
(1988) 09 BOM CK 0039

In the Bombay High Court

Case No : Criminal Writ Petition No. 1335 of 1987

Govind Raghe Khairnar and Another

APPELLANT

Vs

Khan Wahid Ali Maddan Khan and Another

RESPONDENT

Date of Decision : 23-09-1988

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 202, 204, 482
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 100

Citation : (1989) 1 BomCR 434

Hon'ble Judges : A.D. Tated, J

Bench : Single Bench

Advocate : M.D. Gangakhedkar, Public Prosecutor, for respondent No. 2, P.R. Namjoshi and E.M. Phadtare, for the appearing parties; T.H. Sardar, for the Respondent

Final Decision : Allowed

Judgement

A.D. Tated, J.—This writ petition under Article 227 of the Constitution of India and section 482 Cri.P.C. has been filed for quashing the process issued by the Additional Chief Metropolitan Magistrate, 38th Court, Ballard peir, Bombay, on 24th September, 1987 in case No, A-38/ Misc. of 1986 against the petitioners-accused for the offence punishable u/s 302 read with section 34 I.P.C.

2. The petitioner No. 1-accused No. 1 in the year 1986 was working as Senior Ward Officer on special Duty (Removal of Enchroachment), Municipal Corporation of Greater Bombay, and the petitioner No. 2-accused No. 2 was a police constable attached to the Bombay Police Force and was deputed as bodyguard to the accused No. 1 The case of the accused is that the accused No. 1 was required to perform by the nature of his duty a number of acts which were fully legal but unpalatable to persons unconnected with those duties. The accused No. 1 as Ward Officer on Special Duty had jurisdiction all over Bombay and had powers to remove encroachments and illegal establishments and installations. In the course

of such duties accused No. 1 accompanied by the accused No. 2 and other members of the municipal staff went to their area of Phaltan Road and Mussafirkhana Junction, as there were a large number of unauthorised stalls, encroachments and establishments which were causing obstruction to the traffic and free movement of vehicles and pedestrians. In the course of his duties the accused No. 1 accompanied by the accused No. 2 and other members of the municipal staff started removing the stalls on the road near Mussafirkhana and the road was cleared. On seeing the accused No. 1 accompanied by the accused No. 2 and other members of the municipal staff some stall holders who had no licences and who were carrying on unauthorised business and who were causing obstruction to the free movement of traffic started running along with their goods in different directions. As the operation of removing unauthorised stall and establishments started, large number of persons, about 400 to 500, collected near about the area in which the operation was going on. The accused further aver that they and the other members of the staff kept themselves back to avoid wrath of the crowd and the mob become violent and started pelting stones, brickbats, soda-water bottles and wooden blocks from the tops of the buildings near about that area. Some people also indulged in throwing acid bulbs at the accused No. 1 and the other members of the staff and the entire mob was surging itself and approaching in the direction of the accused. The mob became violent and there was imminent danger to the life of the accused No. 1. as well as to the other members of the staff which was accompanying the accused No. 1. Since the mob became violent, the accused No. 1 opened fire in the air and two rounds were fired by the accused No. 1 from his revolver in the air. On hearing the report of firing, some people from the mob receded back and as soon as firing stopped, the mob again came in the direction where the accused No. 1 and the other members of his staff were and they again took their position and started pelting stones, brickbats, soda-water bottles and acid and some members of the staff of the accused No. 1 received injuries on account of pelting of stones, brickbats etc. The mob become furious and it was approaching the accused No. 1 and the other members of his staff in a very angry mood and it was not prepared to listen to the appeal made by the accused No. 1 to disperse and not to obstruct lawful discharge of duties by the accused No. 1 and the other members of his staff. The mob become so violent that the accused No. 1 and the other members of his staff apprehended serious trouble from the mob. The mob was not in a mood to disperse and hence the accused No. 1 again opened fire in the air by giving a warning to the crowd to disperse. The said firing in the air had no effect and the entire crowd started surrounding the accused No. 1 the other members of his staff from all sides and some people from the crowd went on the tops of the nearby buildings and pelted stones, brickbats, acid bulbs and soda-water bottles. Sensing serious danger to the life of the accused No. 1 and also to the other members of his staff, the accused No. 1 again warned the crowd that unless they dispersed, the accused No. 1 and the other members of his staff would have no option but to use such force as will required to disperse the violent mob. However, the appeal made by the accused No. 1 had no effect and

the mob started advancing towards the accused No. 1 and the other members of his staff. Since there was danger to the life of the accused, the accused No. 2 fired one bullet from his rifle. On firing the bullet from the rifle of the accused No. 2, the mob started running helter-skelter. The bullet struck one Mehboob Kamal Shaikh who was standing nearby and he subsequently died. In a short while the Deputy Commissioner of Police Chaudhary and other members of the staff of the local police and wireless staff reached the spot and took over the law and order situation which had arise there. The Deputy Commissioner of Police and the other members of his staff made inquiries with the accused No. 1 and also made spot inquiries and it was found that a large number of soda-water bottles, brickbats and stones were near about the spot where the accused No. 1 and other members of his staff had taken their position. The police force took charge of the situation and dispersed the crowd. The accused No. 1 after completing his duties of removing the unauthorised stalls, also left the place.

