Reserve Bank Employees Association, Nagpur Vs. State of Maharashtra and ors.

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Court : Mumbai

Decided On : Apr-04-1968

Reported in : AIR1969Bom199; (1969)71BOMLR99; 1969CriLJ711; ILR1969Bom804; 1968MhLJ725

Judge : Padhye, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 350 and 439; Criminal Procedure (Amendment) Code, 1955 - Sections 263 and 264

Appeal No. : Criminal Application No. 269 of 1967 and Criminal Revn. Appln. No. 31 of 1967

Appellant : Reserve Bank Employees Association, Nagpur

Respondent : State of Maharashtra and ors.

Advocate for Def. : C.S. Dharmadhikari, Addl. Govt. Pleader and ;V.R. Manohar, Adv.

Advocate for Pet/Ap. : N.S. Munshi, Adv.

Judgement :

ORDER

1. The present applicant who was complainant has lodged this application under S. 561-A of the Code of Criminal Procedure to review my judgment dated 25th April 1967 passed in Criminal Revision Application No. 31 of 1967, incorporating a direction in the judgment that the arguments in the case should be heard afresh before delivery of judgment.

2. The original complaint was for the offence under Section 352, Indian Penal Code read with Section 34, Indian Penal Code against the 9 accused who are the non-applicants 2 to 10 in the present application. The trying Magistrate held the 9 non-applicants guilty of offence under Section 352, I. P. C. read with Section 34, I. P. C. and sentenced each of them to pay a fine of Rs. 50 or in default simple imprisonment for 7 days. Against the judgment of the trying Magistrate, revision was preferred by these 9 applicants before the Extra Additional Sessions Judge, Nagpur, who confirmed the convictions and sentences passed by the trying Magistrate on all these 9 persons. The non-applicants then filed a revision application against the judgment of the Extra Additional Sessions Judge, in this Court. The revision application was heard by me and by the judgment dated 25th April 1967 I quashed the judgments of the trying Magistrate as well as that of the Extra Additional Sessions Judge, and

remanded the case to the trying Magistrate for rewriting the judgment. In that judgment I gave a further direction that the case would be sent before another Magistrate who after hearing the parties shall write the judgment afresh after considering the evidence on record and after considering the complaint and other material on record. After setting aside the convictions and sentences passed against the non-applicants 2 to 10 I directed as follows:

'The matter will have to be sent back to the trying Magistrate for writing a fresh judgment after giving a careful thought to the evidence of the witnesses already recorded as well as the complaint and other material on record. For this purpose, I think it necessary to send the case back to the trying Magistrate for writing a fresh judgment.

I would, however, like that since no further evidence is to be recorded, but only a judgment is to be written afresh, it would be desirable if the case is sent to some other Magistrate other than the trying Magistrate who decided the case earlier. The Sessions Judge to whom the record of this case will be sent will forward the case to some other Magistrate than the one who has passed the earlier judgment. The learned trying Magistrate after considering the whole material on record, and after hearing both the parties if so desired, will decide the case according to law'.

The case which was previously decided by Mr. G. H. Sarda, Judicial Magistrate, First Class, 4th Court, Nagpur, was, in view of the directions contained in my judgment, sent to Mr. M. A. Khan, Judicial Magistrate, First Class, 8th Court, Nagpur, and he posted the case for hearing of arguments on 16-9-1967. On this, the present applicant moved this application before this Court on 29th August 1967 for modifying the judgment and in the meanwhile to stay the further proceedings in the case before the trial Courts. I am told that Mr. Sarda has also been transferred.

3. It is urged by Mr. Munshi, on behalf of the applicant that after setting aside the conviction of the non-applicants 2 to 10 the case had to be sent back to the trying Magistrate for the purposes or re-writing the judgment only. He contends that the whole evidence had to be heard afresh by the trying Magistrate before he could proceed to write the judgment and that the evidence which was already recorded could not be taken into consideration. For this purpose he relies on the provisions of Section 263 and 264 of the Code of Criminal Procedure as was as Section k350 and 355 of the Code. The case was a summons case and was tried summarily. He has also placed reliance on some cases to which I will refer to later. Chapter XXII of the Code of Criminal Procedure deals with summary trials. Section 263 lays down a procedure to be followed in summary trials where no appeal lies. Section 263 provides that in cases where no appeal lies the Magistrate need not record the evidence of the witnesses or frame a formal charge; but he shall enter in such form as the State Government may direct the particulars referred to therein Section 264 of the Code of Criminal Procedure has undergone some change after the amendment of the Criminal Procedure Code by Act No. XXVI of 1965. Before the amendment Section 264 reads as under.

'264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in Section 263.

(2) Such judgment shall be the only record in cases coming within this section.'

