
(2009) 11 JH CK 0103
In the Jharkhand High Court

Manoj Rai and Others

APPELLANT

Vs

State of Jharkhand and Another

RESPONDENT

Date of Decision : 09-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 204, 208, 226
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2009) 11 JH CK 0103

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.R. Prasad, J.—This application filed u/s 482 of the Code of Criminal Procedure is directed against the order dated 29.7.2008 passed by learned Sessions Judge, Giridih in Cr. Rev. No. 110 of 2006 whereby learned Sessions Judge upheld the order dated 23.6.2006 whereby learned Magistrate after holding enquiry u/s 202 of the Code of Criminal Procedure did find prima facie case against the petitioners u/s 302/34 of the Indian Penal Code and thereby summoned the accused person to face trial.

2. Learned Counsel appearing for the petitioner submits that for murder of one Sunaina Devi, two cases were lodged, one by Tulsi Rai, husband of the deceased-Sunaina Devi, putting allegation against the petitioners, who are the villagers, of committing murder, whereas Sudama Singh, father of the deceased-Sunaina Devi, lodged another case, wherein he has alleged that it was the husband, namely, Tulsi Rai, who committed murder of Sunaina Devi. Subsequently, in course of investigation of a case lodged by Tulsi Rai, the police did not find allegation to be true and hence, submitted final form. Thereupon, a protest petition was filed by Tulsi Rai which was treated to be a complaint and the court below having examined Tulsi Rai on solemn affirmation put the case for enquiry and recorded the statements of four witnesses only, whereas in the protest petition more than four witnesses had been cited and on the basis of the

statements made by the complainant and the witnesses, cognizance was taken though the learned Magistrate before taking cognizance was required to examine all the witnesses cited in the complaint petition and since it has not been done, the impugned order suffers from illegality.

3. In support of his submission, learned Counsel has referred to decisions rendered in the case of Sri Jayram R. Ranjan Gud v. The State of Bihar and Ors. 1980 B.