3. The petitioners-accused further state that the accused No. 1 was called to the Phaltan Road Police-Station and his statements was recorded alongwith the statements of the other members of his staff accompanying him. In the meantime some persons, posing themselves as members of the peace committee, came to the police-station and lodged their complaints. According to the accused, they and the other members of their staff were discharging their duties of removing illegal installations and stalls and unauthorised business which was carried on by unauthorised hawkers and the accused No. 1 as a Ward Officer on Special Duty was fully within his rights to remove cause to be removed the stalls, illegal establishments and unauthorised obstructions on the road. According to the accused, they had visited the area where the incident took place to discharge their duties and while discharging their duties there was an imminent danger to their lives at the hands of the mob which had become furious and violent and was approaching the accused in a menacing manner. It caused apprehension in the minds of the accused that they would receive serious or serve injuries or grievous hurt or even death at the hands of the furious mob and under such circumstances, the accused No. 2 had fired the bullet from his rifle which had struck deceased Mehboob.

4. According to the petitioners -accused, the learned Additional Chief Metropolitan Magistrate, after recording the evidence of the witnesses produced by the respondent No. 1 complainant. Mechanically passed the order for issuing summonsee against them for the offence u/s 302 read with section 34 I.P.C. The accused further submit that the Deputy Commissioner of police Shri Chaudhary, who had arrived at the scene of the incident, directed the Phaltan Road Police Station to make investigation and the Phaltan Road Police Station after recording the statements of the accused and other witnesses came to the conclusion that no offence was disclosed and there was no case made out for charging the accused for the offence u/s 302 read with section 109 I.P.C. and the Investigating Officer treated the matter as closed and the accused were not charged or proceeded against by the police. According to the accused, in the

circumstances in which the incident took place, the learned Additional Chief Metropolitan Magistrate was not right in issuing process against them for the offence u/s 302 read with section 34 I.P.C. Hence the accused have approached this Court for quashing the process for the offence u/s 302 read with section 34 I.P.C. issued against them.

5. The learned Counsel for the petitioners-accused took me through the complaint filed by the respondent No. 1 and also through the deposition of the witnesses examined by the complainant in the inquiry held by the learned Additional Chief Metropolitan Magistrate, 33rd Court Ballard Pier, Bombay (Shri R.N. Barulkar). The learned Additional Chief Metropolitan Magistrate has recorded the verification of the complainant and the depositions of the witnesses of the complainant and the order dated 24th September, 1987 for issuing process was passed by Shri. S.J. Shivkar, Additional Chief Metropolitan Magistrate, who succeeded Shri Borulkar. The learned counsel for the petitioners-accused contends that the petitioners are the public servants and they had been to the area of Phaltan Road and Mussafirkhana Junction on 13th June, 1986 to perform their public duties. The accused No. 1 as the Senior Ward Officer on Special Duty (Removal of Encroachments), Municipal Corporation of Greater Bombay, was charged with the duty to remove encroachments, illegal establishments and installations causing obstruction to the traffic. The accused No. 1 along with the accused No. 2 and the other members of the staff had been to the Phaltan Road and Mussafirkhana area for removal of the encroachments on the public road. He submits that it is in the evidence of the witnesses Examined by the complainant that when the accused No. 1 along with the other members of his staff went to that area for removing the encroachments, the people started shouting that Khairnar (namely, the accused No. 1) had come and some people started running with their wares. He also submits that the reading of the depositions of witnesses shows that the member of the mob who had collected there caused obstruction to the accused No. 1 and the other members of his staff in discharging their duties and some members of the mob pelted brick bats and sodawater bottles. He submits that the deposition of Vasant Devarkar (P.W. 12), who was attached to the Phaltan Road Police Station shows that on receiving the information that there was riot near Mussafirkhana, he rushed to the scene of offence and prepared a panchnama of the scene of offence. He states that there were some brickbats and broken glass pieces of soda-water bottles at the scene of offence and they were attached. He also referred to the depositions of Abdul Aziz Abu Bakar (P.W. 7), Mohamad Gulam Shaikh (P.W. 8) and Mohamed Ali Qureshi (P.W. 9) and pointed out that all those witnesses have stated that brickbats and soda-water bottles were thrown and those brickbats and broken soda-water bottles were found at the spot. He submits the evidence of the witnesses clearly supports the case of the accused that they were obstructed in the performance of their duties and were attacked by the mob by throwing brickbats, stones and soda-water bottles at them. He submits that it is also in the depositions of those witnesses that the accused No. 1 first fired two rounds from his revolver in the

