

(1989) 04 AHC CK 0006

In the Allahabad High Court

Case No : Criminal Revision No's. 1058, 1130 and 1755 of 1988

Kallo alias Kalika

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 12-04-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 190(1), 192, 200, 202
Customs Act, 1962 — Section 11
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10, 19, 20, 21, 23

Citation : (1989) 2 AWC 1222

Hon'ble Judges : K.K. Birla, J

Bench : Single Bench

Advocate : Keshav Sahai, for the Appellant; S.P. Malviya and Shirish Chandra, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Birla, J.—These are three connected Cr. revisions. Criminal Revision No. 1058 of 1988 and Cr. Revision No. 1130 of 1988 arise out of the order dated 19-5-1988 passed by the Chief Judicial Magistrate, Varghese, while Criminal Revision No. 1755 of 1988 arises out of the order dated 5-9-1988 passed by the Chief Judicial Magistrate, Varanasi. As the common question arises in all these three revisions, they are being disposed of by this common order.

2. In brief, an Intelligence Officer of Narcotics Control Bureau, Government of India at Varanasi along with his staff raided the premises H. No. 35/31 Audhgarbi, Varanasi on 28-5-1987. Three kilograms of imported Ganja of Nepal origin and incriminating documents were recovered. Ghannoo Lal in Criminal Revision No. 1130 of 1988 and Jagdish son of Kalloo alias Kalika Sao in Criminal Revision No. 1058 of 1988 were in the premises at the time of the raid. According to the prosecution, the premises are alleged in the occupation and control of Kalloo revisionist. After obtaining report from the Chemical Examiner the complaint dated 27-8-1987 was filed under Sections 8/20/23/25 Narcotics

Drugs & Psychotropic Substances Act, 1985 read with Section 11 of the Customs Act, by the Intelligence Officer of Narcotics Control Bureau, Government of India, Varanasi.

3. A raid was made on the same premises on 30-10-1987. Some Opium and Ganja etc. were recovered from the custody and control of Jai Prakash and others regarding which complaint against Jai Prakash and four others including Kalika and Chottey Lal was filed for the offences under Sections 8/10/20/23/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 read with Section 11 of the Customs Act. In the first case the summoning order was passed on 19-5-1988 regarding which Criminal Revision Nos. 1058 and 1130 of 1988 have been preferred, and summoning order was passed by Chief Judicial Magistrate in the other case on 5-3-1988 regarding which Chhotey Lal has preferred Criminal Revision No. 1755 of 1988.

4. Counter affidavit and rejoinder affidavit have been exchanged in the cases and the cases have been heard on merits at the admission stage itself and are being disposed of finally. In Criminal Revision No. 1058 of 1988 and Criminal Revision No. 1755 of 1988 the Petitioners were represented by the Learned Counsel while none appeared on behalf of the Petitioner Channoo Lal in Criminal Revision No. 1130 of 1988.

5. In these cases the complaint was filed by the Intelligence Officer of Narcotics Control Bureau, Government of India, Varanasi, a public servant, which was accompanied by papers, and the Chief Judicial Magistrate, Varanasi, straightway summonsed the accused by the impugned orders. These summoning orders have been challenged.

6. The main contention by the Learned Counsel for the revisionists is that the Magistrate ought to have held an inquiry as provided u/s 202 of the Code of Criminal Procedure (hereinafter referred to as the Code), it amounts to an illegality, that the offences for which the Petitioners have been summoned are triable exclusively by the court of session and are serious offences and therefore holding of the inquiry was mandatory and its absence has adversely affected the Petitioners and as such the impugned order is liable to be set aside. On the other hand, the contention on behalf of Union of India representing the Intelligence Officer of Narcotics Control Bureau, Government of India, Varanasi, (hereinafter referred to as opposite parties) is that no such inquiry was necessary and the Chief Judicial Magistrate has not committed any illegality. It was also contended on behalf of the opposite parties that the scope of the revision is limited, the order passed by the Chief Judicial Magistrate is within its jurisdiction and as such these revisions are not maintainable. Both the parties have relied upon and referred some cases. It has further been contended by the Learned Counsel for the Petitioners that as inconsistent views have been taken by the High Courts and the matter is of general importance, the case should be referred to the larger Bench. I have been taken in detail through the relevant provisions of the Code and the observations made in several cases.

