
(1967) 01 CAL CK 0014

In the Calcutta High Court

Case No : Criminal Revision Case No. 1060 of 1965

C. Mc Lennan and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 30-01-1967

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 202, 202(2), 202(2A), 485A, 540

Citation : AIR 1968 Cal 195 : (1968) CriLJ 482

Hon'ble Judges : T.P. Mukherji, J

Bench : Single Bench

Advocate : Ajit Kumar Datta and Bilin Basu, for the Appellant; Nanda Dulal Dutta, for the Respondent

Final Decision : Allowed

Judgement

T.P. Mukherji, J.—This rule is directed against the orders passed by Shri P. K. Dutta, magistrate, second class Asansol on July 13, 1965 and August 12, 1965 respectively whereby in an inquiry u/s 202 of the Code of Criminal Procedure, he issued summonses on the petitioners on the prayer of the complainant, and on failure of the petitioners to attend court in obedience to the summons issued on them, took cognizance of the offence of non-attendance in obedience to summons u/s 485A of the Code of Criminal Procedure and directed them to show cause why they should not be summarily punished under that section. By this petition, the petitioners prayed for setting aside both the above orders.

2. One Ajit Kumar Ghosal lodged a first information report with the police on April 17, 1964, against one Prodyot Kumar Roy alleging criminal trespass and theft. On April 20, 1964 Pradyot surrendered in court and obtained bail. As the police did not submit any report to the magistrate on the first information report, Pradyot was discharged from his bail bond on June 26, 1964.

3. Ajit Ghosal thereafter filed a complaint before the sub-divisional magistrate of Asansol, Shri M. N. Brahmachari, on July 27, 1964, and the learned magistrate

examined him u/s 200 of the Code and asked for a report from the police on the investigation held on the first information report that was lodged at the police-station. The case was adjourned from day to day for non-receipt of report from the investigating officer

4. On October 12, 1964, the police submitted a final report to the sub-divisional magistrate in the case started at the police-station on the first information report declaring the complaint to be false and the learned sub-divisional magistrate recorded thereon the following order:

"Enter false, sections 454/380/342 IPC Accd. already discharged "

5. From September 21, 1964, the complaint case of which cognizance had been taken by the sub-divisional magistrate was being dealt with by another magistrate, Shri R. C. Ganguly, as the order-sheet on record would show. As the report that was called for from the police in the case was not being received, the case was adjourned from day to day till March 12, 1965, when the final report was placed before Shri Ganguly who perused the same and directed a judicial inquiry by magistrate Shri R. K. Debnath. On the transfer of Shri Deb Nath. Sri P. K. Dutta took up the inquiry as the successor magistrate. Before him the complainant prayed for summons on the petitioners. Summonses were duly served. The petitioners appeared through a lawyer and filed a petition in court challenging the court's jurisdiction to issue summons in an inquiry u/s 202 of the Code of Criminal Procedure The learned magistrate held that he had ample powers u/s 540 of the Code to issue summons He took exception to the petitioners having had the courage to challenge the jurisdiction of the court which according to him, amounted to contempt and he at once ordered a proceeding u/s 485-A of the Code to be started against them and in pursuance thereof, directed them to show pause.

6. Mr. Datta, appearing in support of the rule, contended that the order of discharge that was made by the sub-divisional magistrate on October 12, 1964, was an order passed in the complaint case though the order was not recorded in the record of that case and that, as such, all orders in the case subsequent thereto are of no legal effect. His second objection was that the inquiring magistrate has no power to issue summons in an inquiry u/s 202 of the Code. If that be so, according to him, the witnesses summoned are not legally bound to appear before him in obedience to the summonses and if so, again, Section 485-A of the Code would have no manner of application to the case of a witness illegally summoned in an inquiry u/s 202. In this connection, the argument of Mr. Datta was that wherever a court has been empowered by the Code to issue summons that power has been specifically provided for, as for example, in Sections 244 (2), 252 (2), 251-A (9), 208 (3), 145 (4) and Section 540

7. It appears from the record that cognizance of the offence on the complaint was taken by the sub-divisional magistrate Shri Brahmachari. On September 21, 1964, Shri Brahmachari was the sub-divisional magistrate, as would be apparent

from the order passed by him on the final report dated October 12, 1964. Shri Ganguly, however, continued to deal with this matter till March 12, 1965, on which date he directed the judicial inquiry. It does not appear from the record that on that date he was the sub-divisional magistrate of Asansol as the successor of Shri Brahmachari or that Shri Brahmachari had been transferred, from the station before that date. If that be the position, Shri Ganguly who had not taken cognizance of the offence and who was not the sub-divisional magistrate of the station as a successor magistrate had no power to direct the judicial inquiry and to transfer the inquiry to another magistrate. This is one aspect of the matter which would vitiate all the proceedings that followed the order dated March 12, 1965.

