

(1996) 07 BOM CK 0003

In the Bombay High Court

Case No : Criminal Writ Petition No. 272 of 1995

Jagannath Girhe and another

APPELLANT

Vs

The State of Maharashtra and another

RESPONDENT

Date of Decision : 18-07-1996

Acts Referred:

Bombay Prohibition Act, 1949 — Article 85(1)

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 173, 200, 202

Penal Code, 1860 (IPC) — Section 109, 115, 118, 201, 302

Citation : (1998) BomCR(Cri) 363

Hon'ble Judges : M.B. Ghodeswar, J

Bench : Single Bench

Advocate : Anil S. Mardikar, M.Y. Wadodkar and Shashikant Borkar, for the Appellant; V.M. Deshpande, Assistant Public Prosecutor, P.B. Patil, for the Respondent

Judgement

M.B. Ghodeswar, J.—Petitioners Police constables have filed this petition under Article 227 of the Constitution of India read with 482 of the Criminal Procedure Code challenging the order dated 29-7-1995 Judicial Magistrate, First Class, Murtizapur in Regular Criminal Case No. 27 of 1994 rejecting the application of the petitioners for recalling the summons order dated 13-7-1994 of issuance of process u/s 302, 201 read with 34 of the Indian Penal Code and the judgment dated 19-10-1995 passed/delivered by the Sessions Judge, Akola in Criminal Revision No. 210 of 1995 dismissing the revision filed by the petitioners.

2. Shortly stated, the facts of the case are as follows.

Respondent No. 2 Manabai w/o Kashiram Tondle the complainant and the mother of deceased Bhagwan aged 29 years had filed criminal complaint u/s 302, 304-Part II, 364, 324, 365, 325, 109, 448, 394, 118, 115, 201 read with 34 of Indian Penal Code against the petitioners and Shri K.J. Pawar (P.S.I.) who was P.S.O. to Police Station. Murtizapur, District Akola at the relevant time. It is alleged that on

26-10-1989 at about 9.00 to 9.30 in the night, the petitioners came in civil dress to the house of the complainant with sticks in their hands. The petitioner-accused No. 1 on coming in front of the house of the complainant and abused her and thereafter, after, one hour when Bhagwan was taking dinner at the house of one Hari Dongre, the petitioners took him alongwith them and assaulted Bhagwan with sticks and in an injured condition, Bhagwan was taken to Police Station, Murtizapur. On 27-10-1989 in the morning, the complainant was called to the Police Station, Murtizapur. Thereafter, the police took the complainant in jeep to Lakshmibai Hospital where deceased Bhagwan was lying in the veranda of the hospital. According to the complainant, " deceased Bhagwan was beaten by the petitioners on the false allegation of having drunk liquor. Then, the complainant has alleged about medical examination of Bhagwan. Bhagwan had number of injuries. The medical examination of Bhagwan reveals that he was illegally detained in the lock up for the whole night and was beaten with sticks, belts and kicks and blows, due to which Bhagwan died. The complainant had lodged the report of the incident on 27-10-1989 at Murtizapur Police Station. An offence u/s 302 of the Indian Penal Code was registered against the accused. The complainant was awaiting summons from the Court of Sessions and when the summons did not come, she enquired at Murtizapur Police Station and came to know that the case u/s 302 of the Indian Penal Code is not filed against the accused. The complainant examined herself. The complainant has given the list of about 39 witnesses and Sr. No. 40 of the said list states "Other witnesses informing from time to time". Though, the police have registered the offence u/s 302 of the Indian Penal Code, the police report came to be filed for the offence u/s 324 read with 34 of the Indian Penal Code against the petitioners-accused only in the Court of the same Magistrate.

