Madhya Pradesh High Court
The State vs Ramratan Bhudhan And Anr. on 2 July, 1956
Equivalent citations: 1957 CriLJ 64
Author: A Khan
Bench: A Khan
ORDER A.H. Khan, J.

1. These two references by the learned Sessions Judge of Indore raise a common point, namely, whether a Committing Magistrate Is justified in making a commitment on the basis of Police record under Section 173, Criminal P. C., without taking any evidence whatsoever.

It seems that in both the cases under references, the Magistrate has committed without recording any evidence under Section 207A of the Code and his committal order rests solely on his consideration of the Police papers submitted to the Magistrate under Section 173 of the Code. Since the point involved is common, both the references are disposed by a single order.

2. The Code of Criminal Procedure of 1898 has undergone changes in many important respects by the Criminal Procedure (Amendment) Act 26 of 1955. In Chapter 18, which relates to inquiry into cases triable by the Court of Session or High Court, Section 207A is an altogether new section, designed to introduce changes in the procedure adopted in committal proceedings in cases instituted or, police report. And it is Sub-section (4) of this section in particular which has to be considered.

3. According to this section, the first thing the Magistrate is to do on receiving the police report is to fix a date for holding an inquiry and this date shall not be later than 14 days from the date of receipt of the report. If the Magistrate fixes any later date, he shall record reasons.

4. The second thing the Magistrate is to do is to issue processes for attendance of witnesses or production of documents, should the police desire so.

5. The third thing which the Magistrate is to do is to see that copies referred to in Section 173 of the Code are supplied to the accused. If they are not supplied, the Magistrate shall see that they are made available to him.

6. The fourth thing required by the section is the recording of evidence by the Magistrate. Sub-section (4) of Section 207A runs thus and it is this subsection which is to be construed:

The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any one or more of the other witnesses of the prosecution, he may take such evidence also.

7. The sub-section can be conveniently divided into two parts. The first part deals With the duty of the prosecution to examine persons, if any, who have witnessed the actual commission of the alleged

offence i.e., who are eye-witnesses. The second part, beginning after semicolon and opening with the conjunction 'and' directs the Magistrate to record evidence of other witnesses also under certain circumstances.

8. According to the first part of the sub-section the Magistrate shall record evidence of such eyewitnesses as may be produced by prosecution. What is the force of the word 'may' used in the first part of the sub-section? The question is : does it depend on the sweet will of the prosecution to examine eye-witnesses, or is it the duty of the prosecution to examine eye-witnesses before the committing Magistrate? The word 'may' usually invests a person with discretion to do or not to do a thing.

If 'may' is understood in this sense of the term, then the prosecution in its discretion may examine eye-witnesses and it may not. If the prosecution decides not to examine eye-witnesses, the Court would be helpless. It is obvious to any one familiar with criminal work that if this interpretation is allowed to prevail, then very important piece of evidence would be allowed to slip through the fingers of the Magistrate. I am of the opinion that the word 'may' should be construed as 'shall'.

9. When in a statute the word 'may' is used, it sometimes gives rise to controversy as to whether it confers authority which is merely enabling, or, is it mandatory? It has been held in a number of cases that 'may' has sometimes a compulsory force. See R. v. Tithe Commissioner (1849) 14 QB 459 (A) and Border Rural District Council v. Roberts (1950) 1 KB 716 (B). The rule of interpretation is that where a statute directs the doing of a thing for the sake of justice or public good the word 'may' has the same force as the word 'shall'. Government of Burma v. Municipal Corporation of Rangoon AIR 1930 Rang 279 (FB) (C).

10. The following passage from Maxwell on Interpretation of Statutes (Edn. 10) page 244 further fortifies me in the view I take of the matter:

The Supreme Court of United States similarly laid it down that that which public officers are empowered to do for a third person, the law required that it shall be done whenever the public interest or individual rights call for the exercise of the power, since the latter is given, nor for their benefit, but for his, and is placed with the depository to meet the demands of right and to prevent the failure of justice. In all such cases, the Court observed, the intent of the Legislature, which is the test, is, not to grant a mere discretion but to impose a positive and absolute duty.

11. Both on authority and reason I hold that the first part of Sub-section (4) of Section 207A means that in the event of there being persons who have witnessed the actual commission of the alleged offence, the prosecution shall produce them and the committing Magistrate shall record their evidence.

12. With regard to the second part of Sub-section (4), which begins from, the semicolon, I also hold that if the Magistrate if of opinion that it is necessary in the interest of justice to take evidence of other witnesses of the prosecution, then the Magistrate shall record such evidence as well. In the second part of Clause (4), it is said that the Magistrate may take such evidence.

The use of the word 'may' in this context is not merely enabling, but it has a compulsory force. I think that if in the interests of justice, it is necessary to take other evidence then the Magistrate shall not be allowed to say that it depends upon his will whether to take such evidence or not. Once it is found that it is necessary in the interest of justice that other evidence should be taken, then the interests of justice impose a positive and absolute duty on the Magistrate to record such other evidence.

