
(2004) 07 P&H CK 0146

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 50028-M of 2003

Dr. Surinder Kumar Jain and Another

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 2, 200, 203, 204

Citation : (2005) 139 PLR 816 : (2004) 4 RCR(Criminal) 322

Hon'ble Judges : Satish Kumar Mittal, J

Bench : Single Bench

Advocate : A.K. Kalsy, for the Appellant; S.S. Gill, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

Satish Kumar Mittal, J.—In this case, the question of law, which requires consideration, is:

"Whether charge can be framed against the accused person by the Judicial Magistrate in a warrant case, instituted otherwise than on a police report i.e. on the complaint filed by public servant in discharge of his official duty, without first recording the pre-charge evidence, as envisaged u/s 244 of the Code of Criminal Procedure?"

2. In this case, both the petitioners are qualified practising Doctors. Petitioner No. 1 is running a Scan Centre whereas petitioner No. 2 is practising as a Gynaecologist. She is also running a Nursing Home. A complaint u/s 23 of the Pre-Natal Diagnostic Technique Regulation and Prevention of Misuse Act, 1994 (hereafter referred to as the Act) has been filed by the Senior Medical Officer, Incharge, Civil Hospital, Malerkotla, against the petitioners, on the allegations that on 17.3.2003, the complainant constituted a team, comprising of certain doctors, for the purpose of inspection of ultra sound scan centres running in Sub Division, Malerkotla. The said team inspected the genetic clinic of petitioner No. 1. During the inspection, they found that the petitioners had violated certain

provisions of the Act. The Pre-Natal Diagnostic tests were found being carried out without ensuring the compliance of the provisions u/s 4(1), (2) and (3) of the Act. There was no proper record being maintained under the aforesaid Sections. The petitioners had no displayed the Certificate of Registration on the conspicuous place of its business. They even did not display a notice board in the local language on its premises stating that here pre-natal determination is not done and disclosure of the sex of fetus is prohibited. The petitioners were not maintaining the record as per Rule 9 of the Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1996.

3. Since the aforesaid complaint was filed by a public servant in discharge of his official duty under the Act, the Judicial Magistrate without after taking cognizance of the offence, summoned the petitioners without recording the statement of the complainant and his witnesses. Subsequently, the Judicial Magistrate, without recording any evidence, vide his order dated June 09, 2003, framed the charge against the petitioners u/s 23 of the Act, without recording any pre-charge evidence, as envisaged u/s 244 of the Code of Criminal Procedure (hereinafter referred to as the Code). The petitioners, at the time of framing the charge, had raised a legal objection that when a warrant case is instituted otherwise than on police report and the accused appear before the Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Thereafter on consideration of that evidence, the Magistrate has to apply his mind as to whether charge against the accused is to be framed or not. It was submitted that without applying this procedure, the Magistrate cannot frame charge against the accused.

4. The Sub Divisional Judicial Magistrate, Malerkotla, vide his order dated June 09, 2003, rejected this contention of the petitioners, while observing that the instant case is covered u/s 200 of the Code which provides that when a complaint is made in writing by a public servant acting or purporting to act in the discharge of his official duties, then the Magistrate need not to examine the complainant and the witnesses.

5. Against the said order, the petitioners filed revision petition, which was dismissed by Additional Sessions Judge, Sangrur while observing that a conjoint reading of first proviso to Section 200 of the Code and the provisions of Sections 27 and 28 of the Act makes it transparently clear that there is no illegality in the order passed by the learned trial Court and the necessity of recording the statement of the complainant and his witnesses has been rightly dispensed with, because the complaint was filed by a public servant in the discharge of his official duties. Hence, this petition.

6. Counsel for the petitioners submitted that the instant complaint filed u/s 23 of the Act is to be tried as a warrant case as the punishment prescribed under the provision of the Act is three years. He further submitted that for a warrant case, which is instituted otherwise than on police report, the procedure for trial has been prescribed in Section 244 to 246 of the Code, which read as under: -

244. When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

245. If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

246. If when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the said accused. Thereafter, the accused shall be called upon to enter upon his defence and produce his defence.