3. The complainant's verification statement is recorded on 1-3-1994 and the trial Magistrate directed the complainant to examine the eye witnesses, if any. Thereafter, the complainant had examined herself and two more and gave a pursis that she does not want to examine any other witness from the list. The trial Magistrate perused record of Criminal Case No. 93 of 1993 filed against the accused persons for the offence punishable u/s 324 of the Indian Penal Code, heard the arguments of the learned Counsel for the parties. On 8-3-1994, the complainant examined P.W. 1 Gajanan and P.W. 2 Janrao as the eye witnesses. The trial Magistrate passed an " order below Exhibit 1 issuing process against the petitioners only, since no case was made out against the accused No. 3 P.S.I. Shri Pawar. This order of issue of process was challenged in this Court by filing an application u/s 482 of the Criminal Procedure Code which was withdrawn with liberty to file application before the Trial Magistrate for recalling the order of issue of process. Thereafter, the petitioners filed application for recalling the order of issue of process. Thereafter, the petitioners filed an application for recalling the summons order by dismissing the complaint before the Trial Magistrate on 28-9-1994. It was contended on behalf of the accused that the Court has described the opinion of the doctor who performed the post mortem

examination. As is disclosed, the cause of death is due to the liquor. Further allegation is about assault on Bhagwan by the petitioners. The statement of witness Janrao is contradictory to the arrest panchanama. Further, it is alleged on behalf of the accused that deceased Bhagwan was prosecuted for the offence punishable u/s 85(1) of the Bombay Prohibition Act and the accused persons are already facing trial u/s 324 of the Indian Penal Code as there was no sufficient evidence against the accused persons u/s 302 of the Indian Penal Code. On behalf of the complainant, it was submitted that the medical certificate issued by Mr. Ghate and post mortem report is manipulated by the accused, and that they have deliberately made fabrications in the Station Diary Register and the documents. False certificate regarding consumption of liquor by Bhagwan is obtained from Medical Officer Dr. Ghate. It was strenuously contended by the petitioners-accused persons that the complainant did not examine all the witnesses cited in the list attached to the case diary, as required u/s 202 of the Criminal Procedure Code and for non-compliance of section 202 of the Criminal Procedure Code, the order of the issue of process is bad in law.

4. The learned Counsel for the petitioners-accused relied upon 1980 Criminal Law Journal 1388, Shyamkant Wamanrao Pawar and others v. State of Maharashtra and others, and the complainant relied upon 1991 Maharashtra Law Journal 673, Gopal Mahadeorao Asarkar and others v. State of Maharashtra and others. The Trial Magistrate has observed that when the complainant lodged the report in the police station, on the report of the complainant, the police made investigation and recorded the statements of all the witnesses cited by the complainant in this case and those statements were on record which were available to accused persons during the trial before the Sessions Court. Therefore, no hardship will be caused to the accused and it was therefore not necessary to record the statements of all the witnesses before passing the order. He has further observed that prima facie evidence has been brought on record that the accused were responsible for the death of Bhagwan and the complainant has made out a prima facie case. Though the prosecution has filed separate charge sheet u/s 324 of the Indian Penal Code, it will be tried along with this complaint for the offence punishable u/s 302 of the Indian Penal Code and therefore, passed an order rejecting the application. Further, as per the provisions of section 210 of the Criminal Procedure Code, this private complaint and State case bearing Regular Criminal Case No. 93/93 will be decided together by Sessions Court. Hence on next date both the cases will be committed to Court of Sessions for trial.

5. The learned Counsel for the petitioners relied on 1980 CLJ 1388 Shyamkant and others v. State and others, 1995 CLJ 2238, Chubby Ekwealcoh v. A.K. Sekar, Asstt. Collector of Customs, Bombay and another), 1995 (1) Crimes 104, Chubby Ekwealcoh Vs. V.A.K. Sekar, Asstt. Collector of Customs, Bombay and another, and relied on the decision reported in 1984 MLJ 168, Hansabai Tukaram Wabhe v. Waman Kondaji Ghogare and others, and dismissed the revision.

6. Shri Mardikar, learned Counsel for the petitioners, has submitted that the

finding of the Sessions Judge regarding cognizance by Magistrate is not correct and as the complainant has not examined all the witnesses, there is non-compliance of the mandatory provisions of section 202 of the Criminal Procedure Code and therefore, the order of issue of process against the petitioners is illegal. He placed reliance on the following decisions : Chubby Ekwealcoh Vs. V.A.K. Sekar, Asstt. Collector of Customs, Bombay and another, , Moideenkutty Haji and Others Vs. Kunhikoya and Others, , AIR 1996 CLJ 622 1984 CLJ 901, Omprakash Shah v. Manmohan Mohanty and another, 1981 CLJ 1558, Bajji v. The State of Madhya Pradesh, 1989 (1) Crimes 94, Mariappa and others v. State and another.

