

(1999) 06 CAL CK 0025

In the Calcutta High Court

Case No : Criminal Revisional Jurisdiction Crl Rev. No. 656 of 1995

Gobinda Prasad Biswas and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 09-06-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 202(1), 202(2), 207, 208
Penal Code, 1860 (IPC) — Section 147, 302, 304, 325, 34

Citation : (1999) 2 CALLT 418

Hon'ble Judges : Debi Prasad Sircar-I, J

Bench : Single Bench

Advocate : Mr. Sekhar Kumar Basu, Mr. Prabir Kumar Mitra and Mr. Jaymalya Bagchi, for the Appellant; Mr. Samir Chatterjee, for the Respondent

Judgement

D.P. Sircar-I, J.—This revisional application u/s 482 Cr.PC is for quashing the S.T. No. Vii of February, 1992 pending before the 4th Addl. Sessions Judge, Midnapore.

2. The petitioners are members of police forces posted in Gopiballavpur P.S. Subhankar Sarangi s/o the complainant was going to market. On a suspicion that he was a thief he was beaten up mercilessly as a result of which he was hospitalised subsequently and died.

3. Over this incident the complainant, father of the victim filed complaint before the learned S.D.J.M., Jhargram alleging that the present petitioners, who were the policemen attached to Gopiballavpur P.S. along with certain others took the deceased forcibly to the P.S. on his way to market, beat him up, took him back home when the relatives found marks of injuries on the body of the deceased, took him back to the P.S., beat him up again mercilessly, as a result of which the victim had to be removed to the hospital where he died few days after. This written complaint, registered as a case on private complaint was preceded with as per law by the Magistracy and committed to sessions for trial u/s 302/34 IPC. The learned 4th Addl. Sessions Judge taking all materials produced by the

complainant to consideration framed charge u/s 304 Part-11 read with section 34 IPC and proceeded with the trial, which causes this revisional application.

4. The petitioners submit that over the self-same incident the petitioner No. 2 initiated a proceeding at Gopiballavpur P.S. u/s 325/147 IPC resulting in G.R. Case No. 227/88 before the learned S.D.J.M., Jhargram alleging that the victim was man handled by a mob and rescued by the police party. The CID took up investigation and filed F.R. as no offender could be indentified. That case, the petitioners submit, proves that the averments against the petitioners in the present case are false. The Final Report was accepted by the learned S.D.J.M., Jhargram. The petitioners submit that in the perspective of that final report continuation of this case is abuse of judicial process and for that the proceeding and the relevant orders must be quashed.

5. Arguing the case for the petitioners, Mr. Bose submits the final report after investigation by CID having been accepted by the learned SDJM. over the self-same incident, no case lies against the present petitioners. No FIR was lodged in this case. The persons cited as witnesses in the complaint were not examined before the learned Magistrate u/s 202 Cr.PC but persons not named were examined. The learned lower court used the post-mortem report without examining the medical officer concerned and that act of the lower court was grossly illegal. The learned J.M. while committing the case did not lake into consideration the perspective of the final report in the said police case and the case from defence stand point in this complaint case. Non-examination of the cited witnesses vitiates the proceeding and is grossly illegal. Law provides that list, of witnesses in a Sessions triable case must be filed and exhausted u/s 202 Cr.PC and the lacuna in non-compliance cannot be cured. Mr. Bose relies on Kamal Krishna De Vs. State and Another, , 1987 SCC(Cr.) 584 para 9, 1980 (1) CHN 68 para 8, Vijender and Others Vs. State of Delhi, bottom. The Sessions Case cannot proceed without furnishing the copies of documents referred to u/s 208 Cr.PC.

6. Mr. Chatterjee for the State awkwardly fails to put in any argument excepting 1981 Cr.LJ 838 and relying on section 464 Cr.PC. After obtaining adjournment to get himself ready he relies on Haladhar Bhumij Vs. Sub-Inspector of Police Hura Outpost and Others . He argues that investigation into the incident by police is ridiculous when police is the real offender and the police case as ended in FR was an eye-wash to blanket their own misdeed and forestall this case lest the sin of their misdeed visit them in due course of law. Mr. Chatterjee argues that proviso to section 202 Cr.PC is not mandatory. He cited Bhagwat Pandey and Others Vs. State of Bihar, , Bata alias Batakrushna Behera and Others Vs. Anama Behera, , 1985 Cri.LJ 377 at 378 para G. Abdul Hamidkhan Pathan and etc. Vs. State of Gujarat and Others, Mr. Chatterjee files also written argument as kept in the record. He submits that section 202(1) and 202(2) read together do not require the Magistrate to call upon all the witnesses and examine them. He relies on Kewal Krishan Vs. Suraj Bhan and Another, . Dhanalakshmi Vs. R. Prasanna

Kumar and Others, and Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, . He defends the impugned orders.

