

(2001) 07 PAT CK 0057

In the Patna High Court

Case No : Criminal Misc. No. 3827 of 2001

Amirka Thakur and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Citation : (2001) 07 PAT CK 0057

Final Decision : Dismissed

Judgement

S.K. Chattopadhyay, J.—The order taking cognizance dated 11-8-1999/12-8-1999 of an offence under Sections 395 and 148 of the Indian Penal Code read with Section 27 of the Arms Act is under challenge in this application.

2. Shorn of unnecessary details, the relevant fact, relevant for the purpose of the application, is that the Opposite Party No. 2 filed a complainant case in the Court of the Chief Judicial Magistrate, Gopalganj being numbered as Complaint Case No. 595/1999 under the aforesaid sections. Allegations were made that the petitioners along with other accused persons surrounded the Kirana shop of the complaint and were armed with various weapons. The Petitioner No. 2 on pistol point asked the complainant to part with all the money and threatened him and the cash amount of Rs. 5000/- and goods worth Rs. 40,000/- were taken away by the miscreants. It is further alleged that out of the accused persons the Petitioner Nos. 1 and 2 were apprehended on the spot and were handed over to the police. However, the other accused persons fled away firing in the air. Photo copy of the complaint petition is annexed as Annexure-4.

3. The learned Magistrate after examining the complainant on oath and his witnesses took cognizance of the offence as aforesaid.

4. According to the petitioners this complaint case is nothing but a counter blast of the First Information Report lodged by Amirka Thakur (Petitioner No. 1) against the Opposite Party and other accused persons giving rise Mohammadpur

PS Case No. 30 of 1999, in which the police after investigation filed charge-sheet against the Opposite Party No. 2 and other accused. Another case, according to the petitioners, was filed by the Petitioner No. 2 namely, Mohammadpur PS Case No. 5 of 1998 under Sections 380 and 511 of the Penal Code against one Birnedra Rai, full brother of Opposite Party No. 2. These two First Information Reports are annexed with this application. A grievance has been made that the learned Magistrate without appreciating these facts has taken cognizance of the offence and issued summons to the petitioners.

5. Though on persual of the statements made in the instant application nowhere it appears that the petitioners have taken a plea regarding violation of proviso (2) of Section 202 of the Code of Criminal Procedure, but the learned Counsel Mr. Ashis Anshu has raised the point that where the allegations made out a case which is exclusively triable by the Court of Sessions the learned Magistrate must examine all the witnesses named in the complaint petitioner before taking cognizance and issuing process or otherwise his order will be bad. According to him, this proviso is mandatory in nature and has not been complied with and, therefore, the order taking cognizance must be set aside. In support of his contention he has relied on the decision in the case of 1980 BUR 174, Jai Ram R. Ranjan Gud and Ors. v. State of Bihar and Anr. Moideenkutty Haji and Others Vs. Kunhikoya and Others,

6. Mr. Tiwari, learned APP countering the submission of Mr. Anshu submitted that in view of subsequent decision of this Court proviso (2) of Section 202 of the Code of Criminal Procedure is not mandatory and non-compliance of the same will not vitiate the order taking cognizance.

7. As noted above, nowhere the petitioners on the application have raised any ground for setting aside the order taking cognizance on the ground of violation of this proviso. They only point raised in the application is that the learned Magistrate without appreciating the facts that the case is nothing but a counterblast has taken cognizance. However, as a legal question has been cropped up I may examine the same.

8. Section 202 of the Code of Criminal Procedure deals with the postponement of issue of process. Sub-section (2) of Section 202 of the Code contemplates that "in an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

From the aforesaid provision it appears that the Magistrate, in a case exclusively triable by the Court of Sessions, should examine all the witnesses named in the complaint petition before taking cognizance. However, there is no factual basis in the application that all the witnesses of the complainant have not been examined by the learned Magistrate. The impugned order indicates that besides the

complainant eye-witnesses were examined by the complainant and on the basis of their statement the learned Magistrate has taken cognizance. Thus, in my view, the point raised by Mr. Anshu has no factual basis.

9. Much stress has been given by Mr. Anshu on the decision of Jai Ram's case (supra) where a Single Bench of this Court has held that consequence of non-compliance with the mandatory procedure will render the order of issuance of process and all subsequent orders following it illegal. In this case, however, the learned Judge has opined that if the complainant gives up some witnesses or if some witnesses are not prepared to be deposed. In those cases they will be his witnesses and their non-examination will be of no consequence. At a later stage it appears that this Court has held that proviso to Sub-section (2) of Section 202 of the Code of Criminal Procedure cannot be said to be of such mandatory nature as to render the non-compliance of the same to vitiate the jurisdiction of the Magistrate taking cognizance after such an inquiry. Another learned Judge in the case of Bhagwat Pandey and Others Vs. State of Bihar, has noticed the decision in the case of Jai Ram's (supra) but has differed with the same on the basis of the Division Bench decision of this Court reported in ILR (1980) LIX 321 Naresh Singh and Ors. v. The State of Bihar). The Division Bench on facts therein was of the view that cognizance can be taken in such a case even without the evidence of the prosecution witnesses taken before the trial commences in the Sessions Court, therefore, this provision of proviso to Sub-section (2) of Section 202 of the Code of Criminal Procedure cannot be said to be mandatory in nature. In the case of Nageshwar Rao and Ors. v. State of Bihar and Anr. 1986 BBCJ 385 another learned Single Judge has been pleased to hold that only requirement of law is that the Magistrate has to call upon the complainant to produce all his witnesses and examine them on oath, if so produced. In the aforesaid case it appears that out of six witnesses named in protest petition five witnesses were already examined and the Court held that the complainant failed to produce one of his witnesses and that will not vitiate the order of the learned Magistrate. This Court while giving this finding had gone through the order-sheet and found that opportunity was given to the complainant on various dates to bring his witnesses but one of the witnesses named in the protest petition was not examined and in this circumstance it was held that the order taking cognizance would not vitiate.

10. I respectfully agree with the view expressed in the case of Bhagwat Pandey and Ors. v. State of Bihar (supra), and Nageshwar Rao and Ors. v. State of Bihar and Anr. (supra). In this connection I may give one instance, wherein in a given case, for example, in a case triable exclusively by the Court of Session, the complainant has given names of four eye-witnesses, but on the date when the complainant comes to the Court to record his statement of solemn affirmation, for some reason or other, two of the witnesses avoided to come before the Magistrate for deposing in favour of the complainant. In such circumstances, the complainant will have no option but to give his statement and that of remaining two other witnesses. The Magistrate on recording the statement of the

complainant and examining those two witnesses if takes cognizance, though name of four witnesses was there in the complaint petition then, in my view, it cannot be said that the order taking cognizance is vitiated. In a recent decision is the case of Rosy and Another Vs. State of Kerala and Others, there lordships have held that "it is no doubt true that by the use of the word "shall" it appears that the language used in the proviso is of a mandatory nature. At the same time it is a procedural law and it is to be read in the context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry u/s 202 is itself a discretionary one giving the option to examine or not to examine witnesses on oath. Hence, the proviso to the said sub-section is required to be read accordingly though couched in mandatory terms by using the word "shall". Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases."

11. For the aforesaid reasons I am of the view that the argument of Mr. Anshu is not sustainable. moreover, as noticed above nowhere it has been stated that the learned Magistrate has not examined all the witnesses named in the complaint petition nor he asked the complainant to produce all his witnesses. In such circumstances, in my view, it cannot be said that the order taking cognizance is vitiated in law.

12. I find no reason to interfere with the impugned order and as such, this application stands dismissed.