
(2001) 01 OHC CK 0015

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 4598 of 1999

Dr. Gangadhar Behera and another

APPELLANT

Vs

State of Orissa and another

RESPONDENT

Date of Decision : 03-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2), 190, 190(1), 202
Penal Code, 1860 (IPC) — Section 304, 304

Citation : (2001) 91 CLT 550 : (2001) CriLJ 2643 : (2001) 20 OCR 255 : (2001) 1 OLR 277

Hon'ble Judges : R.K. Patra, Acting C.J.

Bench : Single Bench

Advocate : M/s Y. Das, D. Das and Dr. G. Tripathy, for the Appellant; M/s B. Panda, S.R. Mohapatra, G.P. Panda, B.R. Mohanty and S.C. Mishra, for the Respondent

Final Decision : Partly Allowed

Judgement

R.K. Patra, A.C.J.

1. In this application made u/s 482 of the Code of Criminal Procedure, the petitioners seek quashing of the order dated 17-7-1999 of the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack (in brief "S.DJ.M") in G. R. Case No. 2228 of 1996 by which he Has taken cognizance of the offences u/s 304A and section 304, Part-II, I P.C. and directed issue of processes against them.

2. Opposite party No. 2 presented a written report before the Officer-in-charge of Mangalabag Police Station, Cuttack on 23-12-1996 alleging that her husband Satyanarayan Bhuyan was admitted into Kailash E. N. T. Clinic for Tonsillectomy operation on that day at 8 a.m. and the operation was done by petitioner No. 1. Petitioner No. 2 being the anaesthetist attached to the said clinic administered general anaesthesia to the patient. At about 10 a.m. petitioner No. 1 and his associate came out from the Operation Theatre. When opposite party No. 2 asked them about her husband, she was told by them that operation was in

progress and there would be no difficulty. One hour thereafter, petitioner No. 1 told her that he was sorry that the operation on her husband could not be successful. She accordingly with her family members went to the Operation Theatre and found her husband lying dead in a pool of blood. She alleged that her husband was quite hale and hearty before he was operated upon and because of negligence of the petitioners in performing the operation, he died.

The aforesaid report was registered as F. I. R. No. 309 dated 23-12-1996 u/s 304A, I. P. C. On the basis of the said F. I. R., G. R. Case No 2228 of 1996 was registered on the file of the S.D.J.M., Sadar, Cuttack. Police took up investigation. On 29-8-1997 while investigation was in progress, opposite party No. 2 filed a complaint against the petitioners in the court of the S. D. J. M. under sections 304A and 304, Part-II, I.P.C. on the self-same allegations. The complaint was registered as I. C. C. No. 171 of 1997. On 28-10-1998 the learned S. D. J. M. passed orders in the complaint case directing its closure on the ground that since in respect of the self-same occurrence police investigation was being done, there was no necessity to proceed with it. Opposite party No. 2 being felt aggrieved by the closure of the complaint case moved the learned Sessions Judge, Cuttack in Criminal Revision No. 118 of 1998. By order dated 8-3-1999, the learned Sessions Judge set aside the order dated 28-10-1998 of the learned S. D. J. M. in the complaint case and directed him to consider as to whether he would prefer to await submission of final form in G. R. Case No. 2228 of 1996 and if he considered that it was not desirable to a-wait submission of final form, he may proceed with the complaint case in accordance with law. In view of the said order, learned S. D. J. M. passed order on 19-3-1999 in G. R. Case No. 2228 of 1996 directing restoration of the complaint case to file. He further directed the G.R. case to be put upon 28-6-1999 awaiting final form. On that day itself (19-3-1999) police filed final form u/s 173, Cr. P. C. stating that the case is a mistake of fact u/s 304A, I. P. C. . The learned Magistrate also on that day directed issue of notice to the informant -opposite party No. 2 on the final form. On 4-6-1999 the case record was put up before the learned Magistrate along with a a protest petition filed by opposite party No. 2. On 24-6-1999 the learned Magistrate heard on the protest petition filed by opposite party No. 2 and pronounced the impugned order on 17-7-1999. It would be appropriate to quote the relevant portion of the order :

".....Perused the case record and the order-sheet, F.I.R. dated 23-12-1996, seizure list dated 4-1-1997, inquest report in respect of the deceased.....and the final opinion on the cause of death of the deceased Satyanarayan Bhuyan given by Dr. S. Acharya.....are all the documents of importance for necessary consideration of the protest petition. These documents along with the case diaries and other police papers when perused carefully reflect facts which constitute offences u/s. 304A/304II, I.P.C. Having found these facts prima facie I take cognizance of those offences as per the police report u/s. 173, Cr. P, C. in accordance with the provision enumerated in section 190(i)(b). Since it is apparent from the case record that prima facie the offences are committed by Dr.

