
(1987) 04 GUJ CK 0012
In the Gujarat High Court

Abdul Hamidkhan Pathan and etc.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 15-04-1987

Acts Referred:

Constitution of India, 1950 — Article 134
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 203, 204, 208
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 25, 29
Penal Code, 1860 (IPC) — Section 120B

Citation : (1989) CriLJ 468 : (1987) 2 GLR 942

Hon'ble Judges : M.B. Shah, J;B.S. Kapadia, J

Bench : Division Bench

Judgement

M.B. Shah, J.—The Additional City Sessions Judge, Court No. 17, Ahmedabad, by the order 12th Jan., 1987 has framed charge against the petitioner (original accused No. 4) and opponents Nos. 3 to 5 for the offences punishable u/s 20(b) (ii) and Section 25 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 120B of the I.P.C. In the alternative he has framed charge for the offence punishable u/s 20(b)(ii) of the Act. Further, in the alternative accused Nos. 2 and 4 are charged for the offences punishable u/s 25 of the Act.

2. The petitioner original accused No. 4 has filed this Miscellaneous Criminal Application for quashing and setting aside the charge framed against him and also for releasing him on bail. It is his contention that the learned Chief Metropolitan Magistrate had not followed the procedure prescribed u/s 202 of examining all witnesses of the complainant before issuing process and, therefore, the issue of process against accused No. 4 is illegal and consequently the charge framed against the accused is also illegal and void. The petitioner has also filed another Miscellaneous Criminal Application No. 270/87 for releasing him on bail and also quashing the charge framed against him by the learned Additional City Sessions Judge on the ground that there is no evidence against the petitioner accused No. 4.

3. At the outset it should be stated that the learned advocate for the petitioner had submitted that he is not pressing the point that the charge framed by the learned Additional City Sessions Judge against him be quashed on the ground that it is framed without there being any evidence or on totally insufficient evidence.

4. Therefore, the only question which would be required to be decided in this miscellaneous application is whether the order of the learned Chief Metropolitan Magistrate issuing process against the petitioner is illegal or void because he has not examined all the witnesses of the prosecution and thereby acted illegally or in violation of mandatory provisions of Section 202(2) of the Cr. P.C.

5. It is the contention of the learned advocate for the petitioner that examination of all the witnesses under the proviso to Sub-section (2) of Section 202 of the Cr. P.C. is no more an empty formality. This proviso has been incorporated so that the accused gets full information about the allegations against him and to enable him to prepare for his defence. He further submitted that the Legislature has used the mandatory language and has stated that the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. He, therefore, submitted that as the learned Chief Metropolitan Magistrate has not complied with the mandatory direction, the committal order passed by him is void and, therefore, the charge framed by the learned Additional Sessions Judge is illegal and requires to be quashed and set aside. For this proposition he has relied upon the following decisions of various High Courts:

- (1) Ramchander Rao and Others Vs. Boina Ramchander and Another, ;
- (2) Shyamkant Wamanrao Pawar and others Vs. State of Maharashtra and others, ;
- (3) Smt. Anisa and Another Vs. Banne Khan, ;
- (4) Bajji Vs. The State of Madhya Pradesh, ;
- (5) Bajji Vs. The State of Madhya Pradesh, ;
- (6) Kamal Krishna De Vs. State and Another, ;

6. As against this, the learned advocates for the respondents submitted that in the present case the learned Chief Metropolitan Magistrate has examined four material witnesses. The copies of the panchnama and the statements recorded by the Custom Officers are also supplied to the accused. The punch witnesses and such other witnesses were not examined, but that would not vitiate the order of issuing process passed by the learned Chief Metropolitan Magistrate. They further submitted that even if there is some omission or irregularity committed by the learned Magistrate, the order passed by the learned Chief Metropolitan Magistrate would not be vitiated in view of Section 465 because no prejudice is caused to the accused by the said omission or irregularity.

7. In our view, merely because the Chief Metropolitan Magistrate has not

examined all the witnesses named in the complaint as prosecution witnesses at the time of holding enquiry u/s 202 of the Cr. P.C., the order of issuing process against the accused cannot be held to be void or illegal for the reasons stated hereinbelow.

(1) The scope of the enquiry u/s 202 of the Cr. P.C. is for the limited purpose of deciding whether or not there is sufficient ground for proceeding against the accused. The object of enquiry u/s 202 is the ascertainment of the fact whether the complaint has valid foundation calling for the issue of process to the person complained against or whether it is baseless one on which no action need be taken. Therefore, the scope and object of the enquiry is not to see that the Magistrate acts as investigating officer by recording the evidence of all the witnesses even though it is not necessary at the stage of issuing of process Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, .

