

(2015) 09 CAL CK 0019
In the Calcutta High Court
Case No : CRR 2748 of 2015

Haraprasad Ghosh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 202, 202(2), 340(1)
Penal Code, 1860 (IPC) — Section 109, 120B, 193, 195, 201

Citation : (2015) 09 CAL CK 0019

Hon'ble Judges : R.K. Bag, J

Bench : Single Bench

Advocate : D.K. Sengupta, Narayan Chandra Das and D. Hazra Chowdhury, for the Appellant; Subhashis Roy, Advocates for the Respondent

Judgement

R.K. Bag, J—The petitioner has preferred this revision under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 challenging the order dated July 24, 2015 passed by Learned Judicial Magistrate, 6th Court, Alipore in Complaint Case No. C1270 of 1996, by which Learned Magistrate committed the case to the Court of Sessions.

2. The backdrop of the present revisional application is as follows: On March 29, 1995 at about 4.00 p.m. the petitioner and his associates went to the residence of the opposite party No. 2 and took away the eldest son of the opposite party No. 2. Md. Alam, the eldest son of the opposite party No. 2 was mercilessly beaten up by the petitioner and his associates who are police personnel attached to Garden Reach Police Station. On March 30, 1995 the petitioner and his associates demanded Rs. 4,000/- from the opposite party No. 2 as condition precedent for release of Md. Alam, but the opposite party No. 2 could not make payment of the amount of money. However, the opposite party No. 2 and other members of her family found Md. Alam vomiting blood while he was in the custody of the petitioner and his associates. On April 1, 1995 Md. Alam was shifted to Garden Reach Police Station and was confined there illegally till April 8,

1995. On April 9, 1995 Md. Alam was produced before the Court of Learned Magistrate and he was remanded to judicial custody with specific direction for treatment in the hospital of the Presidency Jail. However, on April 10, 1995 at about 1.20 p.m. Md. Alam died in the hospital of the Presidency Jail.

3. The opposite party No. 2 ventilated her grievance before the senior police officers, but no specific case was started against the petitioner and his associates. On July 10, 1996 the opposite party No. 2 filed a petition of complaint before the Court of Learned Chief Judicial Magistrate, Alipore against the petitioner and his associates. Learned Chief Judicial Magistrate took cognizance of the offence and transferred the case to the Court of Learned Judicial Magistrate, 6th Court, Alipore for inquiry. Learned Judicial Magistrate examined six witnesses including one doctor. The opposite party No. 2 could not examine two witnesses namely Md. Kaloo and Khairunnassa who were cited as witnesses in the petition of complaint. Ultimately, the names of those witnesses were expunged from the petition of complaint by Learned Judicial Magistrate on prayer of the opposite party No. 2 on the ground that they declined to come to the court to give evidence in support of the complaint of the opposite party No. 2 for the threat of the petitioner and his associates who were serving police officers. Ultimately, on July 25, 1996 Learned Judicial Magistrate issued process against the petitioner and his associates for facing the charge under Section 341/343/347/348/302/201/120B of the Indian Penal Code. The said order of Learned Magistrate was challenged by the petitioner before this court by filing revision being CRR No. 2494 of 1996. The said revisional application was admitted by this court on September 6, 1996 and the same was disposed of on February 25, 2000. The original Lower Court Record which was called for in connection with CRR No. 2494 of 1996, was found missing and some of portion of the record of this court was found to be mutilated. The initial deposition of the witnesses were not made available at the time of hearing of the revision. Accordingly, on February 25, 2000 Learned Single Judge of this court disposed of CRR No. 2494 of 1996 by giving direction to Learned Judicial Magistrate to reconstruct the Lower Court Record by fresh examination of the witnesses who were examined by the opposite party No. 2 in support of the complaint for issuance of the process against the petitioner and his associates.

4. Learned Judicial Magistrate examined six witnesses who were previously examined in support of the complaint of the opposite party No. 2 and also examined six more witnesses in support of the complaint. Thereafter, on July 3, 2000 Learned Judicial Magistrate issued non-bailable warrant of arrest against the petitioner and his associates for securing their presence before the Court of Learned Magistrate. The petitioner and his associates obtained anticipatory bail from the High Court and thereafter they surrendered before the Court of Learned Magistrate and were released on regular bail. One Md. Jamal Khan filed an application before the Court of Learned Magistrate under Section 340(1) of the Code of Criminal Procedure praying for an inquiry on the ground that two witnesses namely Md. Sabir Khan and Md. Moktar have impersonated themselves