7. Shri Patil, learned Counsel for the respondent No. 2, has relied on the decisions reported in 1991 MLJ 673 , Gopal Mahadeorao Asarkar and others v. State of Maharashtra and others, Sanjay Gandhi Vs. Union of India (UOI) and Others, , and Kewal Krishan Vs. Suraj Bhan and Another, .

8. Chapter XV of the Criminal Procedure Code, 1973 relates to the complaints to Magistrate. Relevant sections of the Code of Criminal Procedure are : Section 200 Cr.P.C. which deals with examination of complaint. Section 202 Cr.P.C. reads as under :

(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 u/s 192 may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceedings :

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 Sessions; or

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

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath.

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

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

Section 203 Cr.P.C. relates to dismissal of complaint.

Chapter XVI of the Criminal Procedure Code relates to commencement of

proceedings before Magistrates. Section 204 Cr.P.C. deals with issue of process which is as under:

"(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate....."

Section 208 Cr.P.C. which deals with supply of copies of statements and documents to accused is as under :

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

(i) the statements recorded u/s 200 or section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded u/s 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely;

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

Section 209 of the Criminal Procedure Code provides for committal of the case. Section 210 Cr.P.C. relates to procedure to be followed when there is a complaint case and police investigation in respect of the same offence, which is as under :

"(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the Investigating police officer u/s 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

9. From the facts as narrated by the Trial Magistrate, it appears that a report u/s 173 of the Criminal Procedure Code was submitted to the Trial Magistrate before the complaint case was filed in respect of the two petitioners-accused and therefore, the statements of witnesses recorded by the police u/s 161 of the Criminal Procedure Code were on the record of Criminal Case No. 93/93. As per section 202(1) of the Code of Criminal Procedure, the Trial Magistrate has the option to 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 proceedings. Proviso to sub-section (2) of section 202 Cr.P.C. leaves no such option to the Trial Magistrate when 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. The submission of the learned Counsel for the applicant is that the Trial Magistrate cannot rely on the statements of witnesses recorded by police which are on record of the said Criminal Case No. 93/ 93 as the Trial Magistrate cannot direct investigation by police in such a case, and therefore, the question that no prejudice is caused to the accused, as observed by the Trial Magistrate and the Sessions Judge, does not come into picture and the Trial Magistrate has no option but to record the statements of all the witnesses as listed in the complaint.

10. The word "shall" used in section 202 of the Criminal Procedure Code is held to be mandatory in the decision in the case of Chubby Ekwealcoh Vs. V.A.K. Sekar, Asstt. Collector of Customs, Bombay and another, , placitum (E) of which reads as under :

"It is necessary to construe the provisions of section 200 harmoniously with section 202 of Criminal P.C. Section 200 is a general one dealing with examination of complainant before taking cognizance. Proviso thereof shows that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses in case the complaint is filed by a public servant or purporting to act in discharge of his official duty. Section 202 deals with postponement of issue of process by learned Magistrate and ordering the investigation or enquiry for satisfying himself prima facie regarding truthfulness of the allegations in the complaint. The discretion is conferred upon the Magistrate who can order investigation or enquiry before taking cognizance of the case. Section 202(1) proviso takes away the discretion of ordering investigation into two cases mentioned in Clauses (a) and (b) thereof. Section 202(2) confers discretion upon the Magistrate to take evidence of witnesses on oath in inquiry. But the discretion is again taken away by proviso where the offence complained of before the Magistrate is triable exclusively by the Court of

Session and the proviso further mandates the Magistrate to call upon the complainant to produce all the witnesses and examine them on oath. It is necessary to confine the phrase "complainant" to a person who is not a public servant mentioned in proviso (a) to section 200. This procedure is not mandatory where the complaint is by public servant. But even in a complaint filed by public servant the Magistrate may exercise discretion as contemplated by section 200(2) in case of doubt regarding allegations and is free to call upon such complainant and his witnesses to state on oath to find out whether there is sufficient ground for proceeding before committing."

