

A

STATE OF KARNATAKA

v.

K. H. ANNEGOWDA & ANR.

December 8, 1976

B

[P. N. BHAGWATI AND A. C. GUPTA, JJ.]

Code of Criminal Procedure 1893—S. 494—Scope of Prosecution withdrawn before Sessions Court—If amounts “discharge” or “acquittal” of accused—Code of Criminal Procedure 1973—S. 300—If a bar for fresh prosecution for the same offence.

C

Section 494 of the Code of Criminal Procedure 1893 provides that any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried and upon such withdrawal—

(a) if it is made before a charge has been framed the accused shall be discharged; and

D

(b) if it is made after the charge has been framed or when under the Code no charge is required, he shall be acquitted.

In the instant case, the committing Magistrate framed a charge against the respondents for having committed an offence under s. 302 read with s. 34 I.P.C. and committed them for trial by a Sessions Court. The Sessions Judge granted permission sought by the Public Prosecutor to withdraw from the prosecution under s. 494 of the Code and “discharged” the respondents.

E

After fresh investigation a new charge sheet was filed. By then the Code of Criminal Procedure 1973 had come into force. Following the provisions of the new Code, the committing Magistrate committed the respondents to stand trial before the Sessions Court for the same offence. When the case came up for trial, the respondents contended that by virtue of the earlier orders of the Sessions Court, they had been acquitted and that they were not liable to be prosecuted again for the offence in view of s. 300 of the new Code. This was rejected on the ground that they had earlier been “discharged” and not acquitted and that s. 300 had no application to their case. The High Court allowed their revision application holding that since the withdrawal from the prosecution in the earlier case was made after the charge had been framed, the respondents had been acquitted and the bar of s. 300 was attracted.

F

Dismissing the appeal,

HELD : The High Court was right in holding that by reason of the order of the Sessions Judge granting consent to the withdrawal from the prosecution in the earlier case, the respondents were acquitted and in view of s. 300 they were not liable to be tried again for the same offence. [356B]

G

(1) Section 484 of the new Code provides that where a trial is pending immediately before the commencement of the new Code, it shall be proceeded with in accordance with the provisions of the old Code as if the new Code were not in force. [352H]

H

In the instant case, when the new Code came into force the case was pending before the Court of Session for trial and so was liable to be tried according to the old Code. It was for this reason that the withdrawal application was made under s. 494 of the old Code. [353A-B]

(2) (a) When the prosecution against an accused committed for trial is allowed to be withdrawn by the Court of Session under s. 494 of the old Code,

the withdrawal of the prosecution would be after the framing of the charge against the accused and it must result in the *acquittal* of the accused under cl. (b) of that section. [355G]

(b) The charge against an accused under the procedure prescribed in the new Code is to be framed for the first time by the Court of Session while according to the procedure prescribed under the old Code, the charge is framed by the committing Magistrate and the Court of Session is merely given the power to alter or amend the charge, if it thinks necessary to do so. Therefore, when under the old Code, the Court of Session commences the trial of an accused, there is already before it a charge framed by the committing Magistrate and it is that charge that is required to be read out and explained to the accused, and on which the plea of the accused is required to be taken. [355D-F]

(c) In the instant case, the Judicial Magistrate followed this procedure and after framing the charge committed the respondents for trial. [354G]

Queen Empress v. Sivarama, 12 Mad. 35 and *In re. Velayudha Mudali*, A.I.R. 1949 Mad 508, approved.

CRIMINAL APPLATE JURISDICTION : Criminal Appeal No. 361 of 1975.

(Appeal by Special Leave from the Judgment and Order dated the 19th Sept., 1975 of the Karnataka High Court in Criminal Petition No. 52 of 1975.)

D. Mookerjee and *B. R. G. K. Achar*, for the appellant.

H. B. Datar and *R. B. Datar*, for respondents.

The Judgment of the Court was delivered by

BHAGWATI, J., This appeal by special leave raises a short but interesting question of law relating to the interpretation of certain provisions of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Old Code"). The facts giving rise to the appeal are few and may be briefly stated as follows.