This section, therefore, required a Magistrate to record in cases coming within the section. It did not require the Magistrate to record any evidence either in extenso or even the substance of the evidence. A reading of Section 264 prior to the amendment would, therefore, show that there was no duty cast on the Magistrate while trying the case summarily to record the evidence or the substance of it or to take notes of the evidence either in appealable or non-appealable cases. I, however, the Magistrate chose to record the evidence or a substance of the evidence or to take notes of the evidence that would not form a part of record of the case and as has been observed in a number of decisions, it would be, so to say, the private property of the Magistrate. After the amendment, Section k264 reads thus:

'264, In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall record' the substance of the evidence' (Underlining is here in main) & also the particulars mentioned in Section 263 and shall, before passing any sentence, record a judgment in the case'.

There is thus a conspicuous departure from old Section k264 now casts a statutory obligation of the Magistrate to record substance of the evidence and the substance of the evidence and the substance of the evidence so recorded is therefore, necessarily a part of the record of the case and is not longer a private property of the Magistrate as it used to be, before the amendment. Chapter XXIV deals with general provisions as to inquiries and trials. It prescribes procedure when a Magistrate who has previously heard the case, ceases to exercise jurisdiction and is succeeded by another Magistrate. Section 350 (1) provides:

'Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry 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'.

This provision, therefore, enables the succeeding Magistrate to act on the evidence already recorded by his predecessor and law does not enjoin on him to record the evidence afresh before deciding the case. The proviso to this subsection is enabling one which enables the succeeding magistrate, if he is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary ink the interest of justice, to resummon any such witness and examine him further. This proviso is in substitution the old proviso by Act No. 26 of 1955. In the earlier proviso it was left to the accused to have the witnesses recommenced for giving evidence and he could claim the trial do novo. This right of the accused is now taken away by the amended proviso and it is left to the Magistrate to decide if the resummoning of the witnesses is necessary in the interest of justice, Chapter 25 provides for the mode of taking and recording evidence in inquiries and trials, and Section 355 (1) is in these terms:-

'355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of S. 260, clauses (b) to j(m) , both inclusive, when tried by a Magistrate of the first or second class and in all proceedings under S. 514 (if not in the curse of a trial,)the Magistrate shall make memorandum of the substance of the evidence of each witness as the

examination of a witness proceeds'.

sub-section (2) reads:

'Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record'.

The memorandum of the substance of the evidence of the substance of the evidence of the witness, kit therefore, to be treated as a part of the record and this should apply also in cases of summary trials where by the amendment, now the substance of the evidence of the witness has to be taken k down by the Magistrate in appealable cases. It will thus be seen that the evidence or the substance thereof which is now recorded by a Magistrate in appealable cases. It will thus be seen that the evidence or the substance therefor which is now recorded by a Magistrate in appeasable cases. It will thus be seen that the evidence or thus be seen that the evidence or the substance thereof which is now recorded by a Magistrate whether a summary trial or a regular trial. Will form part of the record an can be made use of by the Magistrate who recorded the evidence as well as by the Magistrate who succeeded him, which will be clear from the provisions of Section 350 of the Code of Criminal Procedure.

4. The learned counsel for the applicant cited Tippanna Koutya Mannayaddar. In re AIR 1934 Bom 157; Emperor v. Hemandas AIR 1936 Sind 40; Munshi v. State, AIR 356; Tara Chand Singh v. Emperor. ILR (1905) Cal 1069 is not at all a case in point. In that case the Sessions Judge while disposing of a criminal appeal remanded the case to the trying Magistrate to write out proper judgment after rehearing the parties as in his opinion the judgment of the Court was unsatisfactory. The Sessions Judge was sitting in appeal and was the final Court of fact and entitled to go into the evidence and give his finding himself. It was, therefore, not necessary for him to have remanded the case to the trial Court for re-writing judgment & ink this context the high Court held that he had no authority to remand the case as it was the duty of the Sessions Judge in such a case to go fully into whole facts & dispose of the case, and he could not devolve this duty on court below. The case of AIR 1920 Mad 171 is also not in point. In this case the Sessions Judge took the view that the magistrate had not written the judgment in conformity with provisions of Section 367. Criminal Procedure Code . He, therefore, remanded the case back to the District Magistrate to direct the subdivision Magistrate to write full judgment dealing with facts and law. While remanding the case the learned Sessions Judge had not set aside the decision as such but only remanded the case for rewriting the judgment, retaining the case with him. In effect, the Sessions Judge did not want the Magistrate to give the detailed reasons for the very same decision. It was in that context that it was observed by the Madras High Court that this was not a correct procedure. and if the judgment was not in conformity with Section 367. the appellate Court ought to have remanded the case for retrial de novo. and not ask for a fresh judgment. The cases reported in AIR 1934 Bom 157. AIR 1936 Sind 40 and AIR 1954 All cases under the old Sections 263 and 264. As said above. both under Sections 263 and 264 of the Code of Criminal Procedure the trying Magistrate was not bound to record any evidence or even the substance of the evidence or the notes of the evidence or the substance of the evidence or take the notes of the evidence, they did not form part of the record of the case and the succeeding Magistrate was not entitled to take those into consideration. The position has now been changed after the amendment of Section 264 where it is now obligatory on the Magistrate to record substance of the evidence and it forms a part of the record. These authorities, therefore, are also of no