7. Considering the complaint, perspective thereof and train of incident as disclosed in the complaint, the materials contained in the record and the arguments I find no reason to hold that there was any lapse or illegality on the part of the learned courts below. There appears to have no substance in the argument of Mr. Bose.

8. The argument that in the perspective of FR submitted about investigation in the Gopiballavpur, P.S. case dated 16.5.88 lodged by none other than this Petitioner No. 2 (who is an accused in the complained case) against unknown public and acceptance of that Final Report debars this case and makes its continuation abuse of Judicial process, is patently an insipid argument and has no substance. The admitted fact in these cases are that the victim was beaten up mercilessly which he was on his way to market and that the petitioners who were the police men took him to P.S. (for whatever reasons as pleaded by the contending parties) then to his residence and back to P.S. and then the same police men got him admitted to the P.H.C. when his injuries were so serious that he had to be removed to S.D.H. Jhargram, and, that due to this incident of beating the victim died with injuries on the body and inside. There is no dispute that the victim was beaten mercilessly on 16.5.88 and as result of those injuries he died. The petitioner No. 2, one of the accused in whose custody the victim was undoubtedly at the relevant time was aware of the condition of the victim and the role of himself and it is he who promptly lodged FIR accusing the unknown and unidentified public i.e. the void. The investigation by the police men of CID was concentrated to that allegation. Due to police fraternity it is quite impossible for a human being to believe that in such a case the CID would divulge the truth and even if any material could be found, would implicate the present accused persons who were not named in that FIR as accused and not specifically complained against. The normal standard for such an act is not expected of the police establishment of this State. While on the one hand the petitioner No. 2, a police man in whose custody the victim was in the relevant time lodged FIR over the incident pointing his finger of accusation to the void, in the names of some unknown public, (who are easy and inevitable scapegoat to police misdeed) and in normal course that case ended in void, the complainant on the other hand came with a positive case that it was none other than this petitioner No. 2 and his comrades in police forces and certain others as named in the complaint perpetrated the misdeed. The two cases do not appear to have any bearing on each other and are mutually exclusive. A person who himself is alleged to be one of the real offenders, himself a police man, filed the police case accusing some unnamed unidentified assembly patently to absolve himself and save his skin; on the other the complainant the father of the victim came with the positive case that the present petitioners killed his son and by producing materials as he could he prayed for justice. The question of *autofos* acquit cannot be drawn in this case even by wildest imagination. On the other a

reasoned man may reasonably presume that after the incident the petitioner No. 2 apprehended danger and lodged a false FIR with false accusation to save his own skin and with a design to forestall any accusation against actual offenders to cover up their misdeeds. The complainant has surely a right to pray for Justice with his posture case. Reasonably the FR started from void and ended in void. That FR in the police case can in no way known to law and reason cloud and cast shadow on the complaint case. If it could, it would be a travesty of justice. It is settled that complaint against police should not be relegated to police in whatever branch of it or whatever rank the 10 may be. [ILR 14 Cat. 141.] That point of argument for the petitioners cannot but be rejected.

9. The next part of argument of Mr. Bose is that the complainant did not examine all of the witnesses cited in the complaint and brought some others not so cited and for that the sessions case is not maintainable. It cannot agree with Mr. Bose on this contention also. Mr. Bose relies on the proviso to section 202(2) Cr.PC and argues that the Magistrate is bound to call upon the complainant to produce all the witnesses and examine them on oath. Mr. Bose argues that the complainant must examine all the witnesses once cited in the petition of complaint, without any of them and has no escape therefrom, on the one hand, and cannot examine any one not cited in the complaint on the other. This argument is neither supported by the language of the provision nor by any Judicial interpretation. We should remember the purpose and intelligence behind framing of this provision to get at the real import of it. Prior to the Act 2 of 1974 the procedure provided in the Cr.PC was an elaborate committal enquiry by the Magistracy to ascertain whether there was any ground for proceeding against an accused person in a session triable case. By insertion of the said proviso to section 202(2) Cr.PC the committal enquiry has been done away with. But alike a case on police report, it is the fundamental right of the accused to become aware of the materials, if any, against him for being prosecuted in a session triable case and it is also required that the sessions Judge must have an idea about the materials for proceeding against and making the same available, to, the accused for fair trial, providing all opportunities to the accused to defend himself and not to be caught Unaware on any point. These two fold purposes have been served by insertion of the said proviso to section 202(2) Cr.PC. It bounds the Magistrate to examine all the witnesses and collect materials the complainant can produce, to support his contention, and the said proviso to section 202(2) lays down that the Magistrate shall call upon the complainant to produce all his witnesses who shall be examined on oath. All that it means is that the complainant shall be called upon to produce all his witnesses i.e. all those with whose statements he wants to support his complaint. There is nothing in this proviso to suggest that all those once stated in the complaint and only such persons as cited as witnesses must be examined, whether they may furnish any material or not whether they are willing or reluctant and that the complainant as well as the Magistrate shall be debarred in their respective way to produce and examine any witness other than those cited in the complaint. The purpose and import of the