One Bodegowda was murdered and in regard to this incident a case was registered at the Police Station on 13th October, 1973 as Crime No. 62 of 1973. The police investigated the case and after the investigation was complete, a charge-sheet was filed against the respondents in the Court of Judicial Magistrate, 1st Class Chickmagalur and the case was registered as C.C. No. 2319 of 1973. The learned Magistrate held an inquiry in accordance with the provisions of Chapter XVIII of the old Code and being of the opinion that the respondents should be committed for trial, the learned Magistrate framed a charge against the respondents for having committed an offence under section 302 read with section 34 of the Indian Penal Code. The learned Magistrate then read and explained the charge to the respondents and after giving an opportunity to the respondents to give in a list the names of witnesses whom they wished to be summoned to give evidence, the learned Magistrate made an order committing the respondents for trial by the Court of Sessions, Chickmagalur. This order of commitment was made on 15th March 1974 and in pursuance of it, the records of the case were forwarded to the Court of Sessions, Chickmagalur where they reached on 23rd March, 1974 and the case was registered as S.C. No. 5 of 1974. The Sessions Judge fixed the trial of the case on 15th July, 1974 but before that date, the Public Prosecutor filed an

- A application on 29th June, 1974 praying for permission to withdraw from the prosecution under section 494 of the old Code. The learned Sessions Judge by an order passed on the same day accorded permission to the Public Prosecutor to withdraw from the prosecution and 'discharged' the respondents in respect of the offence charged against them. The State thereafter ordered fresh investigation into the offence and in consequence of such investigation, a new charge sheet was filed against
- B the respondents and three other accused in the Court of Judicial Magistrate, 1st Class, Chickmagalur. Since this chargesheet was filed after 1st April, 1974 when the Code of Criminal Procedure, 1973 (hereinafter referred to as "New Code") had come into force, the learned Magistrate, following the provisions of the New Code, committed the respondents and the other three accused to stand their trial before the Court of the Sessions Judge, Chickmagalur for the same offence. When
- C the case came up for hearing before the Sessions Judge, the respondents made an application contending that by virtue of the order dated 29th June, 1974 made by the Sessions Judge under section 494 of the Old Code, the respondents had been acquitted and they were, therefore, not liable to be prosecuted again for the same offence in view of section 300 of the New Code. The Sessions Judge rejected the application, taking the view that the respondents were discharged and not acquitted under
- D the Order dated 29th June, 1974 and, therefore, section 300 of the New Code was not applicable and there was no bar against their fresh prosecution for the same offence. The respondents challenged this Order by preferring a revision application to the High Court. This revision application was allowed and the High Court held that though the Order passed by the Sessions Judge directed that the respondents be 'discharged', the legal effect of this order was to bring about the acquittal of the respondents since the withdrawal from the prosecution
- E was made after the charge had been framed and the respondents having been acquitted under that Order, the bar of section 300 of the New Code was attracted and the respondents were not liable to be prosecuted again for the same offence. This order made by the High Court is challenged in the present appeal preferred by the State with special leave obtained from this Court.
- F

- It may be pointed out that before the High Court it was contended on behalf of the State that the earlier case before the Sessions Judge, viz., Sessions Case No. 5 of 1974, was governed by the provisions of the new Code and, therefore, in view of section 228 of the new Code, it was the obligation of the Sessions Judge to frame a charge before proceeding with the trial and since the withdrawal from the prosecution was effected before the framing of such charge by the Sessions Judge,
- G the order passed by the Sessions Judge amounted to an order of discharge and not of acquittal. This contention was, however, not pressed at the hearing of the appeal before us and it was conceded, and in our opinion rightly, that the earlier case before the Sessions Judge was governed by the provisions of the old Code and the new Code had no application to it. Section 484 of the new Code clearly provides that
- H where a trial is pending immediately before the commencement of the new Code, it shall be proceeded with in accordance with the provisions of the old Code as if the new Code were not in force. Here in the present case the Judicial Magistrate had already made an order of