(2) At the stage of enquiry u/s 200 or 202 of the Code, the accused has no locus standi and he is not entitled to be heard on the question whether the process should be issued against him or not. Therefore, at this stage the accused does not enter into picture, Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, .

(3) Section 202 is to be read along with Section 200 of the Cr. P.C. u/s 200 the Magistrate can take cognizance of an offence on the complaint by examining the complainant and the witnesses present if any. Further, the proviso to the said section provides that if the ! complaint is by a public servant, the Magistrate need not examine the complainant and the witnesses. Therefore, if it is held that under the proviso to Section 202 the Magistrate is sound to examine all the witnesses as if it is trial, it would lead to inconsistencies. In the Same type of enquiry which is meant for issuance of process, in one enquiry u/s 200 there won't be any recording of evidence while under the enquiry u/s 202(2) the entire evidence would be required to be recorded. If the Legislature mended to provide that the Magistrate should record the evidence of the complainant and all his witnesses in offences which are exclusively triable by the Court of Session, he Legislature would have provided similar proviso in Section 200 of the Code.

(4) Even though the phrase "shall call upon he complainant to produce-all his witnesses and examine them on path" is used, yet taking into consideration the scope of the said enquiry it can be said that it gives discretion to the learned Magistrate to examine witnesses till he is satisfied that a prima facie case for issuing process is made out. The word "all" is required to be interpreted in the context of Section 200 and Section 202 and, in our opinion, it would be just and reasonable to hold that it means any of them meaning thereby u/s 202(2) of the Code the Magistrate is required to examine all the witnesses of the complainant who are material and relevant to prove prima facie case for the purpose of issuing process against the accused In any case, if the complainant chooses to examine some witnesses at the time of enquiry u/s 202, that would be sufficient compliance of the proviso, Kewal Krishan Vs. Suraj Bhan and Another, .

(5) The contention that the Legislature has directed the Magistrate to examine all the witnesses with the intention and purpose that the accused gets recorded statements of the witnesses so that he can prepare his defence at the time of trial seems to us to be without any basis. That would mean that even though there is no provision in the Code, yet the Magistrate should be directed to record the statements of all the witnesses in private complaints involving offences triable exclusively by the Court of Session. In our opinion, these considerations are totally foreign to the scope and ambit of an enquiry u/s 302 of the Code.

In our opinion, the aforesaid reasons are borne out by the following decisions.

8. The scope and object of the enquiry u/s 202 is considered by the Supreme Court in number of cases. In the case of Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, , the Court has held as under:

An inquiry u/s 202 of the Code is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after process is issued to the accused. The said proceedings are not strictly proceedings between the complainant and the accused. A person ; against whom a complaint is filed does not become an accused until it is decided to issue process against him. Even if he participates in the proceedings u/s 202 of the Code, he does so not as an accused but as a member of the public. The object of the inquiry u/s 202 is the ascertainment of the fact whether the complaint has any valid foundation calling for the issue of process to the person complained against or whether it is a baseless one on which no action need be taken. The section does not require any adjudication to be made about the guilt or otherwise of the person against whom the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings u/s 202 of the Code.

9. In the case of Kewal Krishan Vs. Suraj Bhan and Another, , the Court has observed that at the stage of Sections 203 and 204, in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see whether or not there is "sufficient ground for proceeding" against the accused.

10. In the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , with regard to the scope of inquiry u/s 200 of the Cr. P.C. the Court has held that the inquiry is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint-

(i) on the materials placed by the complainant before the Court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all advert to any defence that the accused may have.

In fact it is well settled that in proceedings u/s 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not,

11. From the aforesaid propositions of law with regard to the scope and object of the inquiry laid down by the Supreme Court it is clear that at the stage of inquiry u/s 200 or 202 of the Code, the Legislature has kept into mind only the complainant and not the accused. If the Magistrate is satisfied by referring to the complaint and after examining him on oath and the witnesses present if any, he can straightway issue the process u/s 200 of the Code. If the complaint is by a public servant acting or purporting to act in discharge of his official duties, the Magistrate is not required even to examine the complainant and the witnesses. u/s 202 also, the complainant and witnesses are required to be examined only for deciding whether or not there is sufficient ground for issuing process against the accused. The purpose of the proviso to Section 202 is to see that the Magistrate examines all the witnesses produced by the complainant for deciding whether process against the accused should be issued or not. If the Magistrate is satisfied after examining some witnesses produced by the complainant that there is a prima facie case or there are sufficient grounds for issuing process, it would be futile for him to postpone the issuance of process and examine the other witnesses. Examination of other witnesses would not be necessary for the inquiry u/s 202 of the Code. Taking this into consideration, in our opinion, it cannot be said that if the Magistrate has issued process only by examining some witnesses and has not examined all the witnesses who are named in the complaint or in the list annexed with the complaint, the accused can say that the process issued against him is illegal or void.

