

(2001) 01 AP CK 0068
In the Andhra Pradesh High Court
Case No : Criminal P No. 3370 of 1997

G. Subba Naidu and others	Vs	APPELLANT
Talluri Mahalakshamma and another		RESPONDENT

Date of Decision : 25-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 192, 200, 202
Penal Code, 1860 (IPC) — Section 143, 147, 149, 302

Citation : (2001) 1 ALD 572 : (2001) 1 ALD(Cri) 324 : (2001) 1 ALT(Cri) 187 :
(2001) 1 APLJ 164 : (2001) CriLJ 1315

Hon'ble Judges : V. Eswaraiah, J;C.Y. Somayajulu, J;Bilal Nazki, J

Bench : Full Bench

Advocate : Mr. K. Suresh Reddy, for the Appellant; Mr. P. Sridhar Reddy, Public Prosecutor, for the Respondent

Judgement

Bilal Nazki, J

1. This is a reference made by the learned single Judge. A private complaint was filed. The Magistrate passed an order on 27-9-1996 that :

"Complainant present - Perused the record. The offence alleged against the accused is u/s 302 Indian Penal Code which is exclusively triable by the Court of Sessions. In view of the proviso to sub-section (2) of Section 202 Cr.PC the complainant has to produce all his witnesses and examine them on oath. Hence call on 23-10-1996 for the examination of further witnesses."

Some of the witnesses cited were thereafter examined. On 6-6-1997 the Court passed the following order.

"Complainant is present - Complainant and accused submitted that there are no further witnesses to be examined on her behalf. Hence the case is posted for consideration to 13-6-1997."

Then the case was posted for consideration on 13-6-1997 and on 16-6-1997 the

following order was passed:

"Complainant is present - Perused the record and statements. There is prima facie case against the A1 to A8 under Sections 143, 147, 302 read with 149 Indian Penal Code. Hence the case is taken on file under Sections 143, 147, 302 read with 149 Indian Penal Code against the A1 to A8. Issue summons to the accused on payment of process by 11-7-1997."

It appears that the only question raised in challenging the order of taking cognizance was that the Magistrate did not examine all the witnesses of the complainant before taking cognizance therefore the order of taking cognizance was bad. The learned single Judge while hearing the matter found that there is a Division Bench judgment of this Court reported in Ramchander Rao and Others Vs. Boina Ramchander and Another, , which has laid down that all the witnesses cited by the complainant shall have to be examined by the Magistrate before he takes cognizance. The learned single Judge expressed his doubts about the correctness of the judgment and a reference was made for the following question :

"Whether under proviso to sub-section (2) to Section 202 of Code of Criminal Procedure it is mandatory for the complainant to produce all the witnesses cited or only the witnesses chosen by him?"

2. We have heard the learned Counsel for the parties. The learned Counsel for the petitioner submits that Section 202(2) Cr.PC is clear and unambiguous in laying down that, unless and until the statements of the all witnesses of the complainant are taken cognizance cannot be taken. He further states that, unless the accused knows as to what evidence is going to be led against him in the trial he shall be prejudiced. He submitted that, in the present case the post mortem report revealed that the deceased had died because of heart ailment therefore it would have been helpful to the accused if the Doctor's statement had been recorded. The statement of the wife of the deceased was also not recorded who was an eye-witness and who would have not supported the prosecution story. He submits that Section 202(2) of Cr.PC cannot be read in isolation without reading other provisions of the Code. He submits that in the present case Sections 208 and 209 becomes material and Section 202(2) has to be read along with Sections 208 and 209. In order to appreciate the argument Sections 202, 208 and 209 of the Code of Criminal Procedure are reproduced.

"202. Postponement of issue of process :--(1) Any Magistrate, on receipt of complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :

Provided that no such direction for investigation shall be made--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) 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 Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of police station except the power to arrest without warrant."

"208. Supply of copies of statements and documents to accused in other cases triable by Court of Sessions :--Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process u/s 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the statement recorded u/s 200 or Section 202 of all persons examined by the Magistrate

(ii) The statement and confessions, if any, recorded u/s 161 or 164.

(iii) Any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such documents is voluminous, he shall instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through Pleader in Court."

"209. Commitment of case of Court of Session when offence is triable exclusively by it :--When in 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 Session, he shall--

(a) commit, after complying with the provisions of Section 207 of Section 208 as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment had been made;

(b) subject to the provisions of this Code relating to bail remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if

any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case of the Court of Session."

3. The learned Counsel submits that, u/s 202 if the offence appears to be triable by Sessions Judge the Magistrate has to conduct an inquiry and in this inquiry he has to record the statements of all the witnesses and u/s 208 if after recording the statements he finds that the offence is triable exclusively by the Court of Session he is duty bound to furnish to the accused statements recorded u/s 200 or Section 202 and the documents produced before the Magistrate, if any, and Section 209 makes it mandatory for the Magistrate to comply with the mandate of Section 208 before the case is committed. If the witnesses statements are not recorded by the Magistrate u/s 202 the Magistrate cannot comply with the mandate of Sections 208 and 209 therefore it is mandatory for the Magistrate to record statements of all the witnesses. He forcefully relies on the language employed in Section 202 which says that all witnesses shall be examined. In the reference order the learned single Judge referred to the judgment of the Division Bench of this Court in Ramachandra Rao's case (supra). Relevant portion of the Division Bench judgment is reproduced.

"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 offences triable by a Court of Session."