7. Counsel for the petitioners further submitted that a perusal of the aforesaid provisions of the Code makes it abundantly clear that the charge can be framed by the Judicial Magistrate in a warrant case instituted otherwise than on a police report only after recording the pre-charge evidence, after accused put appearance before the Magistrate. He submitted that the provisions of Section 244 of the Code are mandatory as the word "shall" has been used. Counsel for the petitioners further submitted that both the Courts below have misapplied the provisions of Section 200 of the Code, part of Chapter XV, which exclusively deals with the stage of pre-summoning on the filing of the complaint. He submitted that it is correct that in a complaint filed by a public servant in discharge of his official duties, the Magistrate is not required to examine the complainant and the witnesses before issuing process to the accused. But even in such complaint, which pertains to a warrant case, the Magistrate is required to follow the procedure of Chapter XIX-B of the Code, which deals with the cases instituted otherwise than on a police report, where it has been provided that when in a warrant case the complaint is instituted, even though by a public servant, it is mandatory for the Magistrate to consider the question of framing the charge only after recording the evidence of the prosecution. Since, in the instant case, the Magistrate has not followed this procedure, therefore, according to counsel for the petitioners, the impugned order of framing the charge is totally illegal and liable to be quashed.

7. On the other hand, learned counsel for the respondent-State submitted that in the instant case, complaint was filed by Senior Medical Officer, Incharge, Civil Hospital, Malerkotla, u/s 23 of the Act, in discharge of his official duties. It was filed on the basis of the investigation made by a team of doctors, who visited the place of the petitioners and found the various violations of the Act. On the said complaint, cognizance of the offence was taken by the Magistrate u/s 200 of the Code, without recording the statement of the complainant and his witness and the process was issued. Since the complaint was filed by a public servant, while

acting in discharge of his official duties, the Magistrate was not required to examine the complainant and his witnesses as contemplated u/s 200 of the Code, therefore, on the basis of the complaint and the material annexed therewith, the Magistrate was within his jurisdiction to frame charge against the petitioners without recording pre-charge evidence. He further submitted that the offence u/s 23 of the Act is a cognizable offence and the complainant, who was the prescribed authority under the Act, was fully competent to take cognizance of the offence and file complaint before the Magistrate. Therefore, in view of Sections 27 and 28 of the Act read with the proviso to Section 200 of the Code, the Magistrate was not required to frame charge against the accused after recording evidence.

8. I have heard the arguments of learned counsel for the parties and have perused record of the case.

9. It is common case of the parties that the complaint filed by the respondent against the petitioners u/s 23 of the Act is a "warrant case" as defined in Section 2(x) of the Code, and the punishment prescribed for the said offence is three years. It is not disputed that the offence u/s 23 of the Act is a cognizance offence but in the instant case, the complaint was instituted by the Senior Medical Officer, Incharge, Civil Hospital, Malerkotla, otherwise than on police report. It is also admitted case of both the parties that before issuing process against the petitioners, the Judicial Magistrate was not required to record the statement of the complainant and his witnesses, in view of proviso to Section 200 of the Code. It has also not been disputed by the parties that before framing charge against the petitioners, no evidence, whatsoever, was recorded by the Judicial Magistrate. It is also admitted case of the parties that the offence u/s 23 of the Act is triable by the Magistrate.

10. Now, the question arises for consideration is that in such cases what procedure has to be followed. Chapter XIX of the Code contains the provisions of trial by Magistrate. This Chapter divide the procedure of Magisterial trial in two categories. Category A relates to the cases filed on the basis of the police report. For this category, Section 238 to 243 of the Code prescribe the procedure. Category B relates to those warrant cases which are instituted otherwise than on police report. For this category. Section 245 to 247 of the Code prescribe the procedure. The procedure prescribed for the cases of category B is applicable to the instant case as it is a warrant case which was instituted otherwise than on police report.

11. The warrant case instituted on the police report has to be dealt with according to Sections 238 to 243 of the Code. The procedure prescribed for such cases does not require the Judicial Magistrate to record evidence before framing the charge. Section 238 of the Code provides that when, in a warrant case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207, which provides that the

accused must be supplied the copies of the police report and other documents. The object is that before institution of warrant case on the police report, the police investigates the matter and collects the evidence against the accused. Under Chapter XXII of the Code, ample power has been given to the police to investigate the matter and collect the evidence. After completion of investigation, the police submits final report u/s 173 of the Code before the Judicial Magistrate for taking cognizance of the offence.