7. As regards the maintainability of the revisions, as mentioned above, it has been contended by the Learned Counsel for the Petitioners that it was obligatory on the part of the Chief Judicial Magistrate to hold an inquiry u/s 202 of the Code, such inquiry has not been held and therefore necessary procedure to be adopted before summoning the revisionists had not been followed. If this contention is found to be correct, the Petitioners have certainly the right to file the revisions against the impugned orders. The correctness, legality or propriety of any finding, sentence or order and even regularity of any proceedings can be looked into by this Court u/s 397 of the Code. Therefore, the present case is clearly covered under 397 of the Code and the revisions cannot be dismissed on this ground. It is a different matter whether this Court agrees with the contentions advanced on behalf of the revisionists or not.

8. In order to appreciate the controversy in question relevant provisions of the Code may be given:

Chapter XV--Complaints to Magistrates.

200. Examination of complainant--A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that when the complaint is made in writing the Magistrate need not examine the complainant and the witnesses--

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b)...

201....

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 of 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 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 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)....

203. Dismissal of complaint--If, after considering the statement on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Chapter XVI--Commencement of proceedings before Magistrates.

204. Issue of process--(I If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be... .

9. As already mentioned above, in the present cases complaints have been preferred before the Magistrate and the provisions of Chapter XV will be attracted. u/s 200 the normal provision is for examining upon oath the complainant and the witnesses present. But under the first Proviso of this Section the Magistrate need not follow this procedure if the complaint has been made by public servant acting or purporting to act in the discharge of his official duties. In the instant case complaint has been filed by the Intelligence Officer of Narcotics Control Bureau, Govt. of India at Varanasi, therefore, it was not necessary for the Magistrate to examine the complainant or any witnesses under this Section. The contention of the Learned Counsel for the Petitioners is that as the inquiry is contemplated u/s 202 of the Code this provision will be subject to those provisions contained in Section 202 of the Code and, therefore, the Magistrate ought to have examined the complainants and witnesses.

10. The main and short question for consideration in these revisions, therefore, is whether it is mandatory for the Magistrate to hold an inquiry as contemplated u/s 202 of the Code and the case is exclusively triable by the court of session, even if the complaint has been made by a public servant acting or purporting to act in the discharge of his official duties.

11. u/s 202(1) of the Code after the receipt of the complaint, if the Magistrate thinks fit, he may postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer. Further provisions already quoted above clearly go to show that in case the case is exclusively triable by the court of session no direction may be given for investigation to be made by the police and in those cases what may be done by the Magistrate is to hold inquiry and procedure is to be followed as given in Section 202(2) of the Code.

12. The contention of the Learned Counsel for the revisionists is that as the

offences are serious and exclusively triable by the court of session, the inquiry must be made by the Magistrate and in such cases the view should be taken that it is not open to the Magistrate not to hold inquiry. The reasons given for this contention are that the case of complainant stands on a different footing than the case of police report in which police submits its report after holding an investigation in which the witnesses are also examined. It is contended that the copies of the statements of those witnesses and the material collected by the police become available to the accused as provided u/s 207 and as such the accused is not prejudiced while if in a case of complaint where the inquiry is being held by the Magistrate the statements of these witnesses and the other material will be available to the accused u/s 208 of the Code and he will not be prejudiced. On the other hand if no such inquiry is held and the accused are summoned on the basis of the complaint of the public servant only, such material will not be available to the accused and he will not be able to know the evidence which is likely to be adduced against him and this will prejudice him. It is contended that it is for these reasons provisions of Sections 200 and 202 of the Code should be read together and interpreted in this manner. On the other hand it is contended on behalf of the opposite parties that Section 202(1) of the Code itself leaves discretion to the Magistrate either to take cognizance at once after the stage of Section 200 of the Code is over or to hold an inquiry or direct the investigation as the case may be. Therefore, the Magistrate does not commit any illegality or irregularity in not directing any inquiry and such order is perfectly justified. It is also contended that in such cases too the complaint is being filed after collection of the material and as such the accused is not at all prejudiced. It has also been contended by the Learned Counsel for the opposite parties that in similar cases a criminal revision has been dismissed by this Court. Kalika alias Kalloo Sao filed a Criminal Revision No 1447 of 1988 against the summoning order arisen in case No. 700 of 1988. This case was rejected at the admission stage itself by Hon. P.S. Gupta, J. by his order dated 5-10-1988. No reasons were given. An application No. 4959 of 1988 Babu Ram v. State of U.P. and Anr. was preferred in a case u/s 19 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). This application was also dismissed by Hon''ble G. Malviya, J. by an order dated 18-7-1988 relying on the case of v. Srinivasan Supdt Directorate of Revenue Intelligence, New Delhi v. Kishore Deo Mukherji and another reported in 1987 EFR 240. On the other hand the Learned Counsel on behalf of the Petitioners has contended that in these cases the grounds raised by him earlier were not considered and Delhi case does not lay down the correct law and therefore it is necessary to refer the case to the larger Bench. The following cases have also been referred in support of his contention: (1) Ramchander Rao and Others Vs. Boina Ramchander and Another, , (2) Bajji v. State of M.P. 1981 CriLJ 1558 , (3) Smt. Anisa and Another Vs. Banne Khan, , (4) M.G. Pillal v. T. Pillal 1983 CriLJ 917.