and thereby an offence under Section 195/193/205 of the Indian Penal Code is made out against the opposite party No. 2. Since the inquiry under Section 340(1) of the Code of Criminal Procedure was pending for prolonged period of time, the said Md. Jamal Khan preferred revision before this Court being CRR No. 3185 of 2000. On December 21, 2000 Learned Single Judge of this Court disposed of the said revision by directing Learned Judicial Magistrate to dispose of the application under Section 340(1) of the Code of Criminal Procedure as early as possible preferably within the month of January, 2001 in accordance with law. On June 6, 2006 the present petitioner filed another application under Section 340(1) of the Code of Criminal Procedure for inquiry on the ground that the witness Md. Moktar who was examined by the opposite party No. 2 in support of the complaint also impersonated himself. It is alleged by the petitioner that without disposing of the applications under Section 340(1) of the Code of Criminal Procedure filed by Md. Jamal Khan and the present petitioner, Learned Judicial Magistrate committed the case to the Court of Sessions on July 24, 2015.

5. With the above factual matrix, Mr. D.K. Sengupta, Learned Senior Counsel for the petitioner has challenged the order of commitment of the case to the Court of Sessions on the following grounds viz., (i) Learned Judicial Magistrate did not examine two witnesses Kaloo and Khairunnassa, though they were cited as witnesses in the petition of complaint by the opposite party No. 2 in violation of the proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure, (ii) Learned Judicial Magistrate examined six more witnesses after fresh examination of six witnesses who were examined earlier for the purpose of issuing process and thereby Learned Judicial Magistrate violated the direction of Learned Single Judge given on February 25, 2000 in CRR No. 2494 of 1996, and (iii) Learned Judicial Magistrate did not dispose of two applications under Section 340(1) of the Code of Criminal Procedure filed by one Md. Jamal Khan and the present petitioner separately for conducting inquiry against the opposite party No. 2 for the offence under Section 195/193/205 of the Indian Penal Code. Mr. Sengupta has elaborated his argument by referring to the proviso to Section 202(2) of the Code of Criminal Procedure and submits that Learned Judicial Magistrate is duty bound to examine all the witnesses cited in the petition of complaint as witnesses by the opposite party No. 2 before issuing the process against the petitioner and others. He has also pointed out from the order passed by Learned Single Judge on February 25, 2000 in CRR No. 2494 of 1996 that Learned Single Judge gave direction to Learned Magistrate only to record the statement of those witnesses who were initially examined by Learned Magistrate for issuing process against the petitioner and his associates for the purpose of reconstruction of the Lower Court Record and as such Learned Magistrate acted in excess of jurisdiction conferred on him by law by examining six additional witnesses produced by the opposite party No. 2 in support of the complaint for arriving at the satisfaction of issuing process in violation of the order of Learned Single Judge of this Court. He has urged this Court to consider that the allegation of impersonation of the witnesses who were examined by the opposite party No.

2 in support of the complaint needs to be decided by conducting inquiry under Section 340(1) of the Code of Criminal Procedure before committing the case to the Court of Sessions where the petitioner and his associates will have to face the trial. According to Mr. Sengupta, the order dated July 24, 2015 passed by Learned Judicial Magistrate is perverse and the same is liable to be set aside.

6. Mr. Subhasis Roy, Learned Counsel appearing on behalf of the opposite party No. 2 contends that Learned Magistrate can examine all the witnesses on which the opposite party No. 2 wants to rely as complainant. He further submits that two witnesses namely Kaloo and Khairunnassa declined to come to the Court and give evidence in support of the complaint filed by the opposite party No. 2 due to threat of the petitioner and his associates who are the police officers and as such their names were expunged from the list of witnesses by Learned Magistrate on prayer of the opposite party No. 2. By referring to the order dated February 25, 2000 passed by Learned Single Judge in CRR No. 2494 of 1996, he submits that Learned Single Judge has not restrained Learned Judicial Magistrate from examining additional witnesses in support of the complaint of the opposite party No. 2 after recording of statement of six witnesses who were examined previously for the purpose of reconstruction of the Lower Court Record. Mr. Roy has relied on the case of Rosy and Another Vs. State of Kerala and Others, AIR 2000 SC 637 : (2000) CriLJ 930 : (2000) 1 JT 84 : (2000) 1 SCALE 85 : (2000) 2 SCC 230 : (2000) 1 SCR 107 : (2000) AIRSCW 1579 : (2000) AIRSCW 156 : (2000) 3 Supreme 698 : (2000) 1 Supreme 114 and "Gobinda Prosad Biswas V. State of West Bengal" reported in 1999 C Cr LR (Cal) 322 in support of his above contention. With regard to the pendency of inquiry under Section 340(1) of the Code of Criminal Procedure, Mr. Roy submits that the application filed by Jamal Khan on July 26, 2000 for inquiry under Section 340(1) of the Code of Criminal Procedure was rejected by Learned Judicial Magistrate on the ground that the said Jamal Khan did not appear before the Court to move the application and his presence could not be procured by the Court even after issuance of coercive process and as such the criminal case was filed against him on October 27, 2015. Mr. Roy has also pointed out from the order dated July 16, 2015 passed by Learned Judicial Magistrate that the application filed by the present petitioner under Section 340(1) of the Code of Criminal Procedure could not be taken up for hearing by Learned Judicial Magistrate as the original application was not traced out. The specific submission of Mr. Roy is that the inquiry under Section 340(1) of the Code of Criminal Procedure is an independent proceeding and the pendency of the said proceeding cannot stand on the way of commitment of the case to the Court of Sessions, particularly when the said case was pending before the Court of Learned Magistrate for last 20 years and serious allegation is made against the petitioner and his associates for the custodial death of the son of the opposite party No. 2.