In 1987 Ker 184 Moideenkutty Haji and others v. Kunhikoya and others, placitum (E) reads as under :

"It is mandatory that a Magistrate before issuing process to the accused on a complaint disclosing an offence which is exclusively triable by a Court of Session shall call upon the complainant to produce all his witnesses and examine them on oath.

.....In a mandatory enquiry in a complaint case.....the proviso to sub-section (2) says that he shall call upon the complainant to produce all his witnesses and examine them on oath. The proviso to section 202(2) makes it compulsory for him to call upon the complainant to produce all his witnesses and examine them on oath."

It is further observed that formation of the opinion by the Magistrate that there is or is not sufficient ground for proceeding is not the only purpose of such an enquiry. It must also appear to him that the offence is triable exclusively by the Court of Session and in that consideration he has to bear in mind that the case would go out from his Court to be tried by a superior Court, which may not be bound by the opinion formed by him on the basis of available materials that there is sufficient ground for proceeding."

Further, "section 208 gives sufficient indication that the enquiry envisaged in section 202 is mandatory if the offences disclosed are exclusively triable by Court of Session."

In 1984 Maharashtra Law Journal 168 Hausabai Tukaram Wable v. Waman Kondaji Ghogare and others, the placitum reads as under ;

"A Magistrate on receipt of a complaint on examining the complainant u/s 200 of the Criminal Procedure Code found that there was sufficient ground to issue process and straightway ordered the issue of process and as the offence u/s 395, Indian Penal Code was exclusively triable by the Court of Session, committed the case to the Sessions Court. It was contended that in view of the provisions of section 202(2) Proviso, it was incumbent on the Magistrate to have examined all the witnesses.

Held, that taking of cognisance and issuing of process may be simultaneous acts. Unless the Magistrate takes cognisance, he cannot issue process. Once the

Magistrate postpones the issue of process, the provisions of section 202 of the Code of Criminal Procedure start operating. It is only if the Magistrate after examining the complainant does not issue process and postpones the issue of process, in that contingency only the provisions of section 202 are attracted. The proviso to sub-section (2) of section 202 of the Code of Criminal Procedure comes into play only when the Magistrate postpones the issue of process and holds enquiry. As in the present case, he had not postponed the issue of process, the consequent commitment without examining all the witnesses was quite legal and proper."

In the decision reported in 1996 CLJ 622, Avertson Paul Fernandas v. Rabindra A.L. Das and another, the learned Single Judge of this Court, after examining one witness who was present in the Court, had taken cognizance of the offence and as the offence disclosed was triable by the Sessions Court, committed the proceedings to the Sessions Court. A contention was advanced that the plaintiff has not complied with the provisions of section 202 of the Criminal Procedure Code and the learned Judge has held that in the absence of examination of witnesses listed in the complaint, taking cognizance of the offence by the Magistrate is illegal. In the decision in the case of Omprakash Shah v. Manmohan Mohanty and another reported in 1984 Cri.L.J. 901, learned Single Judge of the Kerala High Court has held that no Judicial Magistrate can be entrusted with an inquiry into a complaint under the direction of the Chief Judicial Magistrate, the Sub-Divisional Judicial Magistrate or any other Judicial Magistrate who is empowered to take cognizance of the offence, and of the offences triable exclusively by Court of Sessions. Sub-Divisional Judicial Magistrate directing inquiry to be held by Judicial Magistrate, First Class - Also not calling upon complainant to produce and examine his witness, issuing process on basis of inquiry report - Order issuing process, illegal.

11. The learned Counsel for the petitioners further relied on the decision reported in 1989 (1) Crimes 94 Mariappa and others v. State and another which deals with an important point that when the accused concerned in the case instituted on the police report and on the private complaint are one and the same and where the offences alleged in the complaint are exclusively triable by a Court of Sessions, the process has to be issued only after recording of the statement of all the witnesses cited and such other witnesses whose evidence is considered relevant in the case.

