Ramekbal Tiwary vs Madan Mohan Tiwary & Anr on 17 January, 1967

Equivalent citations: 1967 AIR 1156, 1967 SCR (2) 368, AIR 1967 SUPREME COURT 1156, 1967 B L J R 646, (1967) 1 S C W R 249, 1967 S C D 473, (1967) 2 S C J 191, (1967) 2 S C R 368, I L R 46 PAT 488

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Bench: V. Ramaswami, K. Subba Rao, J.C. Shah, S.M. Sikri, C.A. Vaidyialingam

PETITIONER:
RAMEKBAL TIWARY

Vs.

RESPONDENT:
MADAN MOHAN TIWARY & ANR.

DATE OF JUDGMENT:
17/01/1967

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
RAO, K. SUBBA (CJ)
SHAH, J.C.
SIKRI, S.M.
VAIDYIALINGAM, C.A.

CITATION:
1967 AIR 1156 1967 SCR (2) 368

ACT:
Code of Criminal Procedure (Act 50 1898), ss. 209(1), 403, 437 and 439--Police complaint of major offence triable by Sessions Court--Magistrate framing charge for minor offence--Accused tried and acquitted of minor offence by Magistrate--Sessions Court setting aside acquittal and directing committal for major offence--Order of Sessions Court confirmed by High Court--Jurisdiction of Sessions Court--Acquittal of minor offence, if res judicata regarding major offence.

HEADNOTE:

The police filed a charge sheet against the appellant and others for an offence under s. 307, read with ss. 148 and 149 of the Penal Code. The Magistrate, after examining the prosecution witnesses passed an order under s. 209(1) Criminal Procedure, Code, that no case under s. 307 was made out, and decided to try the accused for offences under ss. 326 and 338, I.P.C. After a regular trial for those offences, the Magistrate passed another order acquitting the accused. The prosecution moved the Sessions Judge under s. 437 Cr. P.C., and he held that the accused were improperly discharged of the offence under s. 307 I.P.C., set aside the order of acquittal for the offence under ss. 326 and 338 I.P.C., and directed the Magistrate to commit the accused to Sessions on charges under ss. 307, 148 and 149 I.P.C. The High Court in 'revision, confirmed the order of the Sessions Judge with respect to the appellant alone and directed his committal under s. 307 I.P.C.

In appeal to this Court, the jurisdiction of the Sessions Judge to set aside the acquittal and to direct committal was questioned.

HELD : (1) The Sessions Judge had jurisdiction to set aside the first order of the Magistrate and to direct the committal. [373 A]

The order of the Magistrate is not an express order of discharge, of the appellant for the offence under s. 307, I.P.C. but is tantamount to an implied order of discharge. The language of s. 437 Cr. P.C., however, is wide, and there is nothing to indicate that the power of the Sessions Court can be exercised only when the Magistrate had made an express order of discharge. In fact, under s. 209(1) Cr. P.C., such an express order is contemplated only in a case where the Magistrate comes to the conclusion that the allegations against the accused do not amount to any offence at all; and not in a case where,, upon the same facts, it is possible to say that though no offence exclusively triable by a Court of Session was made out, an offence triable by 'a Magistrate is nevertheless made out. [372 D-E]

Nahar Singh v. State, A.I.R. 1952 All. 231(F.B.) and Sambhu Charan v. State 60 C.W.N. 709, overruled.

(2) The Sessions Court had no authority to set aside the acquittal with respect to the offences under ss. 326 and 338, but since the order was affirmed by the High Court, the High Court must be deemed to have itself set aside the order of acquittal by the Magistrate, under s. 439 Cr. P.C. [375 G]

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(3) In view of s. 403 (4) Cr.P.C. there could be a fresh charge and trial under s. 307 I.P.C. in spite of the acquittal of the appellant on the minor charges, because, the Magistrate was not competent to try the offence under s. 307 I.P.C. The general principle of res judicata also, would not apply, because, the order of acquittal by the Magistrate

must be deemed to have been validly set aside by the High Court. [376 C; 377 C]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 213 of 1964.

Appeal by special leave from the judgment and order dated May 8, 1964 of the Patna High Court in Criminal Revision No. 162 of 1961.

Nur-ud-din Ahmed and R. C. Prasad, for the appellant. U. P. Singh, for respondent No. 1.

B. P. Jha, for respondent No. 2.

The Judgment of the Court was delivered by Ramaswami, J. This appeal is brought, by special leave, from the judgment of the Patna High Court dated May 8, 1964 in Criminal Revision No. 162 of 1961 affirming the order of the Additional Sessions Judge of Arrah in Criminal Revision No. 194 of 1960 ordering the appellant to be committed to Sessions for being tried on a charge under S. 307, Indian Penal Code.

