

(2018) 11 GAU CK 0036
In the Gauhati High Court
Case No : Criminal Petition No. 18 of 2012

Kalyan Kumar Nath And AnrVs State Of Assam And Anr @RESPONDEN

Date of Decision : 29-11-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 294, 419, 494, 506, 507
Code of Criminal Procedure, 1973 — Section 173, 210, 210(1), 210(2), 210(3), 244

Citation : (2018) 11 GAU CK 0036

Hon'ble Judges : Mir Alfaz Ali, J

Bench : Single Bench

Advocate : Krishnatraiya, S Bhattacharjee

Final Decision : Disposed Off

Judgement

1. This criminal petition u/s 482 Cr.P.C. has been filed for quashing the order dated 13-12-2011 passed by learned Sub-Divisional Judicial Magistrate

No. 2, Kamrup in Complaint Case No. 2135C/2002.

Factual Background :

2. The respondent No. 2, as complainant, lodged a complaint on 24-09-2002 against Ms. Aparajita Nath and Kalyan Nath alleging commission of

offence u/s 420/427/494 IPC read with Section 34 IPC. The learned Judicial Magistrate, on the basis of the said complaint, registered the C.R. Case

no. 2135C/2002 and took cognizance of offence u/s 420/427/494/34 IPC against the petitioners, Ms. Aparajita Nath and Kalyan Nath. During

pendency of the said complaint case, father of the respondent no. 2, Sri Ramakantha Das lodged an FIR with the Chandmari Police Station on 13-11-

2002, alleging that they had received threatening calls from an unknown person on 19th October, 2002, 23rd October, 2002, 28th October, 2002 & 10th

November, 2002. It was further alleged in the FIR that, an unknown person was seen moving suspiciously in front of the house of the informant, who

threatened to finish the family of the informant. On the basis of the said FIR, the police registered Chandmari Police Station Case No. 456/2002 u/s

294/507 I.P.C. and after completion of investigation, laid charge-sheet against the petitioners Ms. Aparajita Nath and Kalyan Nath as well as one

Siddarth Ray and Aninditha Ray u/s 294/507/120-B/34/49/494/506 IPC. On the basis of the said charge-sheet, learned Magistrate took cognizance and

eventually framed charges against the petitioners and Siddartha Ray. However, the charge-sheeted accused Aninditha Ray was discharged. Trial

proceeded in both the cases. In the G.R. Case, after completion of prosecution evidence and recording of statement u/s 313 of the Cr.P.C., the case

was fixed for argument. On the date of argument, an application was filed on behalf of the prosecution, stating that C.R. Case No. 2135C/2002 was

also pending for same offence and as such, prayed for simultaneous trial and judgment of both the cases, i.e., the complaint case and the police case.

The petitioners also filed an application in the complaint case, wherein, the evidence-in-chief before charges was taken and the case was at the stage

of charge, seeking to cross-examine the complainant. Upon such applications, learned Magistrate did not pronounce judgment of the police case, and

fixed the next date for hearing the petitions. After hearing the parties, learned Magistrate passed the impugned order on 13-11-2011, whereby,

Learned Magistrate disposed off both the applications filed by the present petitioners seeking to cross-examine the complainant in the complaint case,

as well as, the petition filed by the prosecution in the G.R. Case praying for simultaneous trial and pronouncement of judgment of both the cases. By

the said impugned order, learned Magistrate clubbed both the cases together invoking the provision of Section 210 Cr.P.C. and held that "both the

cases are clubbed together and the complaint case will be proceeded like a case instituted on police report".

3. Learned counsel, Mr. A.K. Bhuyan for the petitioners and learned Addl. Public Prosecutor, Mr. D. Das for the respondent No. 1 were heard.

None appeared for the respondent No. 2, though notice was served on him.

4. Learned counsel for the petitioner, Mr. A.K. Bhuyan submitted that the offences in both the cases were different, except one, i.e., offence u/s 494

IPC. As, neither the offences, nor the accused persons were same in both the cases, the learned trial court fell in grave error by invoking the provision

of Section 210 (2) of the Cr.P.C, inasmuch as, the condition required for invoking section 210 Cr.P.C was totally absent, submits Mr. Bhuyan. Further

contention of Mr. Bhuyan was that the prayer of the prosecution in the GR Case for simultaneous hearing and pronouncement of judgment was also

erroneous and misconceived, as the cases involved, were not cross cases filed by the rival parties, arising out of the same incident. Learned Addl.

Public Prosecutor also fairly conceded, that the cases were neither cross cases, nor Section 210 Cr.P.C. could be invoked on the facts of both the

cases, as date of occurrence of both the case were different.

