

## **Mohd. Sarifullah vs State Through Yakub Khan And Ors. on 22 September, 1953**

### **Equivalent citations: 1954CRILJ447**

ORDER

Mukerji, J.

1. This is an application in revision against the order of the District Magistrate of Agra whereby the District Magistrate purported to act under the provisions of Section 503 of the Code of Criminal Procedure and directed a Magistrate subordinate to him to examine one Srimati Rohilla Khatoon on commission.

2. It appears that a case was pending in the court of Sri Goswami, a Magistrate of the 1st class, Agra, in which five persons stood charged with offences under sections 366 and 342 I. P. C. The accused were charged with having abducted Srimati Rohilla Khatoon. The complainant in this case was Sharifullah Khan, the husband of Srimati Rohilla Khatoon.

3. Sharifullah Khan applied to the court for summoning Rohilla Khatoon and examining her as a witness in the case on behalf of the prosecution. This application was opposed and Yaqoob Khan, one of the accused in the case who made an application to the Magistrate under Section 506 of the Code of Criminal Procedure for examining Srimati Rohilla Khatoon on commission. This application under Section 506 Cr. P. C. was moved on the 12th of June, 1952. The learned Magistrate fixed the 21st of June, 1952 for orders. On the 21st of June, 1952 when the application came up before the learned Magistrate it was not pressed and consequently the learned Magistrate refrained from making any orders on the application.

It appears that on the same date viz. the 21st of June, 1952, Yaqoob Khan moved the District Magistrate to order Sri Goswami, who was trying the case in which Rohilla Khatoon was to appear as a witness, not to summon her as a witness but to examine her on commission. The learned District Magistrate allowed this application on the 3rd of July, 1952. He has given no reasons why he chose to direct the examination of Rohilla Khatoon on commission. All that the District Magistrate has said in his order is that it appeared to him desirable in the circumstances of the case that she may be examined off commission.

4. This revision, as I have said earlier, is directed against the order of the District Magistrate directing the examination of Rohilla Khatoon on commission. It has been contended by Sri Jagdish Sahai that the District Magistrate could only make an order for the examination of a witness on commission if he was approached by the Magistrate, who was seized of the case, under Section 506 Cr. P. C. There is no doubt that under Section 506 Cr. P. C. a Magistrate other than a Presidency

Magistrate or a District Magistrate before whom a witness is to be examined during the course of an enquiry or trial or any other proceedings may, if he thinks proper, apply to the District Magistrate that in his view the witness should be examined on commission and the District Magistrate may then either issue a commission in the manner provided for or may reject the application of the Magistrate,

5. Under Section 503 a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court can during the course of an enquiry, trial or other proceedings direct that a witness may be examined on commission and when such examination is considered necessary then a commission may be issued to any District Magistrate of the 1st Class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness. This section does not empower either the Presidency Magistrate, or the District Magistrate or the Court of Session or even a High Court to make an order in respect of an enquiry, trial or other proceedings not pending before them or to make an order on the application of any party to a case which is not pending before those courts. If the scope of Section 503 Cr. P. C. were otherwise, viz. if under the provisions of this section the courts mentioned therein had the power to act either 'suo motu' or on, being approached by any party then the language used would have been different. Instead of the words "it appears" the words would in my opinion, have been "it is made to appear."

There is yet another reason why I am of the opinion that the courts mentioned in Section 503 Cr. P. C. have no power to act in respect of cases which are not pending before them because the legislature could not have given a choice of so many courts to a litigant to approach in respect of obtaining the same relief. A Magistrate before whom the question of issuing a commission may arise has not been given any choice of making a reference to either a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court. In such a case the reference has to be made to the District Magistrate alone. In my judgment a reading of the two sections, viz. sections 503 and 506 Cr. P. C., makes it clear that it was never the intention of the legislature to confer any such powers on a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court as is contended for by the opposite parties in this application.

6. A similar view appears to have been taken by the Judicial Commissioner's Court of Sind. The latest decision of that Court is in - 'Saleh v. Emperor' reported in AIR 1936 Sind 221 (A).

7. From what I have stated above, I am of the opinion that the order made by the District Magistrate of Agra on the 3rd of July, 1952 directing the examination of Rohilla Khatoon on commission was an order made without jurisdiction and must be set aside. This order of mine does not however preclude the learned trying Magistrate from considering the question whether or not Rohilla Khatoon should be examined on commission in the event of his being properly moved.

8. I accordingly allow this application and set aside the order of the District Magistrate of Agra dated the 3rd of July, 1952.