It appears that the police submitted a charge-sheet against the appellant and 8 others in respect of offences under s. 307, read with ss. 148 and 149, Indian Penal Code on the information lodged by Gourishankar Tiwari, alleging that the accused had formed an unlawful assembly and, in prosecution of the common object, the appellant Ramekbal Tiwary injured the informant with a gunshot. The defence of the appellant was that Gourishankar Tiwari had raided his house with several other persons and in self-defence he used his gun inside his house as a result of which Gourishanker Tiwari received injuries. The Magistrate to whom the case was transferred by the subdivisional Magistrate, started an enquiry under Ch. XVIII of the Criminal Procedure Code and, having examined eleven prosecution witnesses and heard the arguments of the parties, decided to try the accused under s. 251A of the Criminal Procedure Code for offences under ss. 326 and 338 of the Indian Penal Code, because in his opinion, the evidence did not make out an offence under s. 307, Indian Penal Code. This order was made by the Magistrate on March 19, 1960. Thereafter the Magistrate held a regular trial with regard to charges under ss. 326 and 338, Indian Penal Code and acquitted the appellant and the other accused of those charges by his order dated July 13, 1960. On behalf of the prosecution, an Sup. CI/67-10 application in revision was made to the Additional Sessions Judge who allowed the application and set aside the two orders of the Magistrate dated March 19, 1960 and July 13, 1960 and directed the Magistrate to commit the appellant and the other accused to the Court of Sessions on charges under ss. 307 and 148, and 307 read with s. 149 of the Indian Penal Code. The appellant took the matter in revision in Revision No. 162 of 1961 before the Patna High Court which, by its judgment dated May 8, 1964 held that the appellant was improperly discharged by the Magistrate and the order of the Additional Sessions Judge for his commitment under s. 307, Indian Penal Code was therefore justified. With regard to the other accused persons, the High Court held that there was no evidence to justify their commitment and the order of the

Additional Sessions Judge with regard to these accused persons was set aside.

The first question involved in this appeal is whether the Additional Sessions Judge had jurisdiction under s. 437, Criminal Procedure Code to direct the commitment of the appellant to Sessions Court on a charge under s. 307, Indian Penal Code in the circumstances of this case. In order to decide this question it is desirable to examine the relevant provisions of the Criminal Procedure Code. Section 437 Criminal Procedure Code states :

> "When, on examining the record of any case under s. 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, any may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged Provided as follows :
>
> (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made;
>
> (b) that if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence."

Section 207, Criminal Procedure Code provides that in every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or, which in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate must in any proceeding instituted on a police report, follow the procedure prescribed in s. 207-A. Under s. 207-A the Magistrate, after persuing the police report forwarded under s. 173, has to fix a date for hearing and require the production of the accused on that date. He has also the power to compel the attendance of such witnesses or the production of any document or thing on that date if an application is made in that behalf by the officer conducting the prosecution. On the date of hearing, the Magistrate, after satisfying himself that copies of the documents referred to in s. 173 have been furnished, has to proceed to take the evidence of such persons, if any, as are produced as witnesses to the actual commission of the offence. After the examination of those witnesses and after their cross-examination by the accused the Magistrate may, if he thinks it necessary to do so in the interest of justice, take the evidence of any one or more of the other witnesses for the prosecution. He will then examine the accused for the purpose of enabling him to explain the circumstances appearing in the evidence against him and hear both the prosecution as well as the accused. If at that stage he is of opinion that no ground for committing the accused for trial exists the Magistrate can, after recording his reasons, discharge the accused. If, however, it appears to the Magistrate that such person should be tried by himself or some other Magistrate he must proceed accordingly. This contingency will arise if the Magistrate forms an opinion that no case exclusively triable by Court of Session is disclosed but a less serious offence which it is within the competence of the Magistrate to try is disclosed. In that case the Magistrate has to proceed to try the accused himself or send him for

trial before another Magistrate. Section 209(1), Criminal Procedure Code states :

> "209. (1) When the evidence referred to in s. 208, sub-sections (1) and (3) have been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate, shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly."

