
(1979) 03 KL CK 0019
In the High Court Of Kerala

Kaimala Bhargavi Amma

APPELLANT

Vs

Kundumadathil Ravindran Nair and Others

RESPONDENT

Date of Decision : 09-03-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 203, 226, 227

Citation : (1979) CriLJ 1279 : (1979) 1 ILR (Ker) 610

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J;V. Balakrishna Eradi, J;George Abraham Vadakkal, J

Bench : Full Bench

Judgement

1. The petitioner in Cri. R. P. No. 167 of 1977 is the wife of the 1st petitioner in Cri. R. P. No. 183 of 1977. The other petitioner in Cri. R. p. No. 183 of 1977 is the son of the 1st petitioner therein. The petitioner in Cri. R. P. No. 167 of 1977 filed a complaint before the Chief Judicial Magistrate, Manjeri. After recording her statement, but not of any witness, presumably because none was present, the Magistrate issued process. He then transferred the case to the IInd Class Magistrate, Malappuram. The accused were summoned before that court. That court committed the case to the Court of Session, Manjeri. The Sessions Court discharged the accused u/s 227 of the Code of Criminal Procedure, 1973 as but for "the bald allegations in the complaint and the complainants" interested sworn statement there is nothing on record to show that the accused have committed the offences alleged". The father and son, the petitioners in Cri. R. P. No. 183 of 1977, are the accused in a complaint in respect of the same transaction, delivery of immovable property pursuant to a partition decree, filed by one of the accused in the other case an Amin attached to the District Court, Manjeri. Since that case relates to offences not exclusively triable by a Sessions Court, the Sessions Court, transferred the same to the Chief Judicial Magistrate, Manjeri.

2. Our learned brother Poti J. doubting the correctness of the Division Bench decision of this Court in Sulaiman v. Eachara Warriar 1978 KLT 424 has referred these cases for decision by a larger Bench, and thus these cases are before us.

That decision takes the view that it is not obligatory upon a Magistrate, on receipt of a complaint, to adopt the course open to him u/s 202 of the Code, and it is only if he decides upon that course and further, to hold an inquiry as envisaged thereunder that he need call upon the complainant to produce all his witnesses and examine them on oath even if the complaint discloses an offence triable exclusively by a Court of Session. It is stated in the reference order that in cases where the complaint discloses an offence triable exclusively by a Sessions Court, if the Magistrate does not hold an inquiry by calling upon the complainant to produce all his witnesses and examining them, or does not direct an investigation to be made by a police officer or by such other person as the Magistrate thinks fit, the Public Prosecutor who is to open the case before the Sessions Court would not be in a position to say what evidence he proposes to let in to sustain the charge.

3. The scheme of the Code, as was of the old Code, is that the Magistrate is required to issue process only on his being satisfied of a prima facie case for the complainant. So, Section 200 thereof, as did Section 200 of the old Code, provides that he shall examine upon oath the complainant and the witnesses present, and Section 202, like Section 202 of the old Code, enables him, "if he thinks fit", to postpone issue of process, so that he may inquire into the case himself or direct an investigation by a police officer or by such other person as he thinks fit, for deciding whether a prima facie case exists for issue of process. At this stage, preparatory to issue of process and in order to determine whether process should be issued or not, the accused has no locus standi, and it is for the complainant to make out a prima facie case for issue of process, by producing witnesses for examination on oath by the Magistrate who is bound to examine such witnesses as are present. Further, the Magistrate, in his discretion, may, at this stage, hold an inquiry into the case himself or cause the same to be investigated by a police officer or by such other person as he thinks fit in order to decide whether process should be issued or not. As in the matter of any discretionary jurisdiction vested in a court, it would not be proper to lay down any hard and fast rule as to when such discretion is to be exercised; nor is it possible or feasible. It is for the Magistrate to decide as to whether he should postpone the issue of process, and if he so decides, as to whether he should himself inquire into the case or direct an investigation; and further, if he is to direct an investigation, who should investigate, a police officer, or if not a police officer, which other person. May be the complainant is entitled to invoke the discretionary jurisdiction, and the revisional court may be competent to examine as to whether in any case the discretionary jurisdiction vested in the Magistrate as aforesaid has been rightly exercised or improperly refused to be exercised, but nonetheless the jurisdiction u/s 202 of the Code is a discretionary one to be exercised by the Magistrate depending upon the facts and circumstances of each case. So no rule of general application with reference to any class of complaints, for example, complaints involving offences exclusively triable by a Court of Session, as regards even the desirability of the Magistrate holding an inquiry into

the case himself or directing an investigation into it by a police officer or other officer can be laid down.