Gangadhar Behera of Kailash E. N. T., Friends Colony, Cuttack and Dr. M. K. Ray, Anaesthetist in the same clinic, process be issued"

3. Counsel for the petitioners has raised three points in support of the application which have been reiterated in his note of submission dated 18-2-2000. They are as follows :

(i) The learned Magistrate having accepted the final form submitted u/s 173, Cr. P. C. and having issued notice to informant to file protest petition, it was obligatory on his part to examine witnesses u/s 202, Cr. P. C. before taking cognizance ;

(ii) The order taking cognizance is vitiated because the learned Magistrate did not follow the mandatory provision contained in the proviso to sub-section (2) of section 202, Cr. P. C. when the offence complained of (Section 304, Part-II, I.P.C) is triable exclusively by the Court of Session ; and

(iii) Accepting the entire prosecution story, no case has been made out u/s 304A and section 304, Part-II, I. P. C.

The learned counsel appearing for the informant-opposite party No. 2 has refuted all the points urged on behalf of the petitioners.

4. Let me now proceed to examine the contentions of the petitioners in seriatim :

Point Nos. (i) and (ii):--Point Nos. (i) and (ii) being connected are taken up together for discussion.

The submission of the learned counsel for the petitioners that the learned Magistrate accepted the final form submitted by the police u/s 173, Cr. P. C. is not factually correct. As already indicated, on 19-3-1999 after restoring the complaint case (I.C.C. No. 171/1997) to file, he passed orders to await submission of final form in the connected G. R. case. Later, it appears, final form was received in the court with the case diary. When it was placed before the learned Magistrate, he passed further order on that day (19-3-1999) which reads as follows:

"F.R.M P. u/s. 304A, I.P.C. received along with C.Ds. Issue notice to the informant. Put up after receipt of the S.R."

Pursuant to the notice, informant-opposite party No. 2 filed protest petition on 4-6-1999. The learned Magistrate directed the copy of the protest petition to be served on the Assistant Public Prosecutor and adjourned the case to 24-6-1999 on which day he heard on the protest petition and reserved for order and pronounced the same on 17-7-1999. The aforesaid order passed by the learned Magistrate clearly indicates that when final form was received on 19-3-1999 in the court, he merely directed issue of notice to the informant and after protest petition was filed, he heard the matter and pronounced the impugned order on 17-7-1999

With regard to the power of the learned Magistrate on the police report u/s 173, Cr.P.C., a three-Judge Bench of the Supreme Court in *M/s. India Carat Pvt. Ltd. v. State of Karnataka*, A. I. R. 1980 S C 885 after critically analysing the provisions in Chapters XII, XIV, XV and XVI of the Cr. P. C. and considering the decisions in *Abhinandan Jha and Others Vs. Dinesh Mishra*, and *H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh)*, held that upon receipt of a police report u/s 173(2), Cr. P.C. any Magistrate is entitled to take cognizance of any offence u/s 190(1)(b) of the Cr. P.C. even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of witnesses examined by the police during investigation and take cognizance of the offence complained of and order issue of process to the accused. Section 190(1)(b) does not lay down that Magistrate can take cognizance of offence only if the Investigating Agency gives an opinion that the investigation has made out a case. The Magistrate can ignore the conclusion arrived at by the Investigating Agency and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit; in exercise of power u/s 190(1)(b) and direct issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in sections 200 and 202 of the Code for taking cognizance of a case u/s 190(1)(e) though it is open to him to act u/s 200 or section 202 also.

The aforesaid being the legal position, no fault can be found with the learned Magistrate when after rejecting the final form he took cognizance of the offence on perusal of the materials available on record.

