Purshottam Singh And Ors. vs The State on 11 October, 1954

Equivalent citations: 1962CRILJ248

ORDER

A.N. Mulla, J.

1. This is an application by Purshottam Singh and six others for quashing the order of Commitment passed against them by a judicial Magistrate of Hardoi, The applicants were committed to the Court of Session under Section 302/149 and several other section, of the I.P.Code. The ground for seeking this relief is that the Magistrate violated the mandatory provisions of Section 208 Criminal Procedure Code and did not permit the applicants to examine certain witnesses in defence.

2. The facts of the case disclose that after the prosecution evidence was over, the applicants, through a counsel, filed an application praying that, before their statements as accused persons be recorded, their witnesses in defence should be examined. This application was filed on. 24.12.1953 and a list of witnesses was submitted along witb this application.

The Magistrate issued processes to the witnesses named in the list and fixed 9.1.1954 as the next date of Hearing. On 9.1.1954 only one witness was served and the Magistrate examined him and the case was adjourned to 23.1.1954. On this date no witnesses appeared and the summonses issued to them came back unserved Thereupon fresh summonses were issued and 6.2.1954 was fixed for hearing.

The witnesses did not turn up on that date either and the order sheet of the Court does not show whether they were served or not. The Magistrate then adjourned the case to 9.2.1954. On that date, some summoned documents were taken on the file and some more were summoned, but the Magistrate refused to summon ally witness, although the counsel for the applicant requested that only two witnesses be summoned again. It is again not clear from the order sheet whether the summonses issued to these witnesses were served Or not. The two witnesses whom the applicants wanted to summon were the Railway Magistrate of Bareilly and his Reader.

In his order dated 9.2.1954 refusing to summon these witnesses the Magistrate wrote that the accused insist on producing these two witnesses, as it would help them in getting bail from the Sessions Court. He proceeded to give his interpretation of Section 208 Cr.P.C. and observed that a Magistrate should summon only those witnesses whom he deems to be necessary and finally he stared that he refused to summon these witnesses in order to expedite the case.

3. Although the Magistrate wanted to expedite the case, yet we find that he did not commit the case till more than a month later. All this time he was trying to get the, opinion of an expert from the Finger Print Bureau, Lucknow, at the request of the prosecution, on some of the documents filed by

the defence.

His desire to expedite the case was very strong when he refused the prayer of the accused to summon the witnesses, but it seems to have left him altogether when the, prosecution asked him to secure the opinion of an expert. After passing this order, the Magistrate examined the accused1 persons and every one of the applicants stated that he will not make a statement until the defence witnesses were examined. He thereupon committed them to the Court of Session on 15.3.1954.

4. The Magistrate had refused to summon the defence witnesses because in his opinion the circumstances of the case warranted that he should exercise the discretion given to him under Section 208 Sub-section (3) Cr.P.C. against the summoning of these witnesses. Section 208 Cr.P.C. runs as follows:

> (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.
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> Sub-section (2) is not relevant.
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> (3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue proces to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded he deems it unnecessary to do so.

A reading of these two sub-sections makes it clear that while the Magistrate has no option to refuse to examine, those witnesses who are produced before him, he can do so to the case of those witnesses for compelling whose attendance he is asked to issue processes, but he can do so only if he records his reasons for coming to the conclusion that they are unnecessary.

A Similar discretion is given to a Magistrate under Chapter XX Cr.P.C. (Trial of summons cases) as well as under Chapter XXI Cr.P.C. (Trial of warrant cases). Sub-section (2) of Section 244 Cr.P.C. reads as follows:

> The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend it or to produce any document or other thing.
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> Sub-section (1) of Section 257 Cr.P.C. is as follows:
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> If the accused, after he has entered upon his defence. applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application

should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

A comparative reading of these sections shows that while a very wide discretion is given to a Magistrate in the trial of summons cases, this discretion is circumscribed within certain limits in warrant trials as well as inquiry in Sessions trials. It is true that a larger discretion is given in inquiries of Sessions Trials than in warrant trials, but the evidence of a witness must be found to be unnecessary before a Magistrate can refuse to examine him.

In my opinion wherever discretion is given to a Court, it always means "judicial discretion" and not "arbitrary discretion". Mere disagreement with the view of Magistrate will not be enough to set aside his order, if he has exercised his discretion in a judicial manner. But where the higher Court finds that the discretion exercised by the Magistrate has prejudiced the defence appreciably, it will not hesitate to set aside that order.

5. The Assistant Government Advocate contends that where a Magistrate, for some reason, finds that the evidence of a witness is unnecessary and records it in his order, the requirements of law are fulfilled and there is no illegality in such an order. He relies upon a decision of the Patna High Court AIR 1927 Pat 243, Saadat Mian v. Emperor. One of the learned Judges, who decided the case, observed as follows:

We are not at all concerned in the present case as to whether the reasons given by him would have appealed to another person or not. We have only to see if the procedure adopted by the Magistrate has contravened any of the statutory provisions in the Code. He has recorded his reasons for rejecting the application of the accused to summon defence witnesses. He has also expressly held that, it was unnecessary to do so at that stage. Therefore he has complied with the provisions contained in Clause (3) of Section 208 Cr.P.C. The order of the Magistrate cannot be held to be illegal and, therefore, no point of law arises out of it so as to justify the quashing of the commitments by this Court under Section 215 upon that ground.