4. This judgment according to the learned Counsel for the respondents does not lay down good law. The learned Counsel for the respondents submits that the word "all" figuring in sub-section (2) of Section 202 Cr.PC does not mean "some" as was laid down by the Division Bench, but states that "all" has to be understood in the context of "his witnesses". He further states that, if the intention of the Legislature would have been that all the witnesses cited should be examined then the Legislature would not have qualified the word "all" with "his", the Legislature would have enacted the word in the following phraseology; "he shall call upon the complainant to produce witnesses and examine them on oath" But, since the Legislature laid down that, "he shall call upon the complainant to produce all his witnesses and examine them on oath", the choice is left to the complainant and not with the Magistrate. This view has been accepted by the learned single Judge of this Court in a judgment in MM Reddy v. Kanakanti Ma! Reddy, 1997 Cri.LJ 1473, in which it was laid down:

"The proviso to Section 202(2) obliges the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath. To start with the Magistrate has no power to prescribe the number of witnesses for the

purposes for which they have got to be examined. It is for the complainant to choose and to append a list of witnesses to the complaint. Therefore the right of the complainant with regard to the witnesses mentioned in the list cannot be interfered with by the Court nor his right to give up some of them can be interfered with by the Court. It is not the intention of the framers of the enactment to place any embargo on the right of the complainant in the matter of choosing the Witnesses to be examined. It is open to the complainant to give up some of the witnesses and those witnesses that were so given up can no more answer the description of "his witnesses" within the meaning of that expression as occurring in the proviso. Non-examination of the given up witnesses cannot be construed as a non-examination of his witness. Therefore, I am of the opinion that the non-examination of the witnesses given up by the complainant cannot vitiate the proceedings."

Unfortunately this judgment has not been placed before the Division Bench which decided the matter in 1979. Another judgment of which a reference is made is of Karnataka High Court reported in *Muninarasaiah v. T.C. Anjanappa*, 1997 (2) ALT (Cri) 573 (Karn.). Another judgment which has been placed before this Court is from Allahabad High Court in *Jumman v. State of UP*, 1998 Cri.LJ 199. Para 13 of the judgment is reproduced :

"13. Further elementary rule of interpretation is that the statute must be read as a whole. In the instant case reading the entire Section 202 as a whole and particularly the second proviso to Section 200 makes it manifest that the intention of the Legislature was not that the complainant may be compelled to examine all the prosecution witnesses rather only those witnesses were to be examined who can be said to be "his" witnesses. The emphasis by the Legislature appears to be on the word "his" which cannot be ignored in making a proper interpretation. In order to ascertain as to whether the witnesses of the complainant on whom he places his reliance are his witnesses or not, a question may be put to the complainant as to who are the witnesses whom he wants to examine or when certain number of witnesses have been examined a question can be put to the complainant as to whether they are the only witnesses or some more witnesses are required. To ascertain number of witnesses or to put a question to the complainant, no special form has been prescribed under the Code nor any strict procedure has to be followed rather it has to be ascertained judicially. I am accordingly of the view that Section 202(2) (proviso) does not connote that all the prosecution witnesses must be examined rather only those witnesses may be examined who are of the choice of the complainant or in whom the complainant reposes the confidence."

A latest judgment of Supreme Court has also been pressed into service being *Rosy v. State of Kerala*, 2000 AIR SCW 156. Though it does not deal with the point directly as to whether complainant has to produce all the witnesses cited or he can produce some of the witnesses before the Magistrate during an enquiry u/s 202 but the two Judges hearing the matter concurred with each other and

wrote two different judgments. Justice K.T. Thomas was of the view that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely conferring a discretion on the Magistrate but a compelling duty on him to perform in such cases. But his Lordship also was of the view that the Magistrate in such a situation is not obliged to examine the witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the Magistrate to summon such witnesses it is open to the Magistrate to issue such summons. Although Justice K.T. Thomas found that it was a compelling duty on the Magistrate to examine the witnesses but if this course is not adopted by the Magistrate that would not by itself vitiate the proceedings. Section 465 can be pressed into service in such a situation and an objection cannot be taken at a belated stage. That of course is relevant for our purposes. But the judgment is relevant for this Court for the purposes that the Court held that the Magistrate was not obliged to examine the witnesses which may not be produced by the complainant. Justice M.B. Shah while interpreting Section 202 was of the view that even an enquiry was discretionary. Magistrate may not initiate any enquiry but if he decides to hold an enquiry then he will have to follow Section 202(2). One thing becomes clear from this judgment also that it is not for the Magistrate to examine all the witnesses. We are the view that the Legislature has qualified "all" with the words "his" and in case on the basis of the statement of the witnesses produced by the complainant the Magistrate finally takes the cognizance and commits the case in terms of Sections 208 and 209 he will be giving the copies of the statements of only those witnesses whose statements were recorded by him and Allahabad High Court in the judgment referred to above (*supra*) has correctly stated that, only those witnesses can be examined in the trial which were examined before the Magistrate. This view appears to be correct in view of sub-clause (c) to Section 209 of Cr.PC as well which lays down that the Magistrate shall send to the Court of Session the record of the case and the documents and articles, if any, which are to be produced in evidence. So, whatever the documents are sent u/s 209(c) by the Magistrate to the Court of Sessions including the statements of the witnesses can be relied at the time of trial. Therefore, it is not necessary in our view for the complainant to produce all the witnesses in an enquiry u/s 202 Cr.PC.

5. For the reasons given above, we feel that the law laid down by the Division Bench of this Court in *Ramachandra Rao v. B. Ramachander* (*supra*) is not a good law. The reference is accordingly answered.