13. In the case of v. Srinivasan, Supdt. Directorate of Revenue Intelligence New Delhi v. Kishore Deo Mukherji (supra) the Magistrate had issued process to the

accused for the offences under Sections 21 and 29(1) of the Act. The revision was allowed by the Additional Sessions Judge against which a revision preferred by the Superintendent Directorate of Revenue Intelligence, New Delhi was allowed by the Delhi High Court. The order of the Magistrate issuing a process immediately against the accused persons and not postponing the issuance of the same was maintained. Therefore, it was found that the stage of the applicability of Section 202(2) did not arise. Learned Counsel for the opposite parties has also relied on the case of Abdul Haraid Khan Pathan v. State of Gujarat 1987 EFR 709. The point involved in that case was whether while holding an inquiry u/s 202(2) of the Code is it mandatory for the Magistrate to call upon the complainant to produce all his witnesses and examine them. On this point it was held that it was not necessary to examine all the witnesses. Therefore, the point involved in that case was different. Some observations were relied upon.

14. In the case of Smt. Anisa v. Banne Khan (supra) again the point involved was that in an inquiry u/s 202(2) whether all the witnesses should be examined and it has been held that all of them should be examined. This case is, therefore, inapplicable to the revisions before me. If it is mandatory for the Magistrate to hold an inquiry u/s 202 of the Code in the case as is before me, certainly non holding of such inquiry will vitiate the summoning order. Therefore the principles laid down in these cases are of no avail.

15. In the case of Ram Chander Rao v. Boina Ram Chander (supra) FIR was filed against 29 persons. The charge-sheet was submitted against 19 persons. A private complaint was filed against all the 29 persons. In this case too an inquiry u/s 202 of the Code was held by the Magistrate. Some of the witnesses mentioned in the list were examined in that inquiry and it was held that it was mandatory to examine all the witnesses. Reliance has been placed by the Learned Counsel for the Petitioners on the observations made thereunder:

But the proviso to Section 202(2), Code of Criminal Procedure makes it clear that if the offence complained of is triable exclusively by a Court of Session he shall examine all the witnesses on oath. In our opinion the language of the proviso is clear and unambiguous, Where the case is one triable exclusively by a Court of Session under the proviso to Clause. (2) of Section 202, it is mandatory on the part of the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath. The word used is "all" and "all" does not mean "some". He has to perform the statutory functions before issuing process in connection with the offences triable by a Court of Session. Though the committal proceedings as contemplated by the old Code have been abolished, Section 202 evolved a new procedure of examination of the witnesses. The examination of the witnesses is not a mere formality. This provision has been incorporated in the Code so that the accused has full information about the allegations about him and to enable him to prepare for his defence. We are of the view that the Section while on one hand is intended to restrain the Magistrate from refusing to take cognizance of the offence after examining only some witnesses it is also intended

to give a fair and reasonable opportunity to the accused to get adequate information about the charge against him to prepare his defence. Section 208 casts a duty on the Magistrate to furnish the accused free of cost with copies of all the statements of witnesses, examined by him. This provision is of great importance not only to the complainant but also to the accused. The object and the context in which the words "the Magistrate shall examine all witnesses" appear (make it clear) that it is a mandatory provision which must be complied with. In a private complaint contemplated by Section 202(2) the accused will not be in a position to point out any contradictions when they give evidence in the Court of Session. The accused can cross-examine the witnesses with regard to their earlier statements in the court of the Magistrate, and point out the contradictions. It is no doubt true that the accused does not come into the picture in the committal Court. After the process is issued the accused appears and the case is made over to the Court of Session. Though he may not have a right in the Court of the Magistrate he has certainly a right to cross-examine the witnesses in the Sessions Court with reference to the statements made by them earlier in Court of a Magistrate and therefore it cannot be said the accused is not prejudiced at that stage. After the process is issued the accused has a right to complain that the mandatory provisions of Section 202(2) of the Code of Criminal Procedure have not been complied with. It may be pointed here that it was a case of complaint by private person.