13. If 'may' has not a compulsory force, then let us see what the position will be if the police in the exercise of its discretion does not produce eye-witnesses, nor does the Magistrate think it necessary to take other evidence. The position we shall be reduced to would be that in committal proceedings there would be no evidence before the Committing Magistrate at all.

All that he would have before him would be the documents referred to in Section 173 of the Code, namely, the police papers. Now, would a committal order be just and proper if it rests on police papers only, there being not a shred of evidence on the record? I believe that the Legislature intended that before an accused is discharged or a charge is framed against him, the Magistrate should consider some evidence before him. To substantiate the point, I invite attention to Sub-section (6) and Sub-section (7) of Section 207A which reads as follows:

Sub-section (6)-When the evidence referred to in Sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall if he is of opinion that such evidence and documents disclose no ground 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.

Sub-section (7)-When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

14. Now, both these sub-sections say that either in discharging the accused or in framing a Charge against him, the Committing Magistrate shall consider:

1. The evidence recorded under 01. (4).

2. The documents of police under Section 173 of the Code.

15. And if necessary, the Court may examine the accused to explain any circumstances appearing against him in evidence. Thereafter the prosecution and the accused would be heard. If no evidence is recorded under Sub-section (4), then the Magistrate will have no evidence to consider under Sub-sections (6) and (7) and reference to evidence in Clauses (6) and (7) becomes meaningless.

It is significant that Sub-section (6) says : "When the evidence referred to in Sub-section (4) has been taken" and it does not say "when the evidence referred to in Sub-section (.4), if any, has been taken," If the intention of the Legislature had been to leave it to the Magistrate and to the police to have the evidence at their discretion, then it would have been more apt to begin Sub-section (6) by saying "When the evidence referred to in Sub-section (4), if any, has been taken".

'If any' would have meant that the discretion given in Clause (4) was merely enabling and not mandatory. The absence of if any suggests that there must be some evidence under Clause (4) which the Magistrate shall consider under Sub-sections (6) and (7) of the section. It appears that Sub-section (4) of Section 207A is not happily worded. By way of comparison I may say that if the intention of the legislature had been that in an enquiry into cases triable by the Court of Session, the Committing Magistrate shall either frame a charge or discharge the accused merely upon the consideration of documents under Section 173 of the Code, then there should have been something as clear-cut as the discretion contained in Clauses (2) and (3) of Section 251A of the Code.

According to Clauses (2) and (3) of Section 251A, the Magistrate is to consider documents under Section 173 of the Code only, and he is not required to take any evidence before framing the charge. Since there is no such direction as we find in Clauses (2) and (3) of Section 251A of the Code. I am inclined to think that the intention of the Legislature is different and mere perusal of police documents would not justify an order of committal by the Magistrate.

16. Let us pause and look at it from another angle. If under Sub-section (6) of Section 207A, the Magistrate could frame a charge on the basis of documents under Section 173 only, without considering any evidence before him (and the record of the police, is not evidence in the case), then I suggest that in each and every case the Magistrate shall have to frame a charge and Sub-section (6) dealing with the discharge of the accused shall become useless, because the Police documents under Section 173 always contain statements against the accused and these statements without being tested by other evidence on record, would invariably suggest an inference against the accused and hence no discharge of the accused would ever be possible on the basis of police papers. But the Legislature contemplates the discharge of the accused in proper cases and the discharge will only be possible if there is some evidence before the Court.

17. It will not be out of place to consider the real intention of the Legislature in framing Section 207A. The Legislature has retained the committal proceedings and this is a basic fact which must not be lost sight of. It was usual at the inquiry, for the police to examine a lot of unnecessary witnesses and for this reason the Legislature has endeavoured to make the procedure shorter. That does not mean that the committal procedure should be reduced to a farce.

It may also be said that if no evidence was to be recorded before the Committing Magistrate then Section 288, Criminal P. C., would be rendered nugatory. Under certain conditions, the statement of a witness in an inquiry can be brought by the Sessions Judge on the record and treated as substantive evidence.

18. In Criminal Reference No. 38 of 1956 sent by the learned Sessions Judge, I find that there are no eye-witnesses in the case, so the Police has not produced any eye-witness. But in the absence of eye-witnesses, it was all the more necessary for the Magistrate in the interests of justice to record the evidence of some other witness. The Magistrate has not done so and in result there is no evidence whatsoever on the record for the Magistrate to consider.

For reasons stated above, the order of committal on the basis of police papers only is not what is contemplated by Section 207A of the Code.

19. Prom the facts given in Criminal Reference No. 46 of 1956, it appears that there are no eye-witnesses of the murder, but in the words of the Committing Magistrate there are other important witnesses in the case, whose evidence he has not deemed necessary to record. If there are no eye-witnesses, then in the interests of justice it is all the more necessary for the Magistrate to record the evidence, which he has himself described as important. The discretion given to the Magistrate in the sub-section is not fitful. It is a judicial discretion which should be judiciously exercised.

20. For reasons stated above, I would accept both the references and setting aside the orders of committal, I would send the cases back to the Committing Magistrate to record other evidence in the interests of justice. Thereafter following the procedure laid down in Sub-sections (6) and (7) of Section 207A he shall frame a charge or discharge the accused as the case may be.