It was submitted on behalf of the appellant that if a person is accused of a major offence, for example under s. 307, Indian Penal Code, and the Magistrate frames a charge of minor offence, for example under s. 326 or s. 338, Indian Penal Code, the order of the Magistrate is not tantamount to an order of discharge, because the criminal case is proceeding against the accused on the same facts and therefore the Sessions Judge is not competent, under s. 43n7, Criminal Procedure Code, to direct the commitment of the accused to the Court of Session in respect of the major offence. We are unable to accept this argument as correct. It is true that in the present case there is no express order of the Magistrate discharging the appellant of the charge under s. 307, Indian Penal Code, but in his order dated March 19, 1960 the Magistrate has given reasons for holding that no case is made out under s. 307, Indian Penal Code in order to justify an order of commitment. It is manifest that the order of the Magistrate is tantamount to an implied order of discharge and the Additional Sessions Judge had therefore jurisdiction, under s. 437, Criminal Procedure Code, to set aside the order of the Magistrate and to order that the accused should be committed to trial in the Court of Session on the major charge under s. 307, Indian Penal Code. There is nothing in the language of s. 437, Criminal Procedure Code from which it could be said that the power of the Sessions Court under that section can be exercised only when the Magistrate has made an express order of discharge. It is apparent from the language of s. 209(1) Criminal Procedure Code that an express order of discharge is only contemplated in a case where the Magis- trate comes to the conclusion that the allegations against the accused do not amount to an offence at all and therefore no question arises of trying him either by himself or by any other Court. But the section does not contemplate that an express order of discharge should be made in a case where upon the same facts it is possible to say that though no offence exclusively triable by a Court of Session is made out, an offence triable by a Magistrate is nevertheless made out and the Magistrate thereafter proceeds with the trial of that offence. There is also another consideration to be taken into account. Take, for instance, a case where on a certain state of facts the accused is alleged by the prosecution to have committed a very grave offence, say under s. 302, Indian Penal Code exclusively triable by the Court of Session, but the Magistrate thinks that the offence falls under s. 304-A which he can try and after trying the accused either convicts or acquits him. In either case the result would be that the appropriate Court will be prevented from trying the accused for the graver offence which those very facts disclose. It is to obviate such a consequence and to prevent inferior Courts from exercising a jurisdiction which they do not possess that the provisions of s. 437, Criminal Procedure Code have been enacted. To say that these provisions can be availed of only where an express order of discharge is made by a Magistrate would be to render those provisions ineffective and inapplicable to the very class of cases for which they were intended. As we have already pointed out, the language used in s. 437, Criminal Procedure

Code is wide and there is nothing in that section from which it could be gathered that the power can be exercised only when the Magistrate has made an express order of discharge. We accordingly reject the argument of Mr. Nurrudin Ahmed on behalf of the appellant and hold that the Additional Sessions Judge had jurisdiction to set aside the order of the Magistrate dated March 19, 1960 and to direct the commitment of the appellant to Sessions Court on a charge under s. 307, Indian Penal Code. The view that we have expressed is borne out by the decision of the Full Bench of the Madras High Court in Krishna Reddi v. Subbamma(1). In that case, certain persons were charged before a First Class Magistrate under s. 379, Indian Penal Code with the theft of a promissory note. The prosecution applied for a further charge to be framed under s. 477, Indian Penal Code, but this the Magistrate declined to do, as in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence the Magistrate acquitted the accused under s. 258, Criminal Procedure Code. An application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under s. 477, Indian Penal Code. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. It was contended before the High Court that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged. It was held by the Full Bench that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under s. 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised. In the course of its judgment the Full Bench observed at page 146 of the Report as follows:

> "If section 209 of the Criminal Procedure Code is to be construed as meaning that there can be no 'discharge' under that section in respect of an offence exclusively triable by a Court of Session in cases where it appears to the Magistrate that the accused should be tried before himself or some other Magistrate in respect of offences not so exclusively triable, there would be a deadlock, since there is no provision in the Code, other than that contained in section 209, for dealing with a case where the Magistrate is of opinion that there is no evidence of an alleged offence which is triable exclusively by a Court of Session, but considers that the accused should be tried before himself, or some other Magistrate in respect of alleged offences which are not so exclusively triable. From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that (1) I.L.R. 24 Madras 136.

there was not, and he declined to charge him with the major offence. It seems to us that this is a 'discharge' within the meaning of section 209.

Chapter XVIII relates to enquiries into cases triable by the Court of Session or High Court. The primary object of section 209 is to make provision for the. procedure in such cases. If in the opinion of the Magistrate, there is no evidence to warrant a charge for an offence exclusively triable by a Court of Session, he may 'discharge' the accused in respect of the alleged offence and, having done so, may proceed as regards the minor offence or offences under Chapter XXI or other appropriate chapter. In fact, a Magistrate cannot proceed to act under the latter part of sub-section (1) of section