5. u/s 190(1)(b), Cr. P. C., the scope of the proviso contained in sub-section (2) of section 202, Cr. P. C. and the effect of its non-compliance and the stage at which the grievance of such non-compliance can be raised came up for consideration recently before the Supreme Court in *Rosy and Another Vs. State of Kerala and Others*, That happened in that case was that the Excise Inspector filed a complaint against the accused before the Judicial Magistrate of the Second Class alleging certain offences punishable under the Kerala Akbari Act. Those offences were exclusively triable by the Court of Session. The learned Magistrate without examining any witness committed the case to the Court of Session. After framing of the charge, trial before the Court of Session commenced, the prosecution closed examination of its witnesses and thereafter the accused was questioned u/s 213, Cr. P. C. The accused also examined defence witnesses. In course of argument a point was raised on behalf of the accused that the Magistrate having not followed the procedure prescribed in the proviso to sub-section (2) of section 202, Cr. P. C., the committal order was vitiated. Hon'ble K. T. Thomas, J. in his opinion held that the accused having not raised objection on the ground of omission to examine witnesses before the process was issued by the Magistrate, it must be, taken that he had no grievance that such omission had occasioned failure of justice. Hon'ble M.B. Shah, J. in his separate opinion also observed that person complaining of non-compliance of the proviso to sub-

section (2) of section 202 should raise objection at the earliest stage and should point out the prejudice caused or likely to be caused by not following the proviso. If he fails to raise objection at the earliest stage, he is precluded from raising it later.

With regard to the offence triable exclusively by the Court of Session, Hon^{ble} Thomas, J. held that the proviso incorporated in sub-section (2) of section 202, Cr. P. C. is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. The Magistrate, however, in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. If the complainant requires the help of the Court to summon such witnesses, it is open to the Magistrate to issue such summons. His Lordship again reiterated that if the Magistrate omits to comply with the above requirement, that would not by itself vitiate the proceedings. Hon^{ble} M.B. Shah, J. inter alia held that where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction to the police to make investigation is not permissible and he is required to hold inquiry by himself. During that inquiry, he may decide to examine the witnesses on oath. At that stage the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason is that in a private complaint, which is required to be committed to the Court of Session for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant u/s 204(2), Cr. P. C. before issuance of the process.

6. On careful reading of the judgment, it appears to me that if the learned Magistrate decides to follow section 202, Cr. P. C., proviso to sub-section (2) of section 202 would come into operation which makes it obligatory for the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath.

In view of the judgments of the Supreme Court in India Carat and Rosy (supra), there is no point in referring to the other cases cited by the counsel for parties.

7. In the case at hand, it may be seen that the learned Magistrate has not decided to follow the procedure contained in section 202, Cr. P. C. . Therefore, question of complying with the proviso to sub-section (2) of that section does not arise. For the aforesaid reasons, I do not find any illegality committed by the learned Magistrate in taking cognizance u/s 190(1)(b) Cr. P. C. and issuing process to the petitioners.

8. Now coming to the last point, it may be examined if on the basis of materials available offences under sections-304A and 304, Part-II, I. P. C. have been made out," So far as offence u/s 304, Part-II, I. P. C. is concerned, learned counsel appearing for the opposite party No. 2 could not show how an offence of culpable

homicide not amounting to murder punishable u/s 304, Part-II, I. P. C, has been made out. The petitioners had no motive to kill the patient. They had also no intention to do so or cause such bodily injury as was likely to cause the death. There is also nothing on record to suggest that the petitioners operated the patient with the knowledge that it was likely to cause death. In the circumstances, since no case u/s 304, Part-II, I. P. C. has been made out, the order of the learned Magistrate taking cognizance of offence u/s 304, Part-II, I. P. C. is vulnerable. The same is accordingly set aside.

9. So far as the order taking cognizance of offence u/s 304A. I.P.C. is concerned, it may be stated that in a case under the aforesaid section, the prosecution is obliged to establish the following :

(a) the death of the person in question ;

(b) that the accused caused the death; and

(c) that such act of the accused was rash or negligent, The learned counsel appearing for the petitioners has not been able to point out that on the materials as available, no case u/s 304A, I. P. C, has been made out. I am, therefore, not inclined to interfere with that part of the impugned order.

10. In the result, this application is allowed in part. The learned Magistrate is directed to conclude the trial as expeditiously as possible preferably by the end of June, 2001.

11. Application partly allowed.