5. In view of the submission of the learned counsel and also the facts of both the cases as indicated above, only question arises for consideration in

this petition is, whether on the facts, the complaint case could be tried together with the police case, as per mandate of sub- section (2) of Section 210

Cr.P.C.

6. Section 210 Cr. P.C. reads as under :

S. 210 Cr.P.C. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(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 under section 173 Cr.P.C. 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.

7. The provision of Section 210 CrPC provides three stages. Sub-section (1) of

Section 210 CrPC provides for staying the complaint case and calling for a report from the police officer, when the magistrate finds that police is also investigating the same offence, and following are the conditions precedent for invoking the provision of Sub-section (1) of Section 210 Cr.P.C. (i) the pendency of enquiry or trial of a case before the Magistrate instituted otherwise than on police report (complaint case) (ii) an investigation by police is in progress in relation to the same offence, which is subject matter of enquiry and trial before the Magistrate in the complaint case. (iii) on the date of filing the complaint or taking cognizance, the investigation by police relating to the same offence must be in progress or pending. Once the above conditions are satisfied, the magistrate shall stay the proceeding in the complaint case and call for a report on the matter from the police, conducting the investigation.

8. Sub-section (2) of Section 210 Cr.P.C. provides, that if a report is submitted by police officer u/s 173 Cr.P.C. and cognizance is taken by the Magistrate of any offence against any person, who is also an accused in the complaint case, it is mandatory on the part of the Magistrate to enquire into and try the complaint case together with the police case and the procedure to be followed in both the cases shall be the procedure of a police case.

9. Sub-Section (3) of Section 210 Cr.P.C. provides that if the police report does not relate to any accused in the complaint case or Magistrate does not take cognizance of any offence on police report the Magistrate cannot proceed under subsection (2) of Section 210 Cr.P.C. and in such situation, the Magistrate has to proceed with the complaint case independently in accordance with the provision of the code, meaning thereby, the complaint case shall proceed as per the procedure of the case instituted otherwise on police report. Therefore, in order to proceed under or to invoke the provision of subsection (2) of Section 210 Cr.P.C., not only the offence should be the same, the accused in both the complaint case and police case also must be same. If the complaint case relates to one accused, who is not an accused in the police case or no cognizance is taken against him in the police case, in such situation, two cases cannot be clubbed together and complaint case cannot be tried as police case by invoking the provision of subsection (2) of Section 210 Cr. P.C.

10. The Apex Court, in *Sankaran Moitra vs. Sadhna Das and Anr.* reported in (2006) 4 SCC 584, had the occasion to discuss the applicability of

the provision of Section 210 Cr.P.C., where there is complaint case and police investigation in respect of the same offence. The Apex Court held in

para 76, 77, 78 and 79 as under :

76. A bare reading of the above provision makes it clear that during an inquiry or trial relating to a complaint case, if it is brought to the notice of

the Magistrate that an investigation by the police is in progress in respect of the same offence, he shall stay the proceedings of the complaint case and

call for the record of the police officer conducting the investigation.

77. The object of enacting Section 210 of the Code is three fold:

(i) it is intended to ensure that private complaints do not interfere with the course of justice; (ii) it prevents harassment to the accused twice; and (iii) it

obviates anomalies which might arise from taking cognizance of the same offence more than once.

78. The Joint Committee of Parliament observed: "It has been brought to the notice of the Committee that sometimes when serious case is under

investigation by the police, some of the persons file complaint and quickly get an order of acquittal either by cancellation or otherwise. Thereupon the

investigation of the case becomes infructuous leading to miscarriage of justice in some cases. To avoid this, the Committee has provided that where a

complaint is filed and the Magistrate has information that the police is also investigating the same offence, the Magistrate shall stay the complaint

case. If the police report (under Section 173) is received in the case, the Magistrate should try together the complaint case and the case arising out of

the police report. But if no such case is received the Magistrate would be free to dispose of the complaint case. This new provision is intended to

secure that private complainants do not interfere with the course of justice.

79. It is thus clear that before Section 210 can be invoked, the following conditions must be satisfied.

(i) There must be a complaint pending for inquiry or trial; (ii) Investigation by the police must be in progress in relation to the same offence; (iii) A

report must have been made by the police officer under Section 173; and

(iv) The magistrate must have taken cognizance of an offence against a person who is accused in the complaint case.

11. What is abundantly clear from the provision of Section 210 Cr.P.C. is that Sub-section (2) and subsection (3) of Section 210 Cr.P.C. deal with two

different situations. Having said the legal proposition, now, let me see whether on the facts of the cases as indicated hereinabove, the learned

Magistrate could have proceeded u/s 210 sub-section (2) in the instant case.

