

Mukhtiar Singh alias Mukhi v. Inspector Customs, Ferozepur  
(S. S. Grewal, J.)

related to the Health Department and, therefore, the State of Punjab should have been served through the Health Secretary. In these circumstances, the *ex parte* proceedings were liable to be set aside.

(6) As regards the delay in filing the application for setting aside the *ex parte* order, the defendant could be burdened with costs. Consequently, this petition succeeds; the impugned order is set aside and the application under Order 9, Rule 7, Civil Procedure Code, for setting aside the *ex parte* proceedings, is allowed on payment of Rs. 200 as costs.

(7) Since at the time of motion hearing further proceedings were stayed in the trial Court, parties are directed to appear on September 12, 1989, on which date the costs will be paid and the written statement will be filed.

(8) Since the suit was filed in January, 1986, in order to expedite the hearing of the same, it is directed that the parties will lead their evidence at their own responsibility through dasti summons may be given, if so desired, as contemplated under Order 16, Rule 7-A, Civil Procedure Code.

S.C.K.

Before : S. S. Grewal, J.

MUKHTIAR SINGH ALIAS MUKHI,—Petitioner.

versus

INSPECTOR CUSTOMS, FEROZEPUR,—Respondent.

Criminal Misc. No. 2325 of 1989.

October 3rd, 1989.

Criminal Procedure Code S. 200 (a), 202, 482—Narcotic Drugs and Psychotropic Substance Act, 1985—Complaint filed by Customs Officer before Judicial Magistrate—Offence triable by Court of Session—Powers of Magistrate.

Held, that the fact remains that once a case is triable by a Court of Session, the Magistrate has no power, whatsoever, to decide whether the case is triable by the Court of Sessions, or not. It is within the exclusive jurisdiction of the Sessions Court to decide this question, and, to discharge the accused at a later stage, as contemplated under Section 227 of the Code. In this view of the matter,

even if a case is triable by the Court of Session, where complaint has been made by a public servant, the case, in my view, would be covered by clause (a) of proviso to Section 200 of the Code, and, not under proviso to Section 202 of the Code.

(Para 13).

*Petition Under Section 482 of the Criminal Procedure Code praying that the Commitment of the Petitioner to the Court of Sessions by Order—Annexure P. 8 and Summoning Order—Annexure P. 2 be quashed and in as much as the petitioner is in custody since 30th June, 1988 he may be directed to be released on bail.*

*In Case Complaint Under Sections 22 and 23 of the N.D.P.S. Act, 1985.*

*Crl. Misc. No. 2325 of 1989.*

*Application Under Section 482 of the Criminal Procedure Code praying that production of certified copies of Complainant—Annexure P. 1 and Order dated 1st March, 1989—Annexure P. 8 may kindly be dispensed with.*

M. L. Merchea, Advocate, *for the Petitioner.*

Mohinder Gupta, Advocate, *for the Respondent.*

### ORDER

(1) This petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') relates to quashment of Commitment Order (Annexure P8), and, the Summoning Order (Annexure P2).

(2) In brief the facts, as per the allegations contained in complaint (Annexure P1), filed by Inspector Customs, Ferozepur, are that on the night intervening 6th/7th May, 1987, Naka Party consisting of NK. Parkash Chand, Constable A. C. Thimmanna, and Constable Malay Kumar Dass of 28 Bn. B.S.F., Jallalabad, observed few miscreants coming from Pakistan to India. The Naka Party challenged those miscreants. On being challenged, the miscreants opened fire. The Naka Party also fired in self-defence. Inspector Bakhtawar Singh, Coy. Commander, reached the spot, and, on search of the area, eight gunny bags, consisting of 224 packets (weighing one Kg.) containing brown powder (presumably heroin), valued at Rs. 11 Crore 20 Lakh, and, one pair of shoes were recovered.