area to disperse the mob, but the mob did not disperse. On the contrary, after accused No. 1 stopped firing in the area, a mob consisting of about 400 to 500 persons gathered there and they were approaching accused and the other members of the staff in an angry mood showering brickbats and soda-waters bottles. He submits that under such circumstances, apprehending danger to their life or causing grievous hurt at the hands of such a violent mob, the accused No. 2 shot one bullet from his rifle, and that bullet unfortunately hit the deceased Mehboob and he succumbed to the injury caused by that bullet.

6. Thus, according to the learned Counsel for the petitioners accused the reading of the deposition of the witnesses examined by the respondent No. 1 complainant clearly spells out that the accused had been to the Mussafirkhana area to perform their duties and in the performance of their duties they were removing the encroachments on the road and at that time they were resisted by the enroachers, hawkers and others in the performance of their duties and they turned violent and threw brickbats and sodawater bottles. He submits that some of the members of the mob climbed a building in the area called Madina Building and neighbouring and from there they pelted stones, brickbats and soda-water bottles. According to the learned Counsel, in the situation in which the accused were placed and seeing the violent mob of about 400 to 500 persons some of whom were throwing brickbats and soda-water bottles at the accused and the other members of the staff, they were justified in apprehending that there was danger to their life or that they might be grievously injured, and, therefore, the accused No. 2, who was the bodyguard of the accused No. 1, opened fire and shot only one bullet from his rifle which unfortunately hit the deceased Mehboob. According to the learned Counsel, if the evidence of the witnesses examined by the complainant is considered in the setting in which the incident took place it can never be held that the accused committed an offence u/s 302 read with section 34 I.P.C. According to the learned Counsel the present complaint has been filed against the accused, who were doing their lawful duties, only to harass them. He submits that the Deputy Commissioner of Police Shri Chaudhary had immediately arrived at the spot and at that time the mob was present and this has been admitted by the witness Abdul Aziz (P.W. 7) and other witnesses. Even the complainant admitted that the Deputy Commissioner of Police Shri Chaudhary within a few minutes of the incident arrived at the spot and he made inquiry on the spot with the accused and also other persons assembled there. The learned Counsel submits that the police, after the necessary inquiry did not find that the accused committed any offence and, therefore, no offence was registered against them. At the same time the Phaltan Road Police Station, within the jurisdiction of which the incident took place, found that the members of the mob committed the offence of rioting and, therefore, C.R. No. 303 of 1986 was registered against them and necessary investigation was made in the offence. Thus, the learned Counsel for the petitioners contends that the learned Additional Chief Metropolitan Magistrate was not right in issuing process for the offence u/s 302 read with section 34 I.P.C. against the accused.

7. The learned Public Prosecutor Shri M.D. Gangakhedkar, who appears for the respondent No. 2. State, submits that the petitioners-accused at the time of the incident were doing their lawful duties and the circumstances under which the accused No. 2, who was the bodyguard of the accused No. 1, fired a bullet from his revolver which hit deceased Mehboob does not prima facie make out an offence u/s 302 read with section 34 I.P.C. against the petitioners.

8. The learned Counsel for the respondent No. 1, complainant contends that the complainant started this public interest litigation by filing a complaint against the petitioners-accused who without any excuse had fired at the crowd which was very peaceful and thereby caused the death of deceased Mehboob and as such they committed an offence punishable u/s 302 read with section 34 I.P.C. He submits that the learned Additional Chief Metropolitan Magistrate who passed the impugned order dated 24th September, 1987 read all the evidence recorded by his learned predecessor and reached the conclusion that a prima facie case to issue process for the offence u/s 302 read with section 34 I.P.C. against the accused was made out and, therefore, he issued the process. According to the learned Counsel, the learned Additional Chief Metropolitan Magistrate having exercised his discretion to issue process, the order issuing process could not be challenged in this Court under the provisions of Article 227 of the Constitution of India and section 482 Cri.P.C. He submits that at this stage only the complaint and the depositions of the witnesses recorded by the learned Additional Chief Metropolitan Magistrate have to be taken into consideration and no other fact should be considered and when the complaint filed by the respondent No. 1 and the evidence of the witnesses examined by him before the learned Additional Chief Metropolitan Magistrate is taken into consideration, it cannot be held that the learned Additional Chief Metropolitan Magistrate was not right in issuing process against the accused.