12. Section 239 of the Code provides that if, upon considering the police report and the documents sent with it u/s 173 of the Code and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

13. Section 240 of the Code provides for framing of charge in warrant case instituted on police report. This Section further provides that if, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. The phrase "upon such consideration" used in this Section pertains to the police report and the documents sent with it u/s 173 of the Code. That is why, Section 238 provides that the Magistrate shall ensure that the provision of Section 207 of the Code must have been complied with. Thus, when the Magistrate applies his mind in a warrant case instituted on the police report, the material/evidence collected by the police during the investigation, is available before him. But in a warrant case instituted otherwise than on police report, i.e. on the basis of a complaint, no material is available before the Magistrate which could have been taken into consideration while considering the issue whether there are grounds to presume that the accused has committed an offence or whether he should be charged or discharged for the offence. That is why, the legislation in its wisdom, while enacting the procedure to try the cases instituted otherwise than on police report, specifically required the recording of evidence before considering the question of framing the charge.

14. Section 244 of the Code provides that in such cases, when the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Sub-section (2) further empowers the Magistrate to issue a summons to any of its witnesses directing him to attend or to produce any document or other thing. The object is clear that in such cases where there is no investigation by the police, the prosecution has to bring some material before the Magistrate, which may be considered by him while considering the question of framing charge against the accused. Section 245 of the Code provides the stage when the accused shall be discharged. This Section provides that if upon taking

all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. This Section again provides the words upon taking all the evidence referred to in Section 244. Then, Section 246 of the Code provides the procedure where the accused is not discharged. This Section provides that if, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

15. Thus, from the aforesaid provisions, it is clear that the Magistrate can consider the question of discharging the accused or framing the charge against him only on the basis of the evidence led by the prosecution u/s 244 of the Code. Therefore, on reading the various provisions contained in Chapter XIX, category B, namely Sections 244 to 247 of the Code, it becomes manifestly clear that a distinction has been made in the procedure of two type of trials, as stated above.

16. Now the question arises for consideration is what is the impact of the proviso to Section 200 of the Code, which empowers the Magistrate to issue process to the accused without recording statement of the complainant and his witnesses in case the complaint filed by a public servant in discharge of his official duties. In that provision, the Magistrate only takes cognizances of the offence disclosed in the complaint and issues the process to the accused u/s 204 of the Code holding that there is sufficient ground for proceeding against the accused. That is the initial stage where the Judicial Magistrate applies his mind whether to entertain the complaint and issue process or not. However, in a complaint case filed by a private person, process can be issued only after recording statement of the complainant and his witnesses on oath, when the Judicial Magistrate is of the opinion that there are sufficient grounds to proceed against the accused. If the complaint is instituted by a public servant in discharge of his official duties, then the Magistrate is not required to record statement of the complainant and his witnesses and he can issue the process. The distinction between the complaint filed by a private person and the one filed by a public servant will not be material for the subsequent stage of the trial i.e. stage after issuing the process. In case, the complaint pertains to a warrant case, the procedure prescribed in category B of Chapter XIX of the Code has to be followed. If the case does not pertain to such category, then the procedure prescribed in Chapter XX for trial of summons case has to be followed. Even in that Chapter, Section 251 provides that when in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. Thereafter, if the accused pleads guilty, Section 252 provides that the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him

thereon. If the accused does not plead guilty then Section 254 provides that the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence. Thereafter, the Magistrate shall take the decision whether to convict the accused or not to convict.

17. Thus in summary cases also, where the Magistrate is not required to frame the formal charge, the Magistrate is required to record evidence in support of the prosecution case. Therefore, after issuing the process and before framing charge in a warrant case and before convicting the accused in summary case, some evidence must have to be recorded. As such, merely because the Magistrate can take cognizance of the complaint filed by a public servant, in discharge of his official duties, without recording statement of the complainant and his witnesses u/s 200 of the Code, does not empower the Magistrate to frame charge in a warrant case instituted otherwise than on police report without recording the pre-charge evidence as contemplated u/s 244 of the Code.

18. In view of the aforesaid observations, this petition is allowed and the impugned orders dated September 01, 2003 and June 03, 2003, passed by Additional Sessions Judge, Sangrur and Sub Divisional Judicial Magistrate, Malerkotla, are illegal and totally contrary to the procedure provided for trial of the warrant case instituted otherwise than on police report and, hence, are quashed. However the trial Court is directed to proceed with the case after following the procedure prescribed in Category B of Chapter XIX of the Code.