209 until he has 'discharged' the accused under the former part of the sub-section. This is the course which the Magistrate adopted in the present case." The same view has been held by the Full Bench of the Madras High Court in In re Nalla Baligadu and Others(1) and it was held that where under s. 209(1) a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such person to be tried before himself or some other Magistrate, the revisional powers under s. 437 Criminal Procedure Code can be exercised by the Sessions Court. On behalf of the appellant Mr. Nuruddin Ahmed relied upon the Full Bench decision of the Allahabad High Court in Nahar Singh v. The State(2) in which it was held that the power under s. 437, Criminal Procedure Code is exercisable only in a case where the Magistrate, by an express order, discharges an accused person in respect of an offence ex- clusively triable by a Court of Session. It was observed in that case that the failure of or refusal by a Magistrate to commit an accused person for trial by a Court of Session does not amount to an implied discharge of the accused person so as to attract the power of the Sessions Judge under s. 437, Criminal Procedure Code to direct the Magistrate to commit the accused person for trial by the Court of Session on the ground that the offence is exclusively triable by the Court of Session. The view taken in Nahar Singh v. The State(2), has been followed by the Calcutta High Court in Sambhu Charan Mandal v. The State(3). For the reasons already expressed, we hold that the view taken by the Madras High Court in Krishna Reddi v. Subbamma(4) and in In re Nalla Baligadu and Others(1) as to the interpretation and effect of ss. 209 and 437, Criminal Procedure Code is correct.

(1) A.I.R. 1953 Mad. 801. (2) A.I,.R. 1952. All. 231. (3) 60 C.W.N. 708. (4) I.L.R. 24 Mad. 136.

We pass on to consider the next contention raised on behalf of the appellant, namely, that the order of the Additional Sessions Judge dated July 13, 1960 is ultra vires since he had no jurisdiction to set aside the judgment of the Magistrate acquitting the appellant of the charges under ss. 326 and 338, Indian Penal Code. We do not think there is any substance in this point. It is true that the Additional Sessions Judge has no authority to set aside the acquittal of the appellant under the provisions of s. 437, Criminal Procedure Code. But the order of the Additional Sessions Judge has been affirmed by the High Court in its order under appeal and under s. 439, Criminal Procedure Code the High Court has jurisdiction to interfere with an order of acquittal in revision and to direct that the accused may be retried on the graver offence. Section 439, Criminal Procedure Code reads as follows :-

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on' a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

> (4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

.....

In our opinion the High Court must be deemed to have itself set aside the order of acquittal under this section and we therefore reject the argument advanced by the appellant on this aspect of the case.

It was lastly contended for the appellant that there can be no commitment for the offence under s. 307, Indian Penal Code in view of the acquittal on the charge under ss. 326 and 338, Indian Penal Code. Reliance was placed on s. 403 (1),. Criminal Procedure, Code which states .lm15 "403. (1) A person who has been once tried by a Court Of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction ,or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under section 237."

There is no substance in the argument of the appellant because s. 403 (4) provides that a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. In view of this sub-section it is obvious that there can be a fresh charge and trial under s. 307, Indian Penal Code in spite of the acquittal of the appellant on the minor charges. There is hence no reason why an order for commitment under s. 307, Indian Penal Code cannot be made by the Additional Sessions Judge in spite of the acquittal of the appellant on the charges under ss. 326 and 338, Indian' Penal Code.

It was also submitted by Mr. Nuruddin Ahmed that apart from s. 403(1) of the Criminal Procedure Code the principle of res judicata applied to a criminal trial also and the effect of a verdict of acquittal pronounced by the Magistrate on the charges under ss. 326 and 338, Indian Penal Code was binding and conclusive in all subsequent proceedings between the parties and the effect of the finding of the Magistrate was that the prosecution had failed to establish that Gourishankar Tiwari was injured in the manner alleged by the prosecution and the prosecution case was not established. It was argued that the same facts could not be proved against the appellant in subsequent proceedings on the charge under s. 307, Indian Penal Code. In support of this proposition Counsel relied upon the decision of this Court in Pritam Singh v. The State of punjab(1) and also on the following observations of Lord MacDermottt in Sambasivam v. Public Prosecutor, Federation of Malaya(2) :

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that

the verdict is binding and conclusive in all subsequent proceedings between the parties (1) A.I. R. 1956 S.C. 415.

(2) [1950] A.C. 458, 479.

to the adjudication. The maxim 'Res judicata pro veritate accipitur is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence."

In our opinion, the principle does not apply to the present case because the order of acquittal of the appellant by the Magistrate must be deemed to have been validly set aside by the High Court for the reasons we have already given. We, accordingly reject the argument of the appellant on this point.

For these reasons we are satisfied that the order of the High Court dated May 8, 1964 is not defective in law. But in the circumstances of this case we think that it is not expedient that the appellant should be tried after this lapse of time before a Sessions Court for an offence committed as long back as September 30, 1958. We accordingly set aside the order of the Additional Sessions Judge, Arrah dated December 20, 1960 ordering the commitment of the appellant and also the judgment of the Patna High Court dated May 8, 1964 which affirms the order of the Additional Sessions Judge. The appeal is accordingly allowed.

V.P.S. Appeal allowed.