9. The learned Counsel for the petitioners accused in respect of his contention that on reading the complaint of the respondent No. 1 and the evidence on record and taking into consideration the circumstances under which the incident took place there was no prima facie case made out for issuing process against the accused for the offence u/s 302 read with section 34 I.P.C. referred to and relied on the decisions of the Supreme Court in Bakhshish Singh Brar Vs. Gurmej Kaur and Another, and Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, . He particularly referred to the passage appearing at page 711 of the report which reads thus :-

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of

an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at preliminary stage."

10. The learned Counsel for the respondent No. 1 complainant in support of his contention that this Court has to take into consideration only the complaint and the evidence adduced by the complainant and if it makes out a prima facie case and the Magistrate issues process against the accused, this Court cannot, in the exercise of the inherent powers under Article 227 of the Constitution and section 482 Cri.P.C. quash the process issued by the learned Magistrate relied on the decisions of the Supreme Court in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, ; Kewal Krishan Vs. Suraj Bhan and Another, ; J.P. Sharma Vs. Vinod Kumar Jain and Others, ; Pukhraj Vs. State of Rajasthan and Another, ; Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, ; K.M. Nanavati Vs. State of Maharashtra, ; Jai Dev Vs. The State of Punjab, ; Ram Dahin Singh and others v. State of Bihar, (1970) 3 SCC 26 ; and Yogendra Morarji Vs. State of Gujarat, . The law regarding right of private defence has been fully stated by the Supreme Court in Jai Dev Vs. The State of Punjab, At page 617 of the report their Lordships of the Supreme Court laid down the law thus :-

"Section 100 (of the Indian Penal Code) provides, inter alia, that the right of private defence of the body extends under the restrictions mentioned in section 99, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailants.

"In appreciating the validity of the appellant's argument, it would be necessary to recall the basic assumption underlying the law of self-defence. In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of the State to afford protection to such person and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonable apprehended and should not exceed its legitimate purpose. The

exercise of the right of private defence must never be vindictive or malicious.

"There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force which he uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require, as Mayne has observed that he should modulate his defence step by step, according to the attack before there is reason to believe the attack is over (Mayne Criminal Law of Indians, 4th Ed., p. 231). The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. This necessarily postulates that as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence. (Vide sections 102 and 105 of the Indian Penal Code." (Squared bracketed portion supplied).

In *Ram Dahin Singh and others v. State of Bihar*, (1970) 3 SCC 26, their Lordships of the Supreme Court held that the onus of establishing the plea of right of private defence is on the accused, though he is entitled to show that this right is established or can be sustained on the prosecution evidence itself. It is also held that the right of private defence is also preventive and not punitive or retributive. In *Yogendra Morarji Vs. State of Gujarat*, their Lordships of the Supreme Court considered the provisions of sections 99 to 102 and the second part of section 304 I.P.C. The law has been summarised in the head-note thus ; -

"The Code (that is, the Indian Penal Code) excepts from the operation of its penal causes large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations. The most salient of them concerning the defence of body are as under :

(1) There is no right of private defence against an act which is not in itself an offence under the Code.

(2) The right avails only against a danger imminent, present and real.

(3) It is a defensive and not punitive or retributive right and, therefore, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to except from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack. It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack,

(4) A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of the right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled.

(5) There must be no safe or reasonable mode of escape by retreat for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant.

(6) The right does not accrue and avail where there is "time to have recourse to the protection of the public authorities."

11. In *K.M. Nanavati Vs. State of Maharashtra*, , their Lordships of the Supreme Court lay down that in India if an accused pleads an exception within the meaning of section 80 I.P.C., there is a presumption against him and the burden to rebut that presumption lies on him. It was further held that whether a reasonable person in the circumstances of a particular case committed an offence under provocation which was grave and sudden is a question of fact for the juries to decide. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, , their Lordships of the Supreme Court considered the powers of this Court under sections 397(2) and 482 Cri.P.C. Their lordships held that proceedings against an accused in the initial stage can be quashed only if on the face of the complaint or the papers accompanying the same no offence is

constituted. In other words, the test is that taking the allegations and the complaint as they are, without or subtracting anything, if no offence is made out, then the High Court will be justified in quashing the proceedings in exercise of the powers u/s 482 Cri.P.C. At page 69 of the report their lordships laid down the law thus :

"The limits of the power u/s 482 of the Code of Criminal Procedure, 1973 were clearly defined by this Court in *Raj Kapoor and Others Vs. State and Others*, where Krishna Iyer, J., observed as follows (Para 10) :-

"Even so, a general principle pervades this branch of law when a specific provision is made : easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code."