assistance or deciding the present question. The decision in : AIR1953Bom29 also does not hold the contention of the applicant. This was also a case under the old Section 264. In this case the trying Magistrate has recorded the evidence partly, and was thereafter transferred. He was succeeded by another Magistrate who recorded further evidence and convicted the accused both on the evidence recorded by him and on the notes kept by the predecessor. It was contended on behalf of the accused that this procedure was illegal;. This contention was not accepted by this Court. It was held that Section 350 of the Code of Criminal procedure also brings into operation summary trials and it has been further laid down that though Section 263 or 264 did not require the Magistrate to record the evidence but if evidence has been recorded then that evidence could be made use of by the succeeding Magistrate. The learned Judge in that connection has observed as follows;

' But inasmuch as S. 263 does not contain a prohibition and as it is permissive in character. it seems to me that if a Magistrate records notes of evidence and makes them part of the record of the case. I do not see why it should be held that in such a case a successor should not be able to act upon the evidence. That is what has precisely happened in this case. It maybe that a Magistrate may make notes of evidence and may not make them part of the record of the case. In such a case there is no question that there shall have to be new trial. but in a case where notes of evidence have been recorded and have been made part of the record of the case. I do not see why a succeeding Magistrate should not be in a position to act upon that evidence and to decide the case both upon the evidence recorded by ..... and upon the evidence recorded by himself'.

If this was the view taken by this Court of the provisions of Section 263 and 264 before the amendment that is much more strengthened by the amendment made by the Amendment Act No.XXVI of 1955 to Section 264 of the Code of Criminal procedure, wherein a statutory obligation is expressly now put upon the trying Magistrate to record substance of the evidence and to make it a part of the record.

5. A decision of the Kerala High Court in Mathai Annakutty v. Isaac Iype : AIR1968Ker56 was also brought to my notice. In this case all the witnesses were examined by the trying Magistrate and the accused also was questioned. Only the hearing of the case and the judgment had remained to be done. The Magistrate was then transferred and was succeeded by another Magistrate. The successor Magistrate, without recalling and re-examining the witnesses, heard the arguments and disposed of the case acquitting the accused. It was contended on behalf of the complainant that this procedure adopted by the successor Magistrate had resulted in miscarriage of justice. However, the complaint in fact was not that the succeeding Magistrate had no jurisdiction to decide the case on the basis of the evidence recorded by that predecessor. but the complaint was that this procedure had resulted in miscarriage of justice because the evidence had been misread and misappreciated. Some instance were given as to how the evidence had been misread and misappreciated. It was observed in that case that some statements made by the witnesses were not properly understood or appreciated by the succeeding Magistrate and if the Magistrate who had recorded the statements himself had himself decided the case, he would have appreciated the matter in a different way, and in these circumstances, it was thought that it would have been better if the evidence had been recorded by the succeeding Magistrate do novo. It has not laid down, therefore, a rule that in every case where a Magistrate who recorded the evidence is transferred, the succeeding Magistrate must record the evidence de novo. In that case the

evidence was recorded in the form of notes and it was not an evidence ink extenso. I do not think that this case also can be of any assistance to the contentions raised on behalf of the applicant.

6. Another case cited was : AIR1961Mad342 . This was a case where a case was transferred form the file of one Magistrate to the file of another Magistrate to the file of another Magistrate under the provisions of Section 528 (2) of the Code of Criminal Procedure for enquiry or trial and it was in that context held that the Magistrate to whom the case was transferred was required to examine all the witnesses afresh and if that is not so done, the conviction would be vitiated by the illegality. It may be noted that the case was transferred specifically for enquiry or trial. That means the transferee Magistrate had to enquire into the case fully or to have a full trial and by the terms of that order and also terms of Section 528 (2) of the Code of Criminal Procedure, the transferee Magistrate was bound to have the full enquiry afresh taking all the evidence and in that context he could not rely upon the evidence already recorded by his predecessor. This is not the matter in the present case. In may view the decision of the Nagpur High Court in emperor v. Durgaprasad would be more appropriate to the facts of the present case. It decides two things . In the first place it lays down that Section j350 of the Criminal procedure Code does not exclude summary trials form kits operation. It applies to all inquiries or trials conducted by a Magistrate in which the whole or any part of the evidence has been heard and recorded. The second proposition laid down by the evidence in a summary case was recorded by the Magistrate in extenso in narrative form, at least quite as fully as it would have been. in a summons case, Section 350 would apply to such evidence. The decision in AIR 1936 Sind 40 has been dissented from and this was the view taken even under the old provisions of the Criminal Procedure Code before the amendment.

