

Shakir Khan vs The State on 14 April, 1952

Equivalent citations: AIR1953ALL349, AIR 1953 ALLAHABAD 349

ORDER

Kidwai, J.

1. Proceedings were going on under Section 110, Cr. P. C., before Sri. C. K. Verma, S. D. M. Maharajganj, district Rae Bareilly. Sri C. K. Verma was transferred on 20-3-1951 and became S. D. M., Rae Bareilly. He was succeeded by Sri Vishnu Prakash, before whom, the accused claimed that the witnesses should be recalled. Orders were passed to this effect on 29-3-1951. On 14-4-1951 Sri Vishnu Prakash recorded the statements of Ram Ratan and Adhar. He was then transferred to some other district and on 4-7-1951 the case was retransferred to Sri C. K. Verma. Before him the accused applied for resumption of the witnesses. This application was rejected on 17-7-1951. The accused went in revision but the learned Sessions Judge rejected his application. He has now come up to this Court in revision.

2. The matter is governed by Section 350, Criminal P. C., which reads as follows ;

"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may res summon the witnesses and recommence the enquiry or trial.

Provided as follows : (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard."

3. In the present case the Magistrate did not suo motu decide to recommence the trial. It was the accused who claimed the right to res summon the witnesses. The distinction between the two is to be found laid down in State v. Bansu, A. I. R. 1950 ALL. 669, but it is not material for the purposes of this case. Here the question is whether Sri C. K. Verma can be deemed to be another Magistrate or whether he will be considered to be the Magistrate who has all along been seised of the case and whatever took place before Sri Vishnu Prakash can be ignored.

4. In *Sardar Shan Sahib v. Athaulla*, A. I. R. 1925 Mad. 174 and *Ramalingam Pillai v. Emperor*, A. I. R. 1934 Mad. 475, it was laid down that if the second Magistrate merely ordered de novo trial at the request of the accused, it had the effect of wiping out everything that had been done by the first Magistrate and that consequently when the case was transferred to the first Magistrate, the accused were justified in asking for a de novo trial. This view is supported by the decisions of the Nagpur High Court in *Sheorajsai v. Dani*, A. I. R. 1931 Nag. 39 and *Tukaram Janla v. Emperor*, A. I. R. 1936 Nag. 153 and *Emperor v. Ganpat*, A. I. R. 1936 Nag. 220. The distinction, however, between a retrial and the re-summoning of witnesses has been clearly laid down by a Bench of this Court in *State v. Bansu*, A. I. R. 1950 ALL. 669, to which I have already referred. In that case it is clearly pointed out that if a Magistrate decides to proceed afresh suo motu, he recommences the trial which means that everything done before is wiped out. On the other hand the accused only has a right to re-summon the witnesses which is not the same thing as de novo trial. With respect I agree with this view of the section.

5. It is, however, not necessary for the applicant to go to this extent because the cases upon which both the lower Courts have relied, namely *Shyamapado Deb v. Sunder Vas*, A. I. R. 1938 ALL. 536 and *Ghaus Mohammad v. Emperor*, A. I. R. 1941 Lah. 322, themselves justify the re-summoning of witnesses in a case such as this.

6. As I have already pointed out Sri Vishnu Prakash recorded statements. He was, therefore, a Magistrate who heard and recorded a part of the evidence in the enquiry or trial when he was transferred and the case was again sent to Sri C. K. Varma. Sri C. K. Varma must be deemed within the meaning of the two authorities which I have just mentioned to be another Magistrate.

7. In the Allahabad case the learned Judge says that in order to attract the provisions of Section 350, Cr. P. C., the first Magistrate must have two qualifications. He must have heard and recorded the whole or any part of the evidence and he must cease to have exercised jurisdiction. This is also the view of the Lahore High Court. In both those cases the first Magistrate had not heard and recorded any part of the evidence. He did not, therefore, possess the first qualification. In these circumstances it was held that Section 350, Cr. P. C., did not apply to this case.

8. In the present case the learned Magistrate Sri Vishnu Prakash possessed both the qualifications namely he heard and recorded part of the evidence and he ceased to have jurisdiction. Section 350, Cr. P. C., therefore, did apply to this case. When the case went back to Sri C. K. Varma, he must be deemed in the circumstances to be another Magistrate and the accused has a right under Clause (1) (a) of Section 350, Cr. P. C., to claim to have the witnesses resummoned.

9. This position becomes still more clear when we remember that the statements of Ram Ratan and Adhar were recorded by Sri Vishnu Prakash, If C. K. Varma is deemed not to be another Magistrate it does not appear what is to happen to the statements of Ram Ratan and Adhar. They, cannot be resummoned before Sri C. K. Varma. This means either that their statements must be ignored or that in spite of the right conferred upon an accused person their statements are to be read as part of the proceedings of Sri C. K. Varma without their being resummoned which is a result which is far from what Section 350, Cr. P. C., contemplates. I, therefore, hold that the accused was entitled to

have the witnesses resummoned and reheard even when Sri C. K. Varma was once more seized of the case.

10. I, therefore, allow the application, set aside the order of the learned Magistrate, dated 17-7-1951, and remit the case to him to proceed to resummon and rehear the witnesses under the provisions of Section 350, Cr. P. C.