to the Court of Session after complying with the provisions under S. 207 or 208 of the Cr.P.C. Relying on the provisions of S. 209 of the Cr.P.C. the Addl. Public Prosecutor submits that even if the approver is not examined as a witness, still the committal ordered by the Magistrate cannot be interfered with in view of S. 209 of the Cr.P.C.

7. As mentioned above regarding. the examination of the approver before committal, the legal provisions as contained under Ss. 337(2) and 337(2-A) of the (Old) Cr.P.C. as well as the provisions under S. 306 (4) and (5) of the Code of Criminal Procedure are almost the same. Both these provisions lay down that the committal Magistrate shall examine the approver as a witness and then proceed to the next step viz. to commit the case if it is exclusively triable by the Court of Session. It can therefore be seen that in a case where the accused is tendered pardon and is taken as an approver a special procedure is laid down and the Magistrate taking cognizance cannot dispense with this special procedure and commit the case merely applying the procedure contemplated under S. 209 of the Kalu Khoda and Others Vs. The State, is a case where the same question was dealt with under S. 337 of the (Old) Cr.P.C. which as already held, is analogous to S. 306 of the Code of Criminal Procedure. A Full Bench of Gujarat High Court, after considering the scope of Ss. 207 and 207-A of the (Old) Cr.P.C. held as follows :

"The committal proceedings and the order would be illegal if, in breach of sub-section (2) of S. 337, the committing Magistrate commits an accused to the Court of Session without the prosecution examining the person who has been tendered pardon and who has accepted the same."

The full bench also observed that S. 207-A of the (Old) Cr.P.C. though enacted late cannot be said to have been superimposed on S. 337(2) of the (Old) Cr.P.C.

and that the procedure laid down under S. 207-A of the (Old) Cr.P.C. may be read subject to the provisions of S. 337 of the (Old) Cr.P.C. The Full Bench also laid emphasis that the approver must be examined and observed that the provisions of S. 337(2) of the (Old) Cr.P.C. are for the benefit of the accused in such a case and are inserted in the interests of justice. The Full Bench held :

"The breach of sub-section (2) of S. 337, therefore, is of a mandatory rather than a mere directory provision and such a breach would render the proceedings and the order illegal. The intended benefit for an accused for which sub-section (2) of S. 337 appears to have been enacted would seem to consist in

(1) that the approver would have to disclose his evidence at the preliminary stage before the committal order is passed, and

(2) that an accused thus not only knows what the evidence is against him but gets an opportunity to rely upon the deposition of an approver before the committing Court for the purpose of proving the approver's evidence at the trial untrustworthy, if there are contradictions or improvements.

There can be thus no question that if the approver is not examined at both the stages, as required by sub-section (2), the accused in the trial would lose this benefit and it cannot be gainsaid that he would be prejudiced if he were to lose the opportunity of showing the approver's evidence unreliable. It would be deprivation of an important and in some cases a vital right which would cause him prejudice resulting in failure of justice. Even if, therefore, the breach of sub-section (2) is not to be regarded as illegal, S. 537 of the Code could not cure such an irregularity and that section cannot be invoked to cure any such irregularity".

In the State v. Chokkaiah (1975) 2 APLJ 200 Madhusudan Rao, J. also held that the committal of cases wherein there are approvers is governed by sub-section (4) and (5) of S. 306 which are Special provisions but not by S. 209(a) which is a general provision.

8. Therefore, when the committal is made without examining the approver, as required by Sub-section (4) of S. 306 the committal is illegal and is liable to be set aside. A plain reading of the provisions makes it clear that in a case of committal where there is an approver, the special procedure as laid down by S. 306 (4) and (5) of the Cr.P.C. has to be followed.

9. The next question is : whether in the instant case the procedure as laid in S. 306(4) of the Cr.P.C. is complied with ? The Addl. Public Prosecutor submits that the approver was examined on November 6, 1982 and on that date the fourth accused was also present in the Court and if the fourth accused wanted, he Could have cross-examined the approver and having regard to all these circumstances it must be held that the approver was examined as a witness and therefore there is compliance of S. 306(4) of the Code of Criminal Procedure. The lower court has also noted in its order that the fourth accused was present on that day in the

court. The record shows that the case was not posted to November 6, 1982. It looks as though the eighth accused who was tendered pardon, was produced before the Magistrate on that date and his statement was recorded. We do not know for what purpose the fourth accused was present in the court and at any rate his mere presence is not of any consequence when all the accused or their counsel have not been informed that the approver is going to be examined as a witness on that day as required under S. 306(4) of the Cr.P.C. Admittedly neither all the accused nor their counsel were put on notice regarding the examination of the approver as a witness on that day. But what the lower Court observed is that the approver was examined on November 6, 1982 and one of the accused (the fourth accused) was present; therefore that satisfies the requirements of S. 306(4) of the Cr.P.C. This view is clearly erroneous.

10. S. 138 of the Evidence Act provides for order of examination of witnesses and lays down that witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) cross-examined, then (if the party calling him so desires) re-examined. Therefore the examination of a witness means it should be done in the manner provided under S. 138 of the Evidence Act. Chapter XXIII of the Cr.P.C. deals with the evidence in inquiries and trials and the method of taking and recording evidence. S. 273 of the Cr.P.C. reads thus :

"Except as otherwise expressly provided all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader. Explanation : In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

This is an important provision which provides that all the evidence taken in the court should be in the presence of the accused. Therefore the casual presence of the fourth accused in the court does not satisfy this requirement. As observed by the Full Bench of Gujarat High Court in *Kalu Khoda v. State* 1962 Cri LJ 604 (supra) the provisions of S. 306(4) of the Cr. P.C., which are analogous to S. 337(2) of the (Old) Cr.P.C. are for the benefit of the accused. Unless the accused are given an opportunity to cross-examine the approver who is examined as a witness, it cannot be said that the provision which is mandatory in nature is complied with and such a failure which is not curable is deprivation of an important and in some cases a vital right which would cause him prejudice resulting in failure of justice.

11. From the above discussion it emerges that mere recording of a statement of an approver on November 6, 1982 does not amount to examination of him as a witness and therefore the provision under S. 306(4) of the Cr.P.C. was not complied with and consequently the committal order made by the learned Magistrate is liable to be quashed. Accordingly the committal order passed by the learned Magistrate in P.R.C. No. 8 of 1981 is quashed and the Magistrate is directed to examine the approver as required under S. 306(4) of the Cr.P.C. and

also give an opportunity to the accused to cross-examine him and then pass appropriate orders as provided under S. 306(5) of the Cr.P.C. The Criminal Revision is ordered accordingly.

12. Order accordingly.