4. On a plain reading of the proviso that occurs after Sub-section (2) of Section 202, it does not control and govern Sub-section (1) of Section 202, for it does not require the Magistrate to inquire into the case himself when it appears to him that the offence complained of is triable exclusively by the Court of Session, but only requires him to call upon the complainant to produce all his witnesses and examine them on oath when it appears to him as aforesaid, in an inquiry into the case himself. If he holds an inquiry into the case himself. Sub-section (2) confers on him a further discretion to take evidence of witnesses on oath, and the proviso makes it obligatory on him to call upon the complainant to produce all witnesses and examine them on oath in such a case.

5. Under the present Code, if the Magistrate issues process, and the case is one triable exclusively by the Court of Session, he has to commit the case to the Court of Session, when the accused appears or is brought before him. The Magistrate can now only dismiss the complaint for the reason that no prima facie case has been made out (Section 203), and cannot hold any preliminary enquiry preparatory to committing the case to the Court of Session, and consequently cannot, after issue of process, discharge the accused without passing an order committing the accused for trial by the Court of Session. Therefore, the complainant has, after issue of process no opportunity to adduce any evidence before the Magistrate, nor has the accused, as he had u/s 208 of the old Code, the opportunity to cross-examine the witnesses for prosecution and to adduce evidence on his (accused's) behalf. In short if the complainant makes out a prima facie case involving an offence exclusively triable by a Court of Session, the Magistrate has to commit the case to the Court of Session after issuing process.

6. u/s 226 of the Code the prosecutor has to open the case stating on what evidence he proposes to prove the guilt of the accused; and u/s 227 thereof if on a consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused. Where no witness is present, when the complainant is examined by the Magistrate, the only material that can be relied on by the Public Prosecutor when he opens the case would be the complaint and the complainant's sworn statement, unless the Magistrate, in his discretion, postpones the issue of process and either inquires into the case himself or directs an investigation to be made by a police officer or by such other person as he thinks fit. In view of this, is the proviso that occurs after Sub-section (2) of Section 202, to be read as a proviso to the whole of Section 202 is the question that is referred to us.

7. We feel that it is not necessary to "decide the above question, so far as the case on hand is concerned. The 1st accused mentioned in the complaint filed Cri.

M.P. No. 502 of 1975 in this Court u/s 482 of the Code, for quashing the complaint, and in disposing of this application by order dated 17-2-1976 this Court advertent to the request made on his behalf that "the Magistrate might be asked to hold an inquiry or direct an inquiry to be made by the police" said:

Apart from other grounds, such a course is excluded at this stage as the Magistrate has already taken cognizance of the complaint and issued process.

Thereafter the 28th accused filed Cri. M.P. No. 766 of 1976 before this Court u/s 482 of the Code to quash the proceedings before the Magistrate. He also raised the contention that the Magistrate did not comply with the provisions of Section 202 of the Code and advertent to this contention this Court said:

The non-compliance with the provisions contained in Section 202 Cr. P.C. was the subject-matter of an earlier Cri. M.P. No. 502 of 1975. This Court as per its order dated 17th February, 1976 held that the objection based on Section-202 Cr. P.C. was not available for the petitioner, inasmuch as the Magistrate had taken cognizance of the offence and had also issued process. In view of the said order, the petitioner cannot urge the same ground again in this petition.

With respect, we are in agreement with what is stated in Cri. M.P. No. 502 of 1976 by our learned brother, Balagangadharan Nair, J. and reiterated by our learned brother Khalid J. in Cri. M.P. No. 766 of 1976, that after issuing process, the Magistrate cannot, under the present Code, hold any inquiry as contemplated by Section 202 of the Code, and that once process is issued, the Magistrate can only, where it appears to him that the offence is triable exclusively by the Court of Session, commit the case to the Court of Session. The Magistrate committed the case to the Court of Session, and in view of that order, the accused are entitled to seek their discharge u/s 227 of the Code, and the Sessions Court is bound to discharge them if the Judge considers that there is no sufficient ground for proceeding against the accused. That is what has been done in this case. We have not been persuaded to hold that on the facts there exists sufficient ground for proceeding against the accused.

8. The order under revision in Cri. R. P. No. 183 of 1977 is one transferring a case to the Chief Judicial Magistrate u/s 228 of the Code and does not call for any interference.

We dismiss both the revision petitions.