
(2011) 08 PAT CK 0058

In the Patna High Court

Case No : Criminal Revision No. 55 of 2006

Jyotish Prasad Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Citation : (2011) 08 PAT CK 0058

Final Decision : Allowed

Judgement

Amaresh Kumar Lal, J.—The informant Petitioner has preferred this revision application against the order dated 22nd November 2005 passed by learned Additional Sessions Judge, F.T.C. III, Bhagalpur in Cr. Revision No. 410 of 2002 by which the order dated 31st August 2002 passed by learned Chief Judicial Magistrate, Banka in complaint case No. 790 of 2002 has been set aside and the learned Magistrate has been directed to examine Yogendra Das, a witness to the occurrence.

2. The prosecution case, in brief, is that on 27.6.2001 at about 7 a.m., the informant after getting information that some people were quarrelling with his father at the field, he and others went to the field and found that his father, Sadanand Singh (deceased) was lying dead in the field, his neck and head had cut injury and huge amount of blood was lying there. On enquiry, the informant could learn that while Yogendra Das was ploughing the field and his father was sitting on the ridge of the field, 5-6 miscreants came there and quarrelled with his father and by sharp cutting weapons his neck and head was injured and he was killed by them. On the fard beyan, Banka P. S. Case No. 194 of 2001 was instituted. After investigation, the police submitted final form as the occurrence true and the accusation false against the accused. The protest petition was filed in that case which was numbered as complaint case No. 790 of 2002. Learned Magistrate proceeded with the complaint and after enquiry and examination of five witnesses the learned Chief Judicial Magistrate, Banka found a prima facie case to be true under Sections 302/34 and 120B I.P.C. against the accused,

opposite party Nos. 2 to 5. Opposite party Nos. 2 and 3, Rajendra Mandal and Prakash Mandal respectively, preferred Cr. Revision No. 410 of 2002 against the aforesaid order dated 31.8.2002. The revision application was heard by learned Additional Sessions Judge, who had passed the impugned order setting aside the order dated 31.8.2002 and the case was remanded to the learned Magistrate to follow the direction of Hon^{ble} Supreme Court reported in 1998 SCC (Cr.) 1400 and to examine Yogendra Das and, thereafter, pass order either u/s 203 or 204 of Code of Criminal Procedure

3. Learned Counsel for the Petitioner has submitted that the informant-complainant has already examined five witnesses out of them E. W. 1, Brajesh Kumar Singh, E. W.2, Siya Ram Singh, E.W. 3, B. N. Singh are the eye witnesses to the occurrence and they have specifically stated that they saw the commission of the occurrence stating therein that Yogendra Das had gone out of State and he is not available and he cannot be examined in this case.

4. Learned Counsel for the Petitioner has further submitted that Additional Sessions Judge cannot force the examination of a particular witness, if he is not available and on this ground the cognizance order cannot be set aside. In support of his contention, he has referred the decisions: in the case of Daroga Choudhary and Others Vs. Kunti Baitha and Another, and in the case of Shivjee Singh Vs. Nagendra Tiwary and Others, In Daroga Choudhary's case, it has been held that u/s 202(2) Code of Criminal Procedure the only requirement of law is that the Magistrate has to call upon the complainant to produce all his witnesses and examine them on oath, if so produced. If the complainant fails to produce some of his witnesses, that will not vitiate the order of learned Magistrate and the High Court cannot substitute its own discretion and the order of the Magistrate should not be disturbed. In Shivjee Singh's case (supra), it has also been held that in Section 202(2) proviso and Sections 200 to 210, 226, 227 and 465 of the Code of Criminal Procedure., the effect of word "shall" occurring in Section 202(2) proviso is prima facie indicative of mandatory character. However, non-examination of any or some of the witnesses cited by the complainant is by itself not sufficient to denude Magistrate of jurisdiction to take cognizance and issue process provided he is satisfied that prima facie case is made out for doing so. The word "all" appearing in Section 202(2) proviso is qualified by the word "his" which implies that complainant is not bound to examine all witnesses named in the complaint or whose names are disclosed in repose to the order passed by the Magistrate. Only those witnesses are required to be examined whom the complainant considers material to make out prima facie case for issuance of process. It has further been held that choice being of complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at trial and not at the stage of issuing process, when Magistrate is not required to enter into details discussions on merits of the case. The Magistrate has only to see whether there exists sufficient ground for proceeding against accused.

5. Learned Counsel for the opposite party Nos. 2 to 5 has submitted that Yogendra Das was an eye witness to the occurrence and he was supposed to be examined by the complainant. He has further submitted that by the impugned order the Additional Sessions Judge has not gone to examine the merit of the case, only he had asked the Petitioner to examine Yogendra Das and it is open to the learned Chief Judicial Magistrate to pass order in accordance with law.

6. After hearing learned Counsel for both the parties and on perusal of the record it appears that Yogendra Das was one of the witnesses in the occurrence. The complainant- Petitioner has examined altogether five witnesses. The complainant has already filed the petition before the learned Magistrate that he is unable to examine the witness, Yogendra Das, who was not available. After examination and enquiry learned Chief Judicial Magistrate has found a prima facie case against four accused, opposite party Nos. 2 to 5 for the offence punishable under Sections 302/34, 120B I.P.C. vide order dated 31.8.2002, against this order opposite party No. 2, Rajendra Mandal and opposite party No. 3, Prakash Mandal filed Cr. Revision No. 410 of 2002 in the court of learned Sessions Judge, Bhagalpur. Later on, the case was transferred to the court of Additional Sessions Judge, FTC III, Bhagalpur who has set aside the aforesaid order dated 31.8.2002 passed by learned Chief Judicial Magistrate in Complaint Case No. 790 of 2002 on the ground that all the witnesses have not been examined and learned Magistrate was directed to follow the direction of Hon^{ble} Supreme Court given in the decision reported in 1998 SCC (Cr.) 1400 and to examine Yogendra Das and thereafter pass an order either u/s 203 or 204 Code of Criminal Procedure

7. Considering the facts and circumstances of the case and in view of the decisions; in the case of Daroga Choudhary (supra) and in the case of Shivjee Singh (supra), the impugned order is not fit to be sustained. The impugned order is set aside. The order dated 31.8.2002 passed by learned Chief Judicial Magistrate, Banka in Complaint Case No. 790 of 2002 is restored. Learned Magistrate will proceed with the case in accordance with law.

8. In the result, this revision application is allowed.