12. Learned advocate for the appellant has laid much emphasis upon the phrase "all his witnesses" used in the proviso to Section 202(2) of the Code. He submitted that if the Magistrate has discretion to examine some witnesses, then the Legislature would not have used the phrase "all his witnesses". In our opinion the word "all" is required to be interpreted in the context of the scheme and object of Section 202. In some cases the word "all" may mean "any of them" or by a context it may mean "any" (see Stroud's Judicial Dictionary, Fourth Edition). Therefore in context whether the word "all" used in proviso to Sub-section (2) of Section 202 could mean "any of them". In our opinion, it would mean "any of them" because in an enquiry u/s 202 recording of evidence of all the witnesses may not be necessary. If the Magistrate after recording of some evidence is satisfied that there is "sufficient ground for proceeding against the accused, he can issue the process and he need not record the evidence of remaining witnesses. The Supreme Court, in the case of Kewal Krishan Vs. Suraj Bhan and Another, , held that at the stage of Sections 202/204, if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session. In para 10 the Court has held as under:

The proposition that in cases instituted on complaint in regard to an offence exclusively triable by the Court of Session, the standard for ascertaining whether or not the evidence collected in the preliminary inquiry discloses sufficient grounds for proceeding against the accused is lower than the one to be adopted at the stage of framing charges in a warrant case triable by the Magistrate, is now evident from the scheme of the new Code of 1973. Section 209 of the Code of 1973 dispenses with the inquiry preliminary to commitment in cases triable exclusively by a Court of Session, irrespective of whether such a case is instituted on a criminal complaint or a police report. Section 209 says: "When a case instituted on a police report or otherwise the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall commit the case to the Court of Session." If the Committing Magistrate thinks that it is not necessary to commit the accused who may be on bail to custody, he may not cancel the bail. This has been made clear by the words "subject to the provisions of this Code relating to bail" occurring in Clause (b) of Section 209. Therefore, if the accused is already on bail, his bail should not arbitrarily be cancelled. Section 227 of the Code of 1973 has made another beneficent provision to save the accused from prolonged harassment which is a necessary concomitant of a protracted trial. This Section provides that if upon considering the record of the case, the documents submitted with it and the submissions of the accused and the prosecution, the Judge is not convinced that there is sufficient ground for proceeding against the accused, he has to discharge the accused under this section and record his reasons for so doing.

These observations of the Court clearly show that at the stage of inquiry u/s 202 prima facie case is to be ascertained and if the complainant has led evidence showing the prima facie case, then the learned Magistrate is bound to issue the process. This would mean that the Magistrate is not bound to wait and record the evidence of all the witnesses of the complainant who are named in the complaint or in the list annexed with the complaint

13. In the case of *Satyadeo Pandey v. State of U.P.* (1987) 1 Crimes 637 : 1987 All LJ 685, the Allahabad High Court has held that the words "all his witnesses" under the proviso to Section 202(2) of the Code do not refer literally to all the prosecution witnesses in number, rather to all his witnesses (i.e. of the complainant) and to whom he considers material to prove his case. The Court has further observed as under:

A bare reading of this provision indicates the wisdom of the legislation inasmuch as the provision is not that the Magistrate shall examine all the witnesses so as to make it obligatory on the part of the Magistrate to examine all the witnesses. The provision, on the other hand is that the Magistrate shall call upon the complainant to produce "all his witnesses". Again the words are not "all witnesses", but "all his witnesses". The word "his" is adjective according to grammar qualifying word "witnesses". His means of himself, or belonging to him,

or associated with him. According to the Webster's Third New International Dictionary, the word "his" connotes, associated or connected with him, of relating to him, that he is capable of. In the present contest the words "all his witnesses" connote that all the witnesses of the complainant associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case.

14. In the case of Vijay Kumar Vs. State of Haryana and Another, , the Punjab and Haryana High Court while dealing with the similar question has observed that it was not incumbent upon the committing Magistrate to record the evidence of all the remaining witnesses if the complainant himself did not rely upon them and that would not be a ground for quashing the proceedings of the committing Magistrate.