16. The case of M.G. Pillal v. T. Pillal (supra) is also a case u/s 202(2) of the Code in which it had been held that the Magistrate is bound to call upon the complainant to produce all witnesses and examine them. Certain observations made in this case have been relied on by the Learned Counsel for the Petitioners in support of his contention that an inquiry as contemplated u/s 202(2) of the Code ought to have been made.

17. I have considered the various contentions of the Learned Counsel for the parties and I am of the view that it was not mandatory for the Magistrate to hold an inquiry in these cases.

18. The complaints coming before the Magistrates may be divided in two categories, (1) the complaints made by the private persons and (2) by the public servant acting or purporting to act in discharge of his official duties or the court. The code rightly provides for the different treatment to these categories of the complaints. In cases of first information report, a preliminary inquiry known as investigation for the purpose of collection of evidence and material, is done by the police- Then either a final report is submitted or a charge-sheet is submitted. This report is mentioned as a police report u/s 190(1)(b). The Magistrate may take cognizance on the basis of a police report as given u/s 190(1)(b). This procedure is to ensure that vexatious reports may not be allowed to lead to the trial resulting in unnecessary harassment to others. In case of complaints the Magistrate is also required to have some prima facie satisfaction that the case is fit for proceeding for trial. It is with this object that the complainant and the

witnesses present are to be examined u/s 200 of the Code. The Court will not file any vexatious complaint. So is expected from a public servant while discharging his official duties and as such need of such examination has been dispensed with in the Code itself in the first proviso (a) to Section 200 Code of Criminal Procedure u/s 202(1) if the Magistrate is satisfied by the statements of the complainant and the witnesses recorded u/s 200 of the Code, the cognizance can be taken by him straightway. He is to postpone the issuance of the process only if he thinks fit. This clearly shows that if subjective satisfaction has been arrived at by the Magistrate at the stage of proceedings u/s 200 of the Code, he need not postpone the issue of process. Therefore, the more relevant point whether the cognizance should be taken or not is after the stage of Section 200 of the Code is over. It is only in those cases where the Magistrate thinks proper that cognizance should not be immediately taken, he may proceed farther and this may be done either by inquiring the matter by himself or directing the investigation by the police. Section 200(1) itself lays down that enquiry or investigation is for the purpose of deciding whether there is sufficient ground for proceeding. This shows that if after the procedure of Section 200 Code of Criminal Procedure the Magistrate is unable to make up his mind clearly in this regard, he should postpone the issue of process and should hold an enquiry or direct an investigation. In that event the procedure provided in Section 202 of the Code has to be followed by him. The intention of the framers of the law is quite evident from these provisions. Therefore, I am in agreement with the principles laid down in the above cited case of T. Srinivasan (supra) and relied on by Hon"ble G. Malviya, J.

19. The question whether in the cases exclusively triable by the court of Session the Magistrate is bound to ask the complainant to produce all his witnesses and to examine them will only arise after the Magistrate considers fit to postpone the issue of the process and decide to hold an inquiry in the matter. If the Magistrate is already satisfied and decides to take cognizance of the matter straightway and to issue process u/s 204 Code of Criminal Procedure that stage will not reach. As pointed earlier this discretion of the Magistrate of taking cognizance without postponing the issue of process is perfectly legal and within the ambit of the provisions of Chapter XV mentioned above. Even if two opinions may be possible, the revisional court could not substitute its opinion or discretion and the revisions shall have to be dismissed as the scope of the revisional jurisdiction is limited.

20. It has been contended by the Learned Counsel for the Petitioners that under old Code the witnesses were examined before the Magistrate during the committal proceedings u/s 209. That procedure has been deleted in the new Code and an inquiry has been provided u/s 202 of the Code. It is, therefore, contended that it is a must for the Magistrate to hold such inquiry. I am of the opinion this contention cannot be accepted and in view of the discussion of the provisions already made it is clear that the discretion has been left to the Magistrate in this regard.

21. Even in the case of M.G. Pillal (supra) relied on by the Learned Counsel for the Petitioners, it has been observed:

As the procedural law relating to the cases inclusive of cases triable exclusively by the Court of Session--stands, the Magistrate taking cognizance of an offence on a complaint after compliance with Section 200 can straightway either dismiss the complaint u/s 203 if there is no sufficient ground for proceeding or issue process to the accused u/s 204 if in the opinion of the Magistrate, there is sufficient ground for proceeding without holding an inquiry or investigation as contemplated u/s 20. Therefore, an order of committal passed u/s 209 by the Magistrate taking cognizance of an offence under 200 and thereafter straightway issuing process u/s 204, is a valid committal order and that committal order cannot be challenged as illegal on the ground that the Magistrate has not availed of an inquiry u/s 202.