7. Mr. Manohar, learned counsel for the non-applicants 2 to 10 has drawn my attention to the decision in K. Vidyanand v. Erramma AIR 1962 AP 394. In this case it has been laid down that under Section k350 of the Code of Criminal Procedure, it is open to the Magistrate who made the finding and passed the sentence in the case, to do so on the evidence recorded, wholly or in part by his predecessor. He also relied upon Sushil Kaman v. State . : AIR1960Pat160 in which Section 350 of the Code of Criminal Procedure, as it now stands, after the amendment has been construed. It is held that Section 350 as it now stands after the amendment, places the matter of de novo trial entirely in the discretion of the Magistrate. Unless, therefore, the Magistrate feels that further examination of any of the witnesses, whose evidence has already been recorded, is necessary in the interests of justice, he will proceed upon the evidence which is already on the record.

8. When the Criminal revision was heard by me, the whole record was before the Court. The record also contained the evidence which was recorded by the trying Magistrate Mr. G. H. Sarada. On perusal of the depositions it was found that though the trial was summary one, the evidence was fully recorded. There were lengthy examinations - in chief and lengthy cross-examinations and it did not appear from the evidence that they were merely subtonic of the evidence or the notes. The evidence has been recorded so fully, it would have been futile to again direct the Magistrate to record the evidence over again, which would have resulted only in waste of time and embellishments. It would have given an opportunity to other side to bring new matters by improvement at such a late stage which would not be very desirable. Under the proviso to S. 350 of the Code of Criminal Procedure, a wide discretion is given to the Magistrate if it is so necessary in his opinion in the interest of justice to

recall and examine those witness afresh. This discretion, however, has to be exercised by the succeeding Magistrate who had not heard the evidence orally. If such opinion could be formed by the succeeding Magistrate and such discretion could be exercised by him in recalling the witnesses, I do not see why in the same circumstances this Court acting in its revisional powers could not form an opinion, or exercise discretion, in the matter of calling or not calling witnesses afresh. Looking to the nature of the record and the evidence made by the trying Magistrate, it was not though necessary to have the evidence recorded afresh and that is why a direction was given that the decision should be given afresh on the basis of the evidence which was already recorded was given that the decision should be given afresh on the basis of the evidence which was already recorded and there was not necessity to record any further evidence which was already recorded and there was not necessity to record any further evidence The decision of the Nagpur High Court, is a decision which is really in point . The learned Judge of the then High Court in dealing with this question has observed as under.

'Section 350, Criminal Procedure Code, does not in terms exclude summary trials from its operation . It applies to all esquires or trials conducted by a magistrate in which the whole or any part of the evidence has been heard and recorded. The learned Advocate General who opposes the reference argues, and I think correctly, that it depends on the way in which the evidence has been recorded in each case whether S. 350 would apply or not. In trying a case summarily it is enough if scanty notes, of the evidence are made, and these need not be kept on the record at all. Where such notes are allowed to remain, it would obviously be improper for the Magistrate to rely on such inadequate material. But in the present case one finds that the prosecution evidence was recorded buy the first Magistrate in extenso in narrative form, at least quite as fully as it would have been in summons case where by S. 355, Criminal Procedure Code, a memorandum of the the substance is enough. It could not be urged that S. 350 would not apply to such evidence if recorded in a summons case'.

It will thus appear that the law does not require that in every case where the case is sent to another Magistrate, that the evidence must be re-heard. It depends upon the particular case and the manner in which the evidence has been recorded. As I said, the evidence in this case has been recorded in extenso in a narrative form, as it is done in a regular summons case, and there is no need for the evidence being taken afresh.

9. In view of this, the direction which has been given by me in my judgment. dated 25th April, 1967 does not need any alteration or modification. The magistrate will now proceed with the case on the evidence and the material as they are before him. He will only hear the arguments advanced on behalf of the parties and then proceed to write the judgment taking into consideration all the evidence and the other material on record. Mr. Munshi urges that opportunity be given to him to move the trying Magistrate to recall the witness and permit the complainant, and if so desired by the accused, to give fresh evidence under the proviso to S. 350 sub-section (1) of the Code of Criminal Procedure. In view of what I have said above, this opportunity is refused and as directed, the Court will proceed only on the basis of the evidence on record. The application stands dismissed.

GGM/D.V.C.

10. Petition dismissed.