15. Same view was taken by the Delhi High Court in the case of Vishnu Bhagwan v. Nawal Kishore 1982 Cri LJ 144 (Delhi), wherein the Court held that the Magistrate taking cognizance on a complaint for an offence triable exclusively by the Court of Session is to examine all the witnesses of the complainant to decide whether the offence complained about is made out against the accused or not. But if the complainant is satisfied with the examination of some of his witnesses and closes his case, the Magistrate cannot compel the complainant to summon the rest of the witnesses named in the list of witnesses.

16. In the case of Bhagwat Pandey and Others Vs. State of Bihar, , the Patna High Court considered the proviso to Sub-section (2) of Section 202 of the Code and held that the plain reading of this proviso is that in such a case, which is exclusively triable by a Court of session, the Magistrate shall permit the complainant to produce all his witnesses and examine them, during the enquiry u/s 202 of the Code. This proviso is of permissive nature and not mandatory. The Court also negated the contention that the accused would be prejudiced at the trial if there would be no evidence of the prosecution witness taken during the enquiry or investigation before the trial had commenced because an accused would be taken by surprise if the witnesses are produced for the first time during the trial in the Sessions Court.

17. In the case of Budaraju Seshagiri Rao and Others Vs. T.V. Sarma and Another, , the Andhra Pradesh High Court has negated the similar contention and has held that the proviso appears to be intended to provide against a Magistrate refusing to take cognizance and issue process without calling upon the complainant to produce all his witnesses and examining them on oath. It is not intended to give lever to the accused to complain that the Magistrate should not have taken cognizance of the case without examining all the complainant's witnesses. It would be worthwhile to produce the following observations:

Section 200 requires a Magistrate taking cognizance of an offence on complaint to examine upon oath the complainant and the witnesses present. Section 204 empowers a Magistrate to issue process to secure the attendance of the accused,

if in his opinion there is sufficient ground for proceeding., Section 202(1), however enables a Magistrate to postpone the issue of process and to enquire into the case himself or direct an investigation by a police officer or other person, for the purpose of deciding whether or not there is sufficient ground for proceeding. Where a Magistrate proceeds to make such an enquiry he is required by the proviso to Section 202(2) if the offence complained of is triable exclusively by the Court of Session, to call upon the complainant to produce all his witnesses and examine them on oath. The proviso appears to be intended to provide against a Magistrate refusing to take cognizance and issue process without calling upon the complainant to produce all his witnesses and examining them on oath. In cases where the offences i complained of are triable exclusively by the Court of Session, it is not intended to give a lever to the accused to complain that the Magistrate should not have taken cognizance of the case without examining all the complainant's witnesses. A complainant may complain against the refusal of a Magistrate to take cognizance of the case without examining all his witnesses. But, an accused cannot complain against a Magistrate taking cognizance of a case without examining all the witnesses. Sri Ayyappu Reddy urged that the proviso to Section 202(2) was intended to provide the accused with an opportunity to know the case against him and the witnesses who were going to depose against him. I do not think, that is the object of the proviso. The accused does not enter the picture at all at that stage. The enquiry by the Magistrate u/s 202 is only for the purpose of enabling him to decide whether or not there is sufficient ground for proceeding. In deciding that question the Magistrate is required to call upon the complainant to produce all his witnesses and examine them on oath in the case of offence exclusively triable by a Court of Session. The provision is clearly not meant to furnish any fodder to the accused.

18. While dealing with the similar question in the case of *Frank Dalton Larkins v. State (Delhi Administration)* 1985 Cri LJ 377 , the Delhi High Court has considered all the decisions which are cited by the learned advocate for the petitioner and held that the Court was in agreement with the aforesaid observations made by Chinnappa Reddy, J. (as His Lordship then was) in the case of *Budaraju Seshagiri Rao and Others Vs. T.V. Sarma and Another*, . However, the learned advocate for the petitioner vehemently submitted that the view expressed in the case of *B. S. Rao (supra)* is overruled by the Division Bench of the Andhra Pradesh High Court in the case of *Ramchander Rao and Others Vs. Boina Ramchander and Another*, . In that case the Division Bench of the Andhra Pradesh High Court has held as under:

In our opinion the language of the proviso is clear and unambiguous. Where the case is one triable exclusively by a Court of Session under the proviso to Clause (2) of Section 202 it is mandatory on the part of the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath. The word used is "all" and "all" does not mean "some". He has to perform the statutory functions before issuing process in connection with the of fences triable by a