"Another important consideration which is to be kept in mind is as to when the High Court acting under the provisions of section 482 should exercise the inherent power in so far as quashing of criminal proceedings are concerned. This matter was gone into in greater detail in *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, supra where the scope of sections 202 and 204 of the present Code was considered and while laying down the guide-lines and the grounds on which proceedings could be quashed this Court observed as follows (Para 5):-

Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside :-

- (1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
- (2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceedings against the accused;
- (3) Where the discretion exercise by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
- (4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like. (Square bracketed portions supplied)

Their Lordships at page 70 of the report observed thus ;

"It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is

that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers u/s 482 of the present Code (that is, the Code of Criminal Procedure), 1973".

(Bracketed portion supplied).

In *Pukhraj v. State of Rajasthan and another* AIR 1973 S.C. 2581, their Lordships of the Supreme Court considered the provisions of section 197 Cri.P.C. In that case it was alleged that the Post Master General, Rajasthan, beat the appellant a clerk working in the Head Post Office at Jodhpur, when the latter submitted his representation for cancellation of his transfer. It was held that in assaulting the complainant the Post Master General was not acting in the exercise of his duty and hence no sanction u/s 197 Cri.P.C. was necessary. In *J.P. Sharma Vs. Vinod Kumar Jain and Others*, their Lordships of the Supreme Court considered the provisions of section 482 Cri.P.C. There was a complaint against the accused for offences u/s 120-B I.P.C. and section 5 of the Imports and Exports (Control) Act, 1947. The cognizance was taken and summons was issued by the learned Magistrate. In that case the High Court had quashed the complaint on the ground of the subsequent report by the Central Bureau of Investigation (C.B.I.) which had not yet been proved and considered in the backgrounds of the allegations made, and, secondly, some of the parties alleged to be in the conspiracy were not made parties. Their Lordships of the Supreme Court held that there were no grounds for quashing the criminal proceedings where, on prima facie being satisfied, the Magistrate had taken the cognizance. It was further held that taking all the allegations in the complaint to be true, without adding or subtracting anything, at this stage it could not be said that no prima facie case for trial had been made out. It was held that the High Court in quashing the complaint had exceeded its jurisdiction. The question at that stage was not whether there was any truth in the allegations made but the question was whether on the basis of the allegations a cognizable offence or offences had been alleged to have been committed. The facts subsequently found out to prove the truth or otherwise on the allegations was held not a ground on the basis of which the complaint could be quashed. In *Kewal Krishan Vs. Suraj Bhan and Another*, their Lordships of the Supreme Court considered the provisions of sections 200, 202, 203, 204, 209 and 227 Cri.P.C. It was held that in a case exclusively triable by a Sessions Court in an inquiry under sections 203 and 204 Cri.P.C. the Magistrate has to see whether there is prima facie evidence in support of charges. It was further held that the Magistrate in weighing evidence meticulously exceeds his jurisdiction. In *Hareram Satpathy Vs. Tikaram Agarwala and Others*, their Lordships of the Supreme Court considered the provisions of sections 190 and 482 Cri.P.C. It was held that where the Magistrate after taking cognizance of the offence and perusal of the record and having been satisfied that there were prima facie grounds in issuing process against certain persons not mentioned in the police report could issue process against them. It was further held that as the Magistrate was restricted to finding out whether there

was a prima facie case or not for proceeding against the accused and could not enter into a detailed discussion of the merits or demerits of the case and the scope of the revisional jurisdiction was very limited, the High Court could not launch on a detailed and meticulous examination of the case on merits and set aside the order of the Magistrate directing of process against certain persons.

12. Having considered all the decisions mentioned above, relied on by the learned Counsel for the petitioner-accused and the learned Counsel for the respondent No. 1 complainant, I find that the law on the point is well settled by the Supreme Court in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , and the recent decision of the Supreme Court in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others,). I Smt. Nagawwa's case (supra) their Lordships of the Supreme Court at page 1948 considered the scope of the inquiry u/s 202 Cri.P.C. and observed thus :-

"The scope of the inquiry u/s 202 of the Code of Criminal Procedure, 1973 is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of the complainant without at all advert to any defence that the accused may have. In fact, in proceedings u/s 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

"It is true that incoming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of prima facie case against him. The Magistrate has been given an undoubted discretion in the has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view find out whether or on the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry u/s 202 which culminates into an order u/s 204."