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(3) After withdrawing 896 sample out of 224 packets of heroin, all the samples were duly sealed at the spot. One sample was handed over to B.S.F., and, the second sample was sent to the Chemical Examiner, New Delhi, who, subsequently, found that the sample was in the form of brown powder, which contained diacetyl morphine, and, was covered under the Narcotic Drugs and Psychotropic Substance Act, 1985. The third sample was kept as Office record, and, was deposited with the Customs House, Malkhana, Amritsar, along with eight gunny bags.

(4) Initially six co-accused of the petitioner were arrested on 23rd May, 1987, who, admitted their involvement in the seizure of heroin, before the Custom Officers. Subsequently, on 10th February, 1988 Fatta Singh co-accused of the petitioner was also arrested by the Customs Department, Jallalabad, and, during his interrogation by the Customs Authorities, he confessed his involvement along with the abovesaid six accused. On the information given by Fatta Singh accused, Mukhtiar Singh present petitioner was arrested by the Police of Police Station Mamdot, and, was lodged in Central Jail, Ferozepur.

(5) An application was moved by the Customs Authorities to the Chief Judicial Magistrate, Ferozepur, with the request to direct the Superintendent Jail, Ferozepur, to enable the Customs Authorities to record the statement of Mukhtiar Singh petitioner, who, on 21st November, 1988, refused to give any information to these officials in the presence of the Superintendent Jail, Ferozepur.

(6) Customs Department filed complaint only against the present petitioner, and, his co-accused Fatta, without impleading Visakha Singh alias Gurmej Singh alias Visakhai son of Phuman Singh, Kundan Singh son of Mala Singh, Khajan Singh son of Bishan Singh, Dara Singh son of Hakam Singh, Resham Singh son of Thakur Singh and Kundan Singh son of Thakar Singh, all residents of village Tahliwala, Tehsil and District Ferozepur, who, according to the allegations in para No. 5 of the complaint, had also confessed their involvement in the abovesaid seizure of the brown powder. However, at the fag end of the complaint a note has been added that the other six accused are facing trial in the Court of Additional Sessions Judge, Ferozepur.

(7) After the two accused were produced before the Judicial Magistrate Ist Class, Ferozepur, on 2nd February, 1989, they were

supplied with the copies (presumably of the complaint and other documents), and, were committed to stand their trial in the Court of Session on 1st March, 1989,—*vide* impugned order Annexure P-8, without recording any evidence.

(8) Counsel for the parties were heard.

(9) On behalf of the petitioner it was mainly contended that it was obligatory for the Magistrate, who, had taken cognizance in this case, under proviso to sub-section (2) of section 202 of the Code, to call upon the complainant to produce all the witnesses, and, examine them on oath, as the offence involved in the complaint was triable exclusively by the Court of Session. Reliance in this respect was placed on the Single Bench authorities of this Court in *State v. Kapur Singh and others* (1), and *Charanjit Singh v. Shingara Singh and others* (2) as well as, Division Bench authority of this Court in *Raj Pal Sood v. Ravinder Nath Vohra* (3), holding that proviso to sub-section (2) of Section 202 of the Code provides in a mandatory form that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. The language of this section makes it manifest that the provision is mandatory, and, the Magistrate holding commitment proceedings under the Code has no option, except to comply with this provision and call upon the complainant to produce all his evidence before him in the case which is exclusively triable by the Court of Session. All these authorities relate prior to amendment of Section 209 of the Code made in the year 1978. This provision relates to commitment of the case to the Court of Session after compliance of the provisions of Sections 207, or, 208, of the Code, as the case may be.

(10) Reliance on behalf of the other side has mainly been on the authority of the Apex Court in *Sanjay Gandhi v. Union of India and others* (4), wherein, on a case instituted upon a police report, in respect of commission of offences, including the one under section 201 of the Indian Penal Code, it was observed that it was also not open to the committal court to launch on a process of satisfying itself that a *prima facie* case had been made out on the merits. The

(1) 1979 P.L.R. 161.

(2) 1979 C.L.R. 261.

(3) 1977 P.L.R. 674.