When the private complaint is u/s 302 read with 34 of the Indian Penal Code and the police report is about offence u/s 498-A I.P.C., the Trial Magistrate, taking cognizance of the offence on the private complaint, proceeded to record sworn statement of the complainant and four witnesses and directed issue of process. In para (5) of the said decision, it is observed :

".....Having regard to what has been stated in sub-section (2) of section 210, it is only in cases where the Magistrate has already taken cognizance on the police report against the same persons and for the same offence or offences triable by

himself, it may be permissible for the Magistrate merely to file the complaint in the case instituted on police report, but where the offence alleged are different or against different persons or when the offences tried to be made out in the complaint case are exclusively triable by the Court of Sessions and those mentioned in the report are triable by the Magistrate, such a course will not be permissible. To do so, would be to ignore the allegations made in the complaint."

It is further observed that the Trial Magistrate has to record the evidence of all the witnesses cited in the complaint and of such others considered relevant and necessary and then issue process to the accused. In 1991 Maharashtra Law Journal 673 Gopal Mahadeorao Asarkar and others v. State of Maharashtra and others, the learned Single Judge of this Court that there was no eventuality to examine all the witnesses. Head note (a) reads as under :

"Trial Court examining the complainant and eight other witnesses from a list of twenty witnesses before issuing process against accused - Accused challenging order issuing process on the ground that all witnesses were not examined by the complainant and there was breach of section 202(2) Proviso -No eventuality arose showing that complainant wanted to examine witness other than those who had been examined before the Trial Court- It is possible that the complainant having examined 9 witnesses may have given up the rest - It could not in the circumstances be held that the Magistrate had not examined all the witnesses as required by section 202(2) of the Code."

Reliance was also placed on the decision reported in AIR 1980 SC 1880 Kewal Krishan v. Suraj Bhan and another, placitum (A) of which reads as under :

"Where two cases exclusively triable by the Court of Session, one instituted as a police report u/s 173, Cr.P.C. and other initiated on a criminal complaint, arise out of the same transaction, if the two cases are tried by two different courts, there is a risk of two courts coming to conflicting findings. To obviate such a risk, it is ordinarily desirable that the two cases should be tried separately but by the same Court."

In placitum (B) it is observed :

"At the stage of sections 203 and 204, in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under sections 200 and 202, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges."

12. Section 210(1) Cr.P.C. is not applicable in the instant case as the report u/s 173 Cr.P.C. for the offence punishable u/s 324 read with 34 of the Indian Penal

Code was already submitted to the Trial Magistrate. Sub-section (2) of section 210 Cr.P.C. provides that the Magistrate shall enquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report and, therefore, if it appears to the Magistrate that the offence complained of is exclusively triable by the Sessions Court, which he cannot try, he has to commit the case as per section 209 of Cr.P.C. In view of this provision, the complaint case merges into the police report.

13. There is a concurrent finding by both the courts below that there is prima facie case and there is sufficient material to commit the case. The facts, as presented, reveal that there is no direct evidence of murder. The statements reveal that the accused persons have assaulted deceased Bhagwan and taken him to Police Station, Murtizapur and thereafter, he died. Therefore, the statements of witnesses who have seen the assault on deceased Bhagwan by the petitioner are already on record of State Case No. 93 of 1993. Both the courts below have held that the statements of witnesses which are listed in the complaint case are on record and no prejudice would be caused to the accused. The purpose of examining all the witnesses is to bring sufficient material on record, as the Trial Magistrate cannot try the matter, to have on record sufficient material to be considered by the Sessions Judge for framing the charge. Relying on the decision reported in 1991 MLJ 673 Gopal Mahadeorao Asarkar and others v. State of Maharashtra and others, in my view, both the courts below have rightly and properly considered the material on record, in compliance of the proviso to sub-section (2) of section 202 of the Criminal Procedure Code. There is no illegality or error committed.

14. In the result, the instant criminal writ petition is dismissed.

15. Petition dismissed.