CASE NO.:
Appeal (crl.) 135 of 2001
Appeal (crl.) 136 of 2001

PETITIONER:
SUDHIR AND ORS

Vs.

RESPONDENT:
VS.

DATE OF JUDGMENT: 02/02/2001

BENCH:
K.T. Thomas & R.P. Sethi.

JUDGMENT:

THOMAS, J.@@
JJJJJJJJJJ
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Leave granted.

A grey area is sought to be replenished with a judicial pronouncement. A case and counter case, both were committed to the Court of Sessions as both cases involve offences triable exclusively by Sessions Court. But after hearing the preliminary arguments the Sessions Judge felt that in one case no offence triable exclusively by a Court of Sessions is involved, whereas in the other case a charge for offences including one triable exclusively by the Sessions Court could be framed. Is it necessary, in such a situation, that the Sessions Court should transfer the former case to the Chief Judicial Magistrate for trial as envisaged in Section 228(1) of the Code of Criminal Procedure (for short the Code). This is the core issue which has come up to the fore in these appeals.

For understanding the question better it is necessary to have a short resume of the facts.

An encounter took place on the night of 18.2.1996, at a particular place near Bhitar Bazar, Sagar, Madhya Pradesh, in which firearms and other weapons were used and persons were injured. The details of the incident are not relevant and hence skipped. Two rival versions reached the police station regarding the above incident and two First Information Reports were registered upon those rival versions by the officer-in-charge of the police station. FIR No.92 of 1996 was registered against 24 persons arrayed in it as accused (for convenience this can be referred to as the first case) and FIR No.93 of 1996 was registered against six persons (this can be referred to as the second case for convenience). Both cases were investigated together by the police and ultimately challans were laid in both cases alleging offences under Section 307 read with Section 149 besides some other offences of the Indian Penal

Code in both the cases. The Magistrate before whom the challans were filed completed the inquiry proceedings and committed both cases to the Sessions Court for trial. Thus far the two cases flocked together side by side.

In the Sessions Court the first case was taken up under Section 227 of the Code and the court framed charge against the accused for offences under Section 307 read with Sections 149, 147 and 427 IPC. When the preliminary arguments in the second case were heard under Section 227 of the Code the Sessions Judge found that no offence triable exclusively by a Court of Sessions need be included in the charge and hence he framed a charge as envisaged in Section 228(1)(a) of the Code for the offence under Section 324 read with Section 149 and certain other counts of the Indian Penal Code. Thereafter he transferred the second case for trial to the Chief Judicial Magistrate as provided in Section 228(1) of the Code.

The accused in the first case moved the High Court in revision contending that no offence under Section 307 IPC is made out against them and further contended that the court should have included the offence under Section 307 IPC also in the charge framed in the second case. A Single Judge of the High Court dismissed the revision petition by order dated 30.6.2000, in which the learned Judge observed, inter alia, thus:

The charge in each criminal case is framed on the basis of materials available in the records of that particular case. Merely because the charge for offence under section 307 IPC has not been framed in the counter case, the petitioners do not become entitled to be discharged for the offence under section 307 IPC, if they are otherwise liable to be charged for the offence under that section in view of the materials placed before the learned Judge.

In the meanwhile, the State of Madhya Pradesh moved the High Court in revision challenging the order by which the Sessions Court declined to frame charge under Section 307 IPC as against the accused in the second case. The said revision petition was separately dealt with by the High Court and the same learned Single Judge dismissed the said revision on the same day by a separate order. He made the following reasoning:

The facts in the counter case warranted the framing of charge under section 307 IPC against the complainant and his companions and simply because a charge under section 307 IPC has been framed against the complainant and his companions, they cannot claim, on ground of parity, that such charge should also be framed against the respondents, especially when the materials placed in the present case do not warrant framing of charge under section 307 IPC against the respondents. It is the settled law that charge is to be framed on the basis of material available in that particular case and the Judge or Magistrate should not be influenced by any other consideration. Under the circumstances, the impugned order needs no interference by this Court on the ground of parity as contended by the learned counsel for the petitioner and the complainant.

The above two orders passed by the High Court are being challenged now in separate appeals by special leave, and

both these appeals were heard together and they can be disposed of together by a common judgment now.

It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called case and counter case by some High Courts and cross cases by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court (Waller and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that a case and counter case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other.

Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide Krishna Pannadi vs. Emperor - AIR 1930 Madras 190). The learned judge said thus:

There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.

We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarised thus: (I) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This court has given its approval to the said practice in Nathi Lal & ors. vs. State of U.P. & anr. {1990 (Supp) SCC 145}. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here:

We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by

whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the magistrate has, nevertheless, power to commit the case to the Court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:

If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made.

The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a magistrate has committed a case on account of his legislative compulsion by Section 209, its cross case, having no offence exclusively triable by the Sessions Court, must appear to the magistrate as one which ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons why it should be so. Hence the magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross case also to the Court of Sessions. Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII.

Now we have to deal with the powers of the Sessions Court in the light of Section 228 of the Code which says that when the Sessions Court, after hearing under Section 227, is of opinion that none of the offences presumed to have been committed by an accused is triable by a Court of Sessions he is to transfer the case for trial to the Chief Judicial Magistrate.

In this context, we may point out that a Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. This power of the Sessions Court can be discerned from a reading of Section 26 of the Code. When it is realised that the Sessions Judge has the power to try any

offence under the Indian Penal code and when a case involving offence not exclusively triable by such court is committed to the Court of Sessions, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial Magistrate. For this purpose we have to read and understand the scope of Section 228(1) in the light of the above legal position. The sub- section is extracted below:

If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which

(a) is not exclusively triable by the Court of session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

The employment of the word may at one place and the word shall at another place in the same sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence.

In the present case, the Sessions Judge ought not have transferred the second case to the Chief Judicial Magistrate as he did, but he himself should have tried it in the manner indicated in Nathi Lal (supra). To facilitate such a procedure to be adopted we have to set aside the order passed by the Sessions Judge in the second case. We do so.

Resultantly, we allow the appeal arising out of S.L.P. (Crl) No.4007 of 2000, and set aside the order of the High Court as well as the order passed by the Sessions Court by which the case was transferred to the Chief Judicial Magistrate. We direct the Sessions Court concerned to try and dispose of the first case and the second case in the manner set out in Nathi Lals case (supra). In view of the above direction, the impugned order in the appeal arising out of S.L.P. (Crl.) No.3840 of 2000, will remain undisturbed.