With deep respect for the learned Judges, who gave this decision, I am unable to accept this interpretation of Section 208. Sub-section (3) Cr.P.C. In my opinion merely observing the letter of the law does not make an order legal. The spirit of the law is just as important as the letter of the law and where a Court only observes the letter of the law but violates its spirit, it cannot be said that the law has been followed and no illegality has been committed. A law is a living and vital thing and the moment its spirit is ignored, it becomes like dead flesh which is no longer fed by the blood stream. The very fact that the Magistrate has to record his reasons while dismissing an application for summoning evidence in warrant trials and inquiries in Sessions Trials while he is not called upon to do so in a summons trial, is a provision made clearly with the intent that a higher Court should see whether the discretion

> was properly exercised or not. My view finds support from a decision of the Bombay High Court AIR 1929 Bom 269, Emperor v. Yellappa Durgaji. The learned Judges who pronounced this decision also disagreed with the view expressed in the Patna decision quoted above. One of the Judges, observed:
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> With great respect, I am not prepared to say that the jurisdiction of this Court would be ousted, under Section 208 Cr.P.C., on the Magistrate recording a reason for his refusal. The reasons recorded by the Magistrate should be one which the Court would regard as valid and acceptable. The Court, however, would not interfere in the matter unless the reason recorded by the Magistrate appears on the face of it to be illegal or untenable.

6. From, the history of the case given, above it is clear that the Magistrate, did not consider the evidence which he refused to summon later as unnecessary on 24.12.1953, when the list of witnesses was submitted. He suddenly changed his mind and found these witnesses unnecessary on 9.2.1954. From his order it appears that two considerations made him change his opinion. Firstly, he found that the insistence for the examination of these witnesses was with the intention of securing bail and secondly, he wanted to expedite the case.

7. I have not been able to understand what was in the mind of the Magistrate when he mentioned the first reason as a ground for coming to the conclusion that the evidence of these witnesses was unnecessary. If the evidence of a witness will help an accused to secure bail in a murder trial, it is obviously of great importance. It means that if he is believed, the prosecution story in some way becomes extremely doubtful. This should also be kept in mind that these witnesses were responsible Government servants. Can this evidence be considered unnecessary, because, the Magistrate at that stage was not willing to assess or weigh the evidence on, either side? Should a Magistrate examine defence witnesses only when he is willing to discharge the accused?

In my opinion these questions never arose in the mind of the Magistrate at all. He did not think for a moment that his order might seriously prejudice the accused. In an inquiry in a Sessions case, the accused has been given an important and peculiar right, which has not been given to him under any other Chapter of the Criminal Procedure Code. He can examine his witnesses before making his statement. In other words, he can mould his statement in the light of the evidence which he has produced. He can first prepare his ground and then take a stand upon it. He can assure himself of the support which he would get before replying to the charge. He cannot be compelled to make a statement without knowing his, weakness as well as his strength. If this right is taken away from him, it will not only be against the law but it would deprive him of a great privilege which would amount to serious prejudice.

Again, a witness might be available at the time of inquiry, but he may not be available at the time of trial. He may even die in this interval. Will it not cause irreparable damage to the accused, if he loses such a witness merely because the Magistrate in his discretion refused to examine him?.

8. Coming to the second reason given by the Magistrate, namely, his anxiety to avoid delay in finishing the inquiry, his own subsequent conduct clearly proves that it was not a genuine reason. He refused to summon the defence witnesses on 9.2.1954 and committed the case on 15.3.1954. Surely there was ample time to examine not only those witnesses on which the defence insisted, but the entire lot of defence witnesses. In my opinion the Magistrate suddenly came to the conclusion that he should cut short these proceedings and he thought that Section, 208 Sub-section (3) gives him this power.

He fished out some reasons because the law required it and then exercised his power in a capricious manner. He did not exercise his discretion judicially and it caused serious prejudice to the applicants. Experience would toll the Magistrate that an attempt to take a short cut usually leads one into wilderness. En the long run, the shortest way would always be that way which faithfully follows the procedure laid down by law.

In a criminal trial whenever an accused makes a prayer, which is reasonable and to which he is entitled under the taw, but which is in the discretion of the Court to grant or refuse, a Court would seldom go wrong, if he grants that prayer. The other considerations which prompt him to refuse such a prayer can very rarely be of such importance as to justify a refusal and override the paramount consideration that an accused should have no reasonable cause to feel that he is being hampered in defending himself.

9. I find that the order of the Magistrate refusing to summon witnesses for defence was bad in law, as he had not exercised his discretion in a judicial manner, I, therefore, set aside this order of commitment passed against the applicants, and allow this application. The Magistrate should give fair opportunity to the accused to produce their evidence and then pass a suitable order.