commitment on 15th March, 1974 and pursuant to that order, the records of the case had reached the Court of the Sessions Judge on 23rd March, 1974. The case was, therefore, already before the Court of Sessions prior to 1st April, 1974 and it was pending before that court for trial on 1st April, 1974 when the new Code came into force. It is immaterial as to when the case was actually registered and a number given to it. Since the case was pending for trial before the Sessions Court on 1st April, 1974, it was liable to be tried in accordance with the provisions of the old Code and it was for this reason that the application for withdrawal from the prosecution was also made by the Public Prosecutor under section 494 of the old Code and not under the corresponding provision of the new Code. Section 494 of the old Code provides that any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict and in other cases, before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried and the section then goes on to add that :

“upon such withdrawal,—

- (a) if it is made before a charge has been framed, the accused shall be discharged (in respect of such offence or offences);
- (b) if it is made after a charge has been framed or when under this Code no charge is required he shall be acquitted in respect of such offence or offences).”

The withdrawal from the prosecution in the present case having been made under this section, it is clear that if it was made before a charge was framed, the respondents would be discharged but if it was made after a charge had been framed, the consequence would be that the respondents would be acquitted. It, therefore, becomes material to inquire whether at the date when the withdrawal from the prosecution was made, a charge had been framed against the respondents or not. Whether the order of the Sessions Judge granting consent to the withdrawal from the prosecution amounted to an order of discharge or acquittal would depend upon the answer to this question. It may be pointed out that it is of no consequence that the Sessions Judge directed the respondents to be ‘discharged’ because if the legal effect of the order was to acquit the respondents, then the incorrect use of the expression ‘discharged’ by the Sessions Judge would not alter the legal position and convert the order of acquittal into one of discharge.

Now, in order to determine whether the withdrawal from the prosecution was made before the framing of the charge or after, it is necessary to notice the scheme of the relevant provisions of the old Code. Sessions Case No. 5 of 1974 in which the withdrawal was made was committed to the Sessions Court by the Judicial Magistrate under the provisions of Chapter XVIII of the old Code. The proceeding before the Judicial Magistrate was instituted on a police report and the learned Magistrate, therefore, followed the procedure specified in section 207A. This section lays down a special procedure to be adopted in proceedings instituted on police report with a view to expeditious disposal of criminal cases. Sub-section (1) provides that the Magistrate, on

A receipt of the report forwarded under section 173, shall fix a date for the purpose of holding an enquiry and sub-section (2) empowers the Magistrate to issue process for compelling the attendance or any witness or the production of any document. The Magistrate is required by sub-section (3) to satisfy himself at the commencement of the enquiry that the documents referred in section 173 have been furnished to the accused. Sub-section (4) then requires the Magistrate to proceed to take the evidence of such persons as may be produced by the prosecution as witnesses to the actual commission of the offence and also empowers the Magistrate to take the evidence of any other witness for the prosecution if he thinks it necessary to do so in the interest of justice. The accused is given liberty under sub-section (5) to cross-examine the witnesses examined under sub-section (4) and sub-section (6) provides that the Magistrate shall, if necessary, examine the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him and thereafter give to the prosecution and the accused an opportunity of being heard. If the Magistrate, at the end of this procedure, feels that there is no ground for committing the accused for trial, he is bound to discharge the accused under sub-section (6). But where "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 forms an opinion that the accused should be committed for trial, sub-section (7) provides that the Magistrate shall frame a charge under his hand declaring with what offence the accused is charged. Sub-section (8) then requires the Magistrate to read and explain the charge to the accused and to give a copy thereof to him free of cost. Sub-section (9) provides that the accused shall then be required to give in at once, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence at the trial and when the accused on being required to give the list under sub-section (9) declines to do so, or gives such list, the Magistrate is empowered under sub-section (10) to make an order committing the accused for trial by the Court of Session. It will thus be seen that, according to this procedure, the Magistrate is required to frame a charge and to read and explain it to the accused before making an order of committal and the accused is in fact committed to stand his trial before the Court of Session on the charge so framed. This was the procedure followed by the Judicial Magistrate in the present case and in accordance with it, the Judicial Magistrate framed a charge against the respondents and committed them for trial to the Court of Session on this charge.