Thereafter their Lordships have stated in what cases the order of the Magistrate issuing process against the accused could be quashed or set aside by this Court, and that portion of the ghas been already reproduced above. The law on the point of quashing the process issued by the Magistrate has been further developed in the recent decision in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, , I have already reproduced the passage appearing at page 711 of the report. It has been clearly stated by their

Lordships of the Supreme Court that while considering whether uncontroverted allegations as made prima facie establish the offence, it is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Their lordship further observed that this was so on the basis that the Court could not be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction were bleak and, therefore, no useful purpose was likely to be served by allowing a criminal prosecution to continue, the Court might while taking into consideration the special facts of a case also quash the proceedings even though it might be at a preliminary stage.

13. Applying those established principles on which the process issued by the Magistrate can be quashed by this Court in exercised of the inherent powers u/s 482 Cri.P.C., it is necessary to consider the facts of the present case. The petitioner No. 1 accused No. 1 was a Senior Ward Officer in the Municipal Corporation of Greater Bombay and he was on special duty of the removal of encroachments. The petitioner No. 2 accused No. 2 was his bodyguard. On 13th June, 1986 at about 11.30 a.m. the accused No. 1 accompanied by two bodyguards, four police constables with rifles and about ten members of the demolition squad of the Municipal Corporation of Greater Bombay had been in a municipal van and a jeep at the junction of Phalton Road and Mussafirkhana Road, Bombay. After the accused No. 1 and the other members of his staff alighted the Municipal van they started removing the encroachments on the road. On seeing the accused No. 1 and the other members of his staff removing the encroachments on the road many persons who were doing their business on the road thereby causing obstruction to the traffic started running away with their wares and some started running leaving their wares there. When the accused No. 1 and the other members of his staff were carrying out their public duty of removing encroachments on the road, a large number of persons gathered there and some members of the mob threw brickbats and soda-water bottles on them. Seeing of some of the members attracting them with brickbats and soda-water bottles, the accused had to retreat and go behind Gulshan-E-Iran Hotel. In order to disperse the mob which was violent and throwing brickbats and soda-water bottles at the accused No. 1 and the other members of his staff, the accused No. 1 by firing two rounds from his revolver tried to seare away the mob but the mob did not disperse. According to the accused, when the mob had become violent and was approaching them, the accused and the other members of the staff apprehended imminent danger to their lives and it was at that time the accused No. 1 asked the accused No. 2 to fire one round and accordingly the accused No. 2 fired one round from his rifle and unfortunately it hit deceased \ Mehaboob who was standing in the mob and he succumbed to the injury. The fact that when the accused No. 1 had been to the Mussafirkhana area for removing the encroachments in the discharge of his duties he was faced with an attack of brickbats and soda-water bottles is borne out by the averments in the

complaint. The relevant portion from paragraph 4 of the complaint reads thus :

"4. However, the stall owners of Mussafirkhana Road started running helter skelter with their goods. Thereupon accused No. 1 with his two bodyguards, all carrying revolvers in their hands, chased the said stall own inside the Mussafirkhana Road upto a distance of about 25 feet ostensibly to seize the said goods. In the meantime from the Western Section of terrace of Madina Building at Mussarfirkhana Road some boys started pelting pieces of bricks and one or two soda-water bottles on Mussafirkhana Road which fell at a distance of about 15 feet aways from accused No. 1 and his said bodyguards and therefore did not cause any hurt or injury to accused No. 1 or his bodyguards and obviously not also to the rifle carrying constables who were all the while standing at the Gulshan-E-Iran naka. Thereupon accused No. 1 and his bodyguards, seeing the falling of brick pieces, etc. in their path, retracted their steps to Gulshan-E-Iran naka and from there accused No. 1 and his bodyguards started firing with their revolvers at the western section of the terrace of Madina Building which resulted in stoppage of throwing of brick pieces, etc. from the terrace of Madina Building."