8. So far as the first objection of Mr. Datta is concerned, I cannot find that the order that was passed on the final report is an order passed in the complaint case. No doubt, the sub-divisional magistrate had directed the police to submit a report on the investigation that had been held by them. The final report, however, came independently and was dealt with independently by the sub-divisional magistrate, otherwise the statement in the order passed by him on October 12, 1964 to the effect that the accused had been already discharged would be meaningless. On March 12, 1965, Shri Ganguly perused this final report. There is no reason to think that the order passed thereon had escaped his notice. In spite of that, he was of the view that a judicial inquiry was necessary for the ends of justice. Considering the materials on record, I cannot accept the argument of Mr. Datta that the order of discharge that was passed by sub-divisional magistrate on October IX, 1964 was an order passed in the complaint case and as such all orders in that case passed subsequent to that date are of no legal effect.

9. Coming to the next objection of Mr. Datta, reference may be made to Section 90 of the Code which prescribes the power of the court to issue warrants of arrest. The power in this regard has been restricted to courts empowered by the Code to issue summons for the appearance of any person. It would appear from this section that the court has to be empowered in the matter of issue of summons and, as a matter of fact, the sections mentioned by Mr. Datta do contain provisions whereby the court in the proceedings concerned have been empowered to issue process. If, therefore, the Court issues processes in a matter in which it is not empowered to do so the person served with the process would not be legally bound to act in obedience thereto and would not be liable to be subjected to proceeding u/s 485-A of the Code in such a case.

10. Mr. Nanda Dulal Dutta, the learned advocate appearing for the State, urged that Sections 207-A and 251-A of the Code have made no provisions for issuing summonses for prosecution witnesses and that it has been held that in such cases Section 540 of the Code would give the court sufficient power to summon witnesses whose evidence might be considered necessary for the inquiry or the trial. The above two sections embody provisions for a sessions inquiry in a

proceeding instituted on a police report and for the trial of warrant cases instituted on police reports respectively. There the magistrate has before him the papers u/s 173 of the Code wherefrom he might be in a position to know what evidence might be necessary in the interests of justice and if the witnesses who might be in a position to adduce that evidence and to help the court be unwilling to come, Section 540 of the Code would certainly empower the court to enforce their attendance. Processes in such cases may be issued either by the court suo motu or on the prayer of the prosecution. We have it, therefore, that in the matter of issue of processes the court has to be empowered either by specific provisions in that regard or the court will have to have sufficient materials before it to consider the necessity of issuing processes u/s 540 which is the general power given to the court in the matter for the ends of justice. In an inquiry u/s 202 of the Code of Criminal Procedure, there is no specific provision empowering the court to issue process on the prayer of the complainant and the court also has no materials before it at that stage to satisfy itself that for the interest of justice processes need issue on particular persons. An inquiry u/s 202 can be held not only by a magistrate but also by a police officer or any other suitable person and the same principle in the matter of an inquiry should be followed where the inquiry is held by a magistrate or by a police officer or by any other person. The only difference in the case of inquiries by the three different agencies is also provided for in Section 202 itself. Under Sub-section (2-A) of the section, the magistrate may take evidence of witnesses at the inquiry on oath which obviously the police officer or the other person would not be entitled to do. Sub-section (2) of the section provides that when the inquiry is held by a person not being a magistrate or a police officer, such person shall exercise all the powers conferred by the Code on an officer in charge of a police station except that he shall not have power to arrest without warrant. Excepting in the above two regards, the manner of the inquiry before all the three agencies under the Code, in my view, should be uniform. As there is no question of issue of processes for appearance of witnesses by a police officer or by the other agency, there is no reason why the magistrate as an inquiring magistrate under the section should be deemed to be impliedly authorised in that behalf. Considering the scheme of the Code of Criminal Procedure in the matter and further considering the fact that the magistrate as an inquiring magistrate u/s 202 has not been specifically empowered to issue processes for the appearance of witnesses, I am of the view that he has no power in that regard. In view of what I have stated earlier. Section 540 of the Code would not also empower him to issue processes for the attendance of witnesses in such an inquiry.

11. The learned magistrate in the present case, in my view, was not correct when he issued summons on the petitioners on July 13, 1965. By his order dated August 12, 1965 he virtually rejected the petitioners' objection whereby the jurisdiction of the court in the matter was questioned and the proper course thereafter for him to follow would have been to direct the petitioners to appear on a date to be fixed by him thereafter. The learned magistrate was not justified

in initiating a proceeding u/s 485-A of the Code without giving the petitioners an opportunity of appearing before him after their objection challenging the court's competence in the matter had been rejected

12. Considering all that has been stated above. I hold that the learned magistrate directing a judicial inquiry has not been proved to have had the jurisdiction to make that order. I further hold that the magistrate was not empowered to issue processes for the appearance of witnesses for an inquiry u/s 202 of the Code and I also hold that the learned magistrate was not suits fled in initiating the proceeding u/s 485-A of the Code without giving the petitioners sufficient opportunity to comply with the summonses after their objection challenging the court's jurisdiction to issue the same had been dismissed.

13. In pursuance of my -findings above, the rule is made absolute and the orders complained of are set aside.