(4) A.I.R. 1979 S.C. 514.

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jurisdiction once vested in him under the earlier Code, but has been eliminated now under the present Code. Under the new Code in cases where offence is triable exclusively by the Court of Session, the Committing Magistrate has no power to discharge the accused. Nor has he power to take oral evidence, save where a specific provision like Section 306 enjoins.

(11) Under Section 208 of the Code reference was also made to supply of statements recorded under Section 200, or, Section 202 of the Code, of all the persons examined by the Magistrate.

(12) The main question which arises for determination in the instant case would be whether proviso to sub-section (2) of Section 202 of the Code would be applicable in the instant case, where the case has been instituted on a complaint filed by the Customs Officer in the Court of the Judicial Magistrate, or, as to whether proviso to Section 200 of the Code would be applicable. No direct case law has been cited on this point, except that support was sought from a Full Bench authority in *Public Prosecutor v. Ratnavelu Chetty* (5), wherein, it was observed that "report of police officer mentioned in S. 190(1)(b) is not confined to a report of a cognizable offence. It includes even the police report in a non-cognizable case", and, his examination on oath was not necessary. In the instant case it was not disputed before me that the Customs Officer, who, filed the present complaint, was a public servant, and, was acting in discharge of his official duties, while, initiating the present proceedings. Thus, in view of clause (a) to proviso to Section 200 of the Code, it was not obligatory for the Magistrate to examine the complaint, or, the witnesses cited by him in the complaint. As far as proviso to Section 202 of the Code is concerned, it is quite apparent that the provisions of Section 202 of the Code would be applicable only if the Magistrate, after receipt of the complaint of an offence which he is authorised to take cognizance, may either inquire into the case himself, or, direct the investigation to be made by the Police Officer himself, or, by such other person as he thinks fit, for the purpose of deciding whether, or not there is sufficient ground for proceeding.

(13) The fact remains that once a case is triable by a Court of Session, the Magistrate has no power, whatsoever, to decide whether the case is triable by the Court of Sessions, or not. It is within the exclusive jurisdiction of the Sessions Court to decide this question,

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(5) A.I.R. 1926 Madras 865.

and, to discharge the accused at a later stage, as contemplated under Section 227 of the Code. In this view of the matter, even if a case is triable by the Court of Session, where complaint has been made by a public servant, the case, in my view would be covered by clause (a) of proviso to Section 200 of the Code, and, not under proviso to Section 202 of the Code.

(14) Apart from that, I am supported on this point to a large extent by the authority in *Sanjay Gandhi's case* (supra), and, the Committing Court is not required to embark upon a regular inquiry by recording the evidence on the merits, or, demerits of the case. At any rate, mere omission on the part of the Committing Court not to record the evidence of the complainant, or, the witnesses cited in the complaint, and, summoning the petitioner and his other co-accused on the basis of the complaint, or, their commitment to the Court of Session in the instant case, would amount to mere irregularity, and, not an incurable illegality. The proceedings, referred to above, taken by the Committing Magistrate, thus, cannot be directed to be quashed at this stage.

(15) This petition is, accordingly, dismissed. The trial Court is directed to proceed with the trial and dispose of the case on merits expeditiously.

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P.C.G.

Before G. R. Majithia, J.

JAGIR SINGH, SON OF PARSIN SINGH,—*Petitioner.*

*versus*

SWINDER SINGH AND ORS.,—*Respondents.*

Civil Revision No. 1395 of 1989.

30th November, 1989.

*Code of Civil Procedure (V of 1908) O. 23 Rl. 1—Appeal dismissed as withdrawn on statement of Counsel—Application for restoration filed on the ground that Counsel was not authorised to withdraw appeal—Appellant confined in Jail on date of dismissal of appeal—In absence of express provision in Vakalatnama Counsel has no implied authority to withdraw.*

**Held**, that on the facts of the instance case, the lower Appellate Court acted illegally in dismissing the application on the ground that