The reading of the above passage from the complaint and the depositions of the witnesses examined by the respondent No. 1 complainant clearly show that the accused No. 1 and the other members of his staff were obstructed in carry out their official duty or removing encroachments and they were attacked by the mob with brickbats and soda-water bottles. Abdul Aziz (P.W. 7) states that he had approached the accused No. 1 and requested him to fire, if necessary, in the air otherwise the bullet may hit the members of the public. Unless the situation had arisen to open fire, Abdul Aziz would not have asked the accused No. 1 to fire in the air. Abdul Aziz also says that the bodyguard, that is, the accused No. 2, then uttered that fire had to be opened against those persons only. Abdul Aziz further states that a crowd of 200 to 300 persons gathered near Mercantile Bank, Mussafirkhana, about 200 or 300 feet away from his shop. According to him, in the meantime some brickbats and stones were pelted from Madina Building and the people from the crowd were shouting not to fire. Mohammed Gulam Shaikh (P.W. 8) also states that when the accused No. 1 ran upto Madina Building, "A" Block some pieces of bricks fell there. Mohamed Ali Qureshi (P.W. 9) also states that when the accused No. 1 reached Madina Building gate, somebody pelted pieces of bricks and bottles from the Madina Building, and then the accused No. 1 and his bodyguards and constables moved behind Gulshan-E-Iran Hotel. He also states that brickbats and bottles fell at a distance of ten feet from the accused No. 1 P.S.I. Vasant Appa Devarkar (P.W. 12), on receiving information on 13th June, 1986 at about 11.30 a.m. that there was some riot incident near Mussafirkhana along with P.I. Patil and the members of his staff rushed to the scene of the incident, that is, the junction of Mata Ramabai Ambedkar Road (Phalton Road) and Mussafirkhana Road. He prepared a panchnama of the scene of offence. He states that some brickbats and broken glass pieces of soda-water bottles were found at the spot. It is mentioned in the complaint that immediately after the incident Deputy Commissioner of Police Shri Chaudhary arrived there

and he recorded statements of certain persons. Mehboob Gurubhai Shaikh (P.W. 3) states that D.C.P. Chaudhary arrived at the spot, made injury with a police constable and dispersed the persons who had gathered there. Mohamed Salim Mohamed Loia (P.W. 11) had reached the spot after the incident. The firing was over before he went there. At the time D.C.P. Chaudhary had arrived there and he made inquiries with the accused No. 1 and the constables. As stated earlier, at Phalton Road Police Station in respect of the present incident on offence of rioting under C.R. No. 303 of 1986 was registered. The panchanama of the sene of offence was made by P.S.I. Devarkar and further investigation was handed over by him to P.I. Patil. In the circumstances in which the incident took place no offence was registered at the Phalton Road Police Station against the accused. After perusing the complaint and the statements of the witnesses examined by the complainant before the learned Additional Chief Metropolitan Magistrate, the allegations made against the accused do not make out a prima facie case disclosing the offence u/s 302 read with section 34 I.P.C. As observed by the Supreme Court in *Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others*, , the Court can take into consideration an special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue.

14. In the present case the petitioner-accused had been to Mussafirkhana area to perform their public duty of removal of encroachments and at that time they were faced with an attack from the mob. Brickbats and soda-water bottles were thrown at them. They were found on the spot. Though the accused No. 1 had with him two bodyguards and four police constables with rifles and members of the demolition squad of the Municipal Corporation of Greater Bombay, it was not possible for him to escape from there and to reach the police-station which was at a distance of about one- half furlog from that place and to seek police protection. The accused No. 1 is a Senior Ward Officer. He has to do a very unpalatable job of removal of encroachments from the roads and he is bound to be faced with opposition from the undesirable elements who are occupying the roads and footpaths for their unlicensed business. Taking into consideration such duties of the accused No. 1, he has been armed with a revolver. He has been also provided with two bodyguards and he has to carry with him a couple of policemen carrying rifles. If we expect such public officers, when faced with opposition from the undesirable elements, to run away from the place of their duty to seek protection at the police-station and not to resort to force necessary for their protection, no offence will be able to do such unpalatable jobs. It must be appreciated that the accused No. 1 has not used more force than necessary. Only one shot was fired at the mob and unfortunately the bullet hit deceased Mehboob. Deputy Commissioner of Police Shri Chaudhary had arrived at the spot immediately after the incident. He made inquiries with the accused, other members of the staff and the members of the public. The police did not register any offence against the accused. On the contrary, they registered an offence against the members of the public who indulged in rioting at the time of the