Court of Session. Though the committal proceedings as contemplated by the old Code have been abolished, Section 202 evolved a new procedure of examination of the witnesses. The examination of the witnesses is not a mere formality. This provision has been incorporated in the Code so that the accused has full information about the allegations about him and to enable him to prepare for his defence. We are of the view that the Section while on one hand is intended to restrain the Magistrate from refusing to take cognizance of the offence after examining only some witnesses it is also intended to give a fair and reasonable opportunity to the accused to get adequate information about the charge against him to prepare his defence. Section 208 casts a duty on the Magistrate to furnish the accused free of cost with copies of all the statements of witnesses examined by him. This provision is of great importance not only to the complainant but also to the accused. The object and the context in which the words "the Magistrate shall examine all witnesses" appear (make it clear) that it is a mandatory provision which must be complied with. In a private complaint unless the witnesses are examined as contemplated by Section 202(2) the accused will not be in a position; to point out any contradictions when they give evidence in the Court of Session. The accused can cross-examine the witnesses with regard to their earlier statements in the Court of the Magistrate, and point out the contradictions. It is no doubt true that the accused does not come into the picture in the committal Court. After the process is issued the accused appears and the case is made over to the Court of Session. Though he may not have a right in the Court of the Magistrate he has certainly a right to cross-examine the witnesses in the Sessions Court with reference to the statements made by them earlier in the Court of a Magistrate and therefore it cannot be said that the accused is not prejudiced at that stage. After the process is issued the accused has a right to complain that the mandatory provisions of Section 202(2) of the Cr. P.C. have not been complied with.

19. Similar view is expressed by the Madhya Pradesh High Court in *Bajji Vs. The State of Madhya Pradesh*, , by the Allahabad High Court in *Smt. Anisa and Another Vs. Banne Khan*, , and by the Madras High Court in *M. G. Pillai v. T. Pillai* 1983 Cri LJ 917.

20. For the reasons stated above, we respectfully disagree with the aforesaid view, In our opinion, preliminary inquiry u/s 202 is not for the benefit of the accused but is only to find out whether "there is sufficient ground for proceeding" against the accused. Therefore there may not be any need to examine all the witnesses at that stage if the Magistrate is satisfied that there is sufficient ground for proceeding against the accused on or after examining one or some of the witnesses of the complainant.

21. In the result, it cannot be said that the order passed by the learned Chief Judicial Magistrate issuing the process against the accused is in any way illegal or void.

22. The learned advocate for the petitioner further submitted that the petitioner

should be released on bail pending the trial in the Sessions Court. Taking into consideration the seriousness of the offence, the punishment provided under the Act and the starting of rampant use of the charas, ganja or such other drugs by the young, we consider that in these types of cases normally accused should not be released on bail. It should not be forgotten that in murder case the accused commits the murder of one or two persons while those persons who are dealing in charas, ganja or intoxicant drugs are causing the death of number of persons in the society and/or ruining their lives. In our view, they are hazard to the society and if they are released on bail, they are likely to continue their nefarious activity of continuing the business of trafficking in intoxicants clandestinely. These types of offences affect the society at large. The law should not be made so much impotent that it does not serve the society and the antisocial elements should not be given licence to create havoc in society. Law should be interpreted in such a manner that it gives protection to the society from anti-social elements creating havoc otherwise lawlessness and anti-social element would affect the fibre of the society as a whole.

23. Further the learned advocate for the respondent had pointed out to us that the Sessions Case pending against the petitioner is ripe for hearing. The case was fixed for hearing before the Court, but it was adjourned because the miscellaneous application filed by the petitioner was pending before this Court. At present the Sessions Case is fixed for hearing on 26th of this month. In the above view of the matter, in our opinion, there is no question of releasing the petitioner on bail at this stage. Hence his prayer for releasing him on bail is rejected.

24. After some discussion with regard to the framing of the charge, the learned advocate for the petitioner has not pressed his contention that there is no evidence for framing the charge against the accused. Therefore, we are not required to deal with the said contention.

25. In the result, both the Miscellaneous Criminal Applications are rejected Rule discharged.

26. The learned advocate for the petitioner submitted that a certificate under Article 134 of the Constitution be granted to the petitioner. In our opinion, at this stage there is no question of granting such certificate. The trial is pending and if it proceeds no prejudice would be caused to the petitioner accused. Hence the case is not a fit one for appeal to the Supreme Court. The certificate is, therefore, refused.