G The procedure to be followed by the Sessions Court when an accused is committed to it for trial is laid down in Chapter XXII of the old Code. Section 271 provides that when the court is ready to commence trial, the accused shall appear or be brought before it and the charge shall be read out and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried. That is the first step to be taken by the Sessions Court in relation to the case committed to it for trial. Now, obviously, the charge that is required to be read out and explained to the accused is the charge that has been framed by the Committing Magistrate under sub-section (7)

of section 207A. There is no provision in Chapter XXIII which requires the Sessions Court to frame a charge before proceeding with the trial of the accused. That is plainly unnecessary because a charge is already framed by the Magistrate when he commits the accused for trial to the Sessions Court and that is the charge on which the Sessions Court is to try the accused. Of course, the Sessions Court is given an overriding power under section 226 that when it finds that an accused is committed for trial without a charge or the charge is imperfect or erroneous, it may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in the old Code as to the framing of charges. But this is only an enabling power to frame a charge where, for some reason or the other, no charge has been framed by the committing Magistrate or to correct a charge where the charge is imperfect or erroneous. It does not say that in every case the Court of Session shall frame a new charge before proceeding with the trial. On the contrary, it clearly postulates that ordinarily there would be a charge framed by the committing Magistrate and it is on that charge that the accused would be tried, unless the Court of Session finds it necessary to alter or amend the charge. It is interesting to compare the procedure under the new Code where there is no provision for framing a charge by the committing magistrate and it is only when the Court of Session to which the case is committed finds, after considering the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution, that there is ground for presuming that the accused has committed an offence which is exclusively triable by the Court of Session, that it is required by section 220 of the new Code to frame a charge against the accused. The charge against the accused under the procedure prescribed in the new Code is to be framed for the first time by the Court of Session while according to the procedure prescribed under the old Code, the charge is framed by the committing Magistrate and the Court of Session is merely given the power to alter or amend the charge, if it thinks necessary to do so. It is, therefore, clear that when the Court of Session commences the trial of an accused, there is already before it a charge framed by the committing Magistrate and it is that charge, unless altered or amended under section 226, that is required to be read out and explained to the accused and on which the plea of the accused is required to be taken. It must follow inevitably as a necessary corollary from this proposition that when the prosecution against an accused who has been committed for trial is allowed to be withdrawn by the Court of Session under section 494, the withdrawal of the prosecution would be after the framing of the charge against the accused and it must result in the acquittal of the accused under clause (b) of that section.

We find that this view which we are taking has prevailed with the Madras High Court since the last about eight or nine decades. The Madras High Court held as far back as 1888 in *Queen-Empress v. Sivarama*⁽¹⁾ that where an accused is committed to stand his trial before a court of session on a charge and the prosecution is withdrawn by

(1) 12 Mad. 35.

A the public prosecutor with the consent of the court of session under section 494, the accused is entitled to be acquitted and not merely discharged. The same view was reiterated by the Madras High Court in *In re Velayudha Mudali*(¹). We are in agreement with the view taken in these two decisions of the Madras High Court.

B We accordingly affirm the decision of the High Court holding that by reason of the Order dated 29th June, 1974 passed by the Sessions Judge granting consent to the withdrawal from the prosecution in the earlier case, the respondents were acquitted and in view of section 300 of the new Code, they were not liable to be tried again for the same offence and dismiss the appeal.

P.B.R.

Appeal dismissed.

(1) A.I.R. 1949 Mad. 508.