incident. The respondent No. 1 filed the complaint against the accused on 9th July, 1986. The verification and the depositions of the witnesses were recorded by Shri R.N. Gorulkar, Additional Chief Metropolitan Magistrate, and he having been transferred his successor Shri S.J. Shivkar, Additional Chief Metropolitan Magistrate, perused the record prepared by his predecessor and passed the impugned order issuing process against the accused for the offence u/s 302 read with section 34 I.P.C. When we consider the allegations made by the respondent No. 1 complainant against the accused and the depositions of the witnesses, taking into consideration the circumstances under which the incident took place; the allegations made in the complaint that the accused, without any rhyme or reason, resorted to firing and committed the offence of murder are patently absurd and inherently improbable so that and prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused. This satisfies the second ground mentioned by their Lordships of the Supreme Court in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , for quashing the process issued by the Magistrate As stated earlier by me in view of the decision of the Supreme Court in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, this Court can take into consideration any special features which appear in a particular case to consider it is expedient and in the interest of justice to permit a prosecution to continue. In the present case it is not at all expedient and in the interest of justice to permit prosecution to continue. There is no least chance of conviction of the accused of the offence u/s 302 read with section 34 I.P.C. or any other offence. If the prosecution is permitted to be continued, it will result into nothing out mere harassment to the accused, as the chances of an ultimate conviction are very bleak.

15. The learned Counsel for the respondent No. 1 complainant contends that in view of the provisions of section 105 of the Indian Evidence Act, 1872, the Court has to presume the absence of the circumstances bringing the case within any of the general exceptions in the Indian Penal Code. He submits that the defence version that the accused had to resort to firing in exercise of their right of private defence cannot be considered at the stage of inquiry u/s 202 Cri.P.C. According to the learned Counsel, the petitioner-accused must face the trial and at the trial, either from the prosecution evidence or by leading defence evidence, the accused must prove that their case falls within any of the general exceptions embodied in the Indian Penal Code. The learned Counsel for the petitioner-accused, on the other hand, contends that the burden proving the guilt of the accused always lies on the prosecution and the prosecution must prove all the ingredients of the offence beyond reasonable doubt. He submits that the accused can always show, even from the prosecution evidence, that the case falls within any of the general exceptions; and if the Court is satisfied from that all the ingredient of the offence circumstances attending the crime that all the ingredients of the offence required to be proved are not proved, it is not necessary that the accused should be required to face the trial. I agree with the

learned Counsel for the respondent No. 1 complainant that it from the facts stated in the complaint and the evidence adduced by the complainant the Court finds that the case squarely falls within any of the general exceptions, the proper course for the Court to follow is to dismiss the complaint u/s 203 Cri.P.C. For example, take a case of a child below seven years of age alleged to have committed some offence. If from the prosecution evidence the Court finds that the child is below seven years of age the Court will be perfectly justified to take into consideration the general exception embodied in section 82 I.P.C. and refuse to issue any process against the child. In the case of an assault on a woman with the intention of committing rape, she can, in the exercise of her right of private defence, voluntarily cause death of the assailant (vide "Thirdly" of section 100 I.P.C.). If on the prosecution evidence in an inquiry u/s 202 Cri.P.C. it transpires that the lady was assaulted with the intention to commit rape and the lady, in exercise of her right of private defence, gave the blow which proved fatal the lady cannot be subjected to trial and the learned Magistrate will be perfectly right in dismissing the complaint u/s 203 Cri.P.C. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists (vide section 3 of the Indian Evidence Act). In the present case, from the evidence adduced by the complainant, if the accused is able to show that his case falls within any of the general exceptions or that the evidence does not prove the offence charged against him the process issued against him u/s 204 Cri.P.C. will have quashed. In order to prove that the case of the accused falls within "Fourthly" or section 300 I.P.C., the prosecution must prove that the act complained of was committed by the accused without any excuse for incurring the risk causing death or such bodily injury as is likely to cause death. The prosecution is bound to negate any exception favourable to the accused which is engrafted in the statutory definition of the offence, though not one contained in a separate clause. If the evidence adduced by the prosecution itself shows that the accused No. 1 while doing his public duty was obstructed and attacked by a large number of persons by throwing brickbats and soda-water bottles and he apprehended danger to the life of himself or any member of his party or grievous hurt to himself or to any member of his party, it cannot be held that he incurred the risk of firing on the mob without any excuse. The accused cannot be called upon to prove their defence unless the prosecution proves the offence charged against the accused beyond reasonable doubt. Therefore, on the basis of the provisions of section 105 of the Indian Evidence Act, it cannot be urged that the accused must face trial and prove their defence, though the evidence adduced by the complainant in the inquiry u/s 202 Cri.P.C. clearly proves that in the circumstances in which the incident took place the accused can never be held guilty of the offence charged against them. The petitioners deserve commendation and not condemnation for courageously performing their public duty.

16. In the result, the petition is allowed, the rule is made absolute and the order of the learned Additional Chief Metropolitan Magistrates dated 24th September, 1987 issuing process against the petitioners-accused for the offence u/s 302 read with section 34 I.P.C. hereby quashed.