12. Admittedly the complaint case was filed on 24-09-2002 and the learned Magistrate took cognizance against the present petitioners in the complaint

case, u/s 420/494 and 427 IPC. The occurrence of the complaint case took place on 26-02-2000. Apparently, there was no police case under

investigation for the same offence when the complaint was filed or cognizance was taken by the learned magistrate in the complaint case.

13. The FIR was lodged by the father of the complainant (respondent No. 2) on 13-11-2002 alleging commission of offence on 19th, 20th, 23rd of

October as well as 10th of November, 2002 and police submitted charge-sheet against the four accused persons, including the present petitioners u/s

294/507/120-B read with Section 34/419/494/506 IPC. Admittedly the occurrence in the police case, alleged to have taken place after the filing of the

complaint case. However, the learned trial court framed charges u/s 109/494 and 506 IPC in the police case.

14. What is apparent from the police case is that the accused Siddarth Nath of the police case, which was instituted subsequent to the complaint case

is/was not the accused in the complaint case. In fact, the complaint case was against the two accused persons, being the present petitioners. Whereas,

the police case was against the three accused persons, being the present petitioners and one Siddarth Nath. The offence in the police case and the

complaint case are also not same and identical. Both the police case and the complaint case related to multiple offences, one offence being common in

the police case and complaint case. Apparently, the police case was instituted after cognizance was taken by the Magistrate in the complaint case.

Therefore, though there was a common offence, the police case and the complaint case cannot be said to be for the same offence or in other words,

offences in both the cases are different, except one offence, i.e. u/s 494 IPC. The accused in both the cases were also different, inasmuch as, one of

the accused in the police case was not an accused in the complaint case. Therefore, the necessary preconditions for proceeding u/s 202 (2) Cr.P.C.

was absent in the instant case. When the offences in both the cases were mostly different and the accused persons were also not same and

admittedly, when the Magistrate took cognizance against the petitioner in the complaint case, no police case in respect of the same offence was

pending for investigation before the police, Section 210(2) Cr.P.C. could not have been invoked and the complaint case also could not have been

clubbed with the police case to be tried as a police case. Therefore, in the facts and circumstances of the case, this Court is of the considered opinion,

that the learned trial court fell in grave error by invoking Section 210 (2) Cr.P.C. by clubbing both the complaint case and the police case together and

proceeding to try the complaint case, as per procedure of police case, and as such, the impugned order deserves to be set aside. Accordingly, the

impugned order dated 13-12-2011 passed by learned Sub-Divisional Judicial Magistrate No. 2, Kamrup in Complaint Case No. 2135C/2002 is set

aside. For the reasons stated above, both the cases shall proceed independently and the Complaint Case No. 2135C/2002 shall proceed as per the

procedure prescribed for cases instituted otherwise than on police report.

15. The contention of the learned counsel for the petitioners, Mr. Bhuyan was that the complaint case was at the stage of evidence before charge,

wherein examination-in-chief of the complainant was recorded as evidence before charge and the petitioners prayed for cross-examination of the

complainant. However, learned Judicial Magistrate did not pass any order on such application and disposed of the petition by a common order

impugned herein, whereby decided to proceed u/s 210 (2) Cr.P.C. As this Court has already observed, that Section 210 (2) Cr.P.C. shall not apply in

the instant case, both the police case and the complaint case shall proceed independently, to be tried in accordance with law, prescribed by the code

for such cases.

16. Evidently the complaint case was at the stage of consideration of charge. Section 244 Cr.P.C. provides, that when in any warrant case instituted

otherwise than on police report, the accused appears or is brought before the Magistrate, the Magistrate shall proceed to hear the prosecution and

take all such evidence as may be produced in support of the prosecution. Therefore evidence contemplated before charge u/s 244 Cr.P.C and the

expression "all such evidence may be produced" necessarily mean the

examination as well as cross-examination of the witness. Since the complaint case, as submitted by the learned counsel, was at the stage of framing of charge and evidence in chief, before framing of charge was recorded, there could be no reason for not allowing the accused/petitioners to cross-examine the witnesses before framing charge. Being of the above view, it is directed that the trial Magistrate shall proceed with the complaint case in accordance with the procedure prescribed for trial of a case instituted otherwise than on police report and permit the accused/petitioners to cross examine the witnesses, examined by the complainant u/s 244 Cr.P.C. before framing of charge.

17. With the above observation and direction, the petition is allowed and stands disposed of.