insertion of this proviso should be considered in the perspective of section 207/208 Cr.PC. The purpose is to collect in the Magisterial forum all the materials with which the complainant wants to support his allegation when such allegation is triable by session court, so that the accused in such heavy case cannot be caught unwarranted and prejudiced and may be aware of all the materials against him for trial free and fair as copies of all those should be furnished to the accused forbidding staling more and all the cards shall be put on the table. On the other hand the Magistrate cannot brush aside such heavy case in slipshod manner by examining one witness or two. There is nothing in the proviso to show that once the complaint cites some particular persons and although he might have any other persons in the queue of his knowledgeable witnesses he must invariably examine all those witnesses cited in the petition, irrespective of their willingness or inability to produce any materials about the matter, willingness to support any side and that the complainant shall be debarred forever to examine any other witnesses even if he is competent to vouchsave important materials. Offenders are always formidable adversary and an ordinary man will naturally feel chary and feign ignorance to save himself from unnecessary trouble even if he had first hand knowledge about the incident and the whole truth of it. When the adversary is police personnel angels could ever fear to tread and number of truthful fools will be handpicked. This contention of Mr. Bose is not supported by any reason, legal provision or authoritative pronouncement of court.

10. It cannot be held that once some witnesses were Cited in the complaint amongst others to support the complainant's case, the complainant shall be bound to examine all of them without any exception and them only, whether they refuse to support his case, are gained over or reluctant to defend his cause and that none other than them may be examined even at the risk of failure to prove the complainant case. All that is the import and meaning of the word "all" in this context is that (i) the complaint shall produce and examine all the witnesses with whose statements and with what materials the complainant wants to build up the complaint case triable by a sessions court, so that all the materials available may be on record for consideration by the Magistrate initially, and then by the session court for taking cognizance and for ensuring that the accused is not prejudiced and do remain aware about the statements and materials against him so that he may confront those effectively; (ii) and, for that, the Magistrate shall be bound to examine all the witnesses the complainant may produce. The proviso does not mean that the complainant shall be bound to restrict himself to the witnesses and materials specifically cited come what may to the justiciable cause he comes with. AIR 1936 289 (Privy Council) . But he must place all the cards available to him on the table so that the accused may know all the materials against him and must not be prejudiced.

11. In the ruling 1987 SCC (Cri.) 584 para 9 cited by the petitioner the Supreme Court down that :

"if the Magistrate is of opinion that the offence complained of is triable

exclusively by the court of session he must call upon the complainant to produce all his witnesses and examine their on oath."

12. It is nowhere laid down that the complainant shall be bound to examine all witnesses cited in the complaint. This observation can be reasonably interpreted to mean all his witnesses with whose statements he wants to support his case and not that once cited in complaint it shall be irrevocable binding on the complaint to examine whatever might be the fate of the case. No one can be compelled to produce materials against him.

13. The rulings reported in Vijender and Others Vs. State of Delhi, and 1980(1) CHN 68 should be distinguished on the question of facts. The observation as to the medical report in the Supreme Court case was after trial which differs as to the stage of proceeding as in this case. The facts in the CHN ruling was completely different and as such para 8 was an obiter dictum not binding as to this case.

14. The argument of the learned advocate for State is supported by some of the rulings relied upon by him although some others are irrelevant. Musara Narayana Reddy and Others Vs. Kanakanti Mal Reddy and Another, , 1989 Cri.LJ 46S (Gujarat), Dinabandhu Das and Others Vs. Batakrushna Das and Another, , Vijay Kumar Vs. State of Haryana and Another, , 1986 Cr.LJ 1429 (Patna) support the views above as held by me.

15. The revisional application, therefore, should be and is dismissed. The stay order is vacated. The petitioners do appear before the learned trial court i.e. session court for taking trial.

16. Learned Addl. Session Judge, 4th court, Midnapore do proceed with the case at the earliest from the stage where it was stayed and if necessary compel the attendance of the accused petitioners before him in connection with the proceeding concerned as per law.

17. Application dismissed.