It is also further observed:

In view of abolition of the committal inquiry under the new Code this course of resorting to an inquiry under the proviso to Section 202(2) in cases triable exclusively by the Court of Session is always desirable, though not mandatory and thereafter the Court shall issue the process... .

22. The case of Bajji (supra) too is not of much help to the Petitioners. In that case a report after investigation was filed by the police officer with regard to a non-cognizable offence. Under the law this should have been treated as a complaint u/s 190(a), but was wrongly treated as a police report u/s 190(b) Code of Criminal Procedure. It was under these circumstances that commitment proceedings and part trial of the session case was vitiated. No doubt in this case it is observed that the procedure of Section 202(2) should have been followed. But as pointed earlier in fact the point involved in the instant case was not considered there.

23. Now as regards the question of prejudice to the accused, the summoning order shows that besides the complaint, papers were also filed along with the complaint. The copy of the recovery memo had been given to the accused. The photostat copies of the statements recorded by the Department have also been filed along with the counter-affidavit. Therefore, besides the complaint there is other material relied upon by the Department. Such material will be given to the accused u/s 208 of the Code before the commitment is made u/s 209 of the Code. Therefore, apprehension of the Petitioners in this regard too does not appear to be well-founded. The Petitioners contention that they will not be able to prepare their defence too does not carry much weight.

24. It is contended in the case of the revision of Kalloo that he was not present at the time of raid, that he does not reside or carry business in the premises concerned, that the statements made by other co-accused cannot be read against him. The contention is that there is no evidence whatsoever against him and as such summoning order was bad. According to the complaint, premises are

in possession and occupation of the revisionist himself. In the statement recorded by the Intelligence Officer of Narcotics Control Bureau, Government of India at Varanasi, the witnesses have stated against him. In my opinion it is not for the Court to enter into this question at this stage. The Code of Criminal Procedure has taken care of this aspect when stage of trial comes it will be open to the revisionists that those facts and points may be raised before the Sessions Judge who even has power of discharge u/s 227 Code of Criminal Procedure if he considers that there is no sufficient grounds for proceedings against the accused. Emphasis may be laid on the fact that the complaint by private person and the complaint by court or public servant acting or purporting to act in the discharge of his duties have been put on different pedestal in the scheme of the Code and without recording any statement of the complainant or any witnesses in the second category the cognizance can be taken straightway and process issued irrespective of the fact whether it is a case exclusively triable by the Sessions Judge or in other ordinary case. Some observations in the case of Abdul Hamid Khan Pathan (supra) may also be referred in this connection:

Section 202 is to be read along with Section 200 of the Code of Criminal Procedure. u/s 200 the Magistrate can take cognizance of an offence on the complaint by examining the complainant and the witnesses present if any. Further the proviso to the said section provides that if the complaint is by a public servant, the Magistrate need not examine the complainant and the witnesses. Therefore, if it is held that under the proviso to Section 202 the Magistrate is bound to examine all the witnesses as if it is trial, it would lead to inconsistencies. In the same type of inquiry which is meant for issuance of process, in one inquiry u/s 200 there won't be any recording of evidence while under the enquiry u/s 202(2) the entire evidence would be required to be recorded. If the Legislature intended to provide that the Magistrate should record the evidence of the complainant and all his witnesses in offences which are exclusively triable by the Court of Sessions, the Legislature would have provided similar proviso in Section 200 of the Code.

It is further observed:

From the aforesaid propositions of law with regard to the scope and object of the inquiry laid down by the Supreme Court it is clear that at the stage of inquiry u/s 200 or 202 of the Code, the Legislature has kept into mind only the complainant and not the accused. If the Magistrate is satisfied by referring to the complaint and after examining him on oath and the witnesses present if any, he can straightway issue the process u/s 200 of the Code. If the complaint is by a public servant acting or purporting to act in discharge of his official duties, the Magistrate is not required even to examine the complainant and the witnesses.

25. In view of the above discussion I am of the opinion that it was not necessary for the Chief Judicial Magistrate to have held an inquiry u/s 202(2) Code of Criminal Procedure in the case and the impugned order is legal and does not suffer from any infirmity.

26. In the result, the revisions have no force and are dismissed.