7. The first point for consideration of the Court is whether Learned Judicial Magistrate is duty bound to examine all the witnesses cited in the petition of complaint before issuing process in a case which discloses offence exclusively

triable by the Court of Sessions. Section 202 of the Code of Criminal Procedure reads as follows:

"202. Postponement of issue of process: (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been made over to him under Section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] 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 under Section 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."

8. On perusal of proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure, it appears that Learned Judicial Magistrate shall ask the complainant to produce all his witnesses in support of the complaint, so that Learned Magistrate can examine those witnesses on oath when it appears to Learned Magistrate that the offence complained of is triable exclusively by the Court of Sessions. In *Rosy and Another Vs. State of Kerala and Others*, AIR 2000 SC 637 : (2000) CriLJ 930 : (2000) 1 JT 84 : (2000) 1 SCALE 85 : (2000) 2 SCC 230 : (2000) 1 SCR 107 : (2000) AIRSCW 1579 : (2000) AIRSCW 156 : (2000) 3 Supreme 698 : (2000) 1 Supreme 114, one Excise Inspector filed a petition of complaint before the Court of Learned Judicial Magistrate disclosing offences exclusively triable by the Court of Sessions. The Magistrate committed the case to the Court of Sessions without examining the complainant and the witnesses. The Sessions Judge took cognizance and recorded the evidence and the trial was almost concluded. During argument of the said sessions case the plea was taken on behalf of the accused person that the trial is vitiated for non-examination of the witnesses of the complainant by Learned Magistrate before committing the case to the Court of Sessions. The High Court directed for fresh commitment proceeding by Learned Magistrate. On appeal the Supreme Court relied on the provision of Section 465 of the Code of Criminal Procedure and observed in paragraph 7 of the Report as follows:

"7. ...No order by a Court of competent jurisdiction shall be reversed or altered by a revisional Court on account of any omission in any proceedings held under this Code unless the Court reaches the conclusion that such omission has occasioned a failure of justice. One of the tests to ascertain whether such omission has occasioned failure of justice is incorporated in sub-section (2) of (section 465) i.e. whether objection has been taken at any earlier stage regarding such omission. If no such objection has been taken earlier normally the Court cannot permit that party to raise it at the last stage."

9. The Supreme Court has specifically held in Para 47.II(c) of the said report that the irregularity or non-compliance thereby would not vitiate the further proceeding in all cases. The proposition of law laid down by the Supreme Court in this report is that the non-compliance of proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure will not vitiate the criminal trial unless the said non-compliance of the provision of law has occasioned a failure of justice. In the instant case, the names of the two witnesses namely Kaloo and Khairunnassa were expunged from the list of witnesses mentioned in the petition of complaint by the opposite party No. 2 as they declined to come to the Court to give evidence in support of the complaint due to threat of the petitioner and his associates who are police officers. Since the opposite party No. 2 was compelled to pray for expunging the names of those two witnesses from the list of witnesses cited by her before the Court of Learned Magistrate under the circumstances beyond her control, I am of the view that non-examination of those two witnesses by Learned Magistrate cannot occasion any failure of justice on the part of the petitioner. In the absence of any failure of justice on the part of the petitioner, non-compliance of proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure by Learned Magistrate cannot be a ground to set aside the order of commitment passed by Learned Magistrate.

10. In "Gobinda Prosad Biswas V. State of West Bengal" reported in 1999 C Cr LR (Cal) 322 the father of the victim filed a petition of complaint before the Court of Learned Magistrate on the allegation that some police officers took the deceased forcibly to the police station beat him up mercilessly and admitted him in the hospital where he breathed his last. Learned Magistrate committed the case against the police officers to the Court of Sessions on the basis of the petition of complaint filed by the father of the deceased, as the petition of complaint disclosed an offence under Section 302/34 of the Indian Penal Code. The order of commitment was challenged by way of revision before the High Court and Learned Single Judge formulated for the decision of the High Court (i) whether the persons cited as witnesses in the complaint should be examined being a sessions trial and (ii) whether the list of witnesses in sessions triable case must be exhausted. Learned Single Judge of our High Court has held in paragraph 10 of the report as follows:

"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, or gained over or reluctant to defend his cause and that none other than they may be examined even at the risk of failure to prove the complaint case. All that is the import and meaning of the word "all" in this context is that (i) the complainant 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 Sessions 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....."

I am inclined to follow the proposition of law laid down in this report by giving liberal interpretation of the proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure. Learned Magistrate must call upon the complainant to produce all his witnesses and examine them on oath in connection with an offence exclusively triable by the Court of Sessions, which does not mean that Learned Magistrate will compel the complainant to examine any witness even if he is gained over or he is reluctant to support the case of the complainant. If the provision of law is interpreted to the extent that the complainant is bound to examine all the witnesses even when the witness may not support the case of the complainant or he is gained over or even when he is threatened by the opposite parties, the interpretation will lead to absurdity. Thus, I would like to follow the interpretation by Learned Single Judge of this Court in "Gobinda Prosad Biswas V. State of West Bengal (supra). The logical inference of my entire above observation is that non-examination of two witnesses whose names are expunged by Learned Magistrate from the list of witnesses cited by the opposite party No. 2 cannot cause any failure of justice as contended on behalf of the petitioner and as such by virtue of Section 465 of the Code of Criminal Procedure, the High Court cannot interfere in the order passed by Learned Magistrate.

11. On perusal of the order dated February 25, 2000 passed by Learned Single Judge in CRR No. 2494 of 1996 relied on by Learned Counsel representing both parties, I find that Learned Single Judge has given direction to Learned Judicial Magistrate to examine six witnesses afresh who were examined earlier for the purpose of reconstruction of the Lower Court Record. Learned Single Judge has not prohibited Learned Judicial Magistrate from examining additional witnesses for the purpose of arriving at the satisfaction whether process should be issued against the petitioner and his associates and as such I am unable to accept the contention made on behalf of the petitioner that Learned Magistrate acted in excess of jurisdiction conferred on him by law and violated the direction given by

Learned Single Judge in CRR No. 2494 of 1996.

12. The last question for consideration of the Court is whether Learned Magistrate can commit the case to the Court of Sessions without disposing of the application under Section 340(1) of the Code of Criminal Procedure. It is alleged by the petitioner that one Md. Jamal Khan filed an application under Section 340(1) of the Code of Criminal Procedure before the Court of Learned Magistrate praying for inquiry against the opposite party No. 2 to ascertain whether she has committed an offence under Section 195/193/205 of the Indian Penal Code. It appears from the order passed by Learned Judicial Magistrate on July 16, 2015 that the said application filed by Jamal Khan on July 26, 2000 is rejected on the ground that Jamal Khan did not turn up before the Court even after issuing of coercive process by Learned Magistrate and as such the criminal case against the Jamal Khan was filed for the present. Accordingly, there is no merit in the submission made on behalf of the petitioner that the application under Section 340(1) of the Code of Criminal Procedure filed by Jamal Khan is still pending in the Court of Learned Magistrate. The other application under Section 340(1) of the Code of Criminal Procedure alleged to have been filed by the present petitioner is not traced out and the application filed for expediting the hearing of the said application under Section 340(1) of the Code of Criminal Procedure is pending before the Court of Learned Magistrate as reflected from the order dated July 16, 2015. In this connection, I would like to observe that the petitioner and his associates have tried their best to delay the ultimate hearing of the case started by the opposite party No. 2 for the custodial death of her son about 20 years ago. It appears from the order dated March 30, 2015 passed by another Learned Single Judge of this Court in CRR No. 529 of 2015 that Learned Magistrate had no option than to commit the case to the Court of Sessions without further delay. The pendency of an application under Section 340(1) of the Code of Criminal Procedure filed by an accused person cannot be a bar to commit the case to the Court of Sessions which was pending before the Court of Learned Magistrate for last 20 years even when Learned Magistrate formed the opinion that the petitioner and his associates being the police officers should face the trial for the offences under Section 323/324/307/320/302/201/109/120B of the Indian Penal Code. However, Learned Magistrate will trace out the original application, if any, filed by the petitioner under Section 340(1) of the Code of Criminal Procedure or reconstruct the same with the help and co-operation of the petitioner and dispose of the same in accordance with law as early as possible preferably within a period of six months from the date of communication of the order. In view of my above findings, I do not find any merit in this revisional application. The revisional application is, thus, dismissed.

The order dated July 24, 2015 passed by Learned Judicial Magistrate, 6th Court, Alipore in Complaint Case No. C1270 of 1996 is hereby affirmed.

Let a copy of this judgment and order be sent down to the Learned Court below forthwith for favour of information and necessary action.

The urgent photostat certified copy of the judgment and order, if applied for, be given to the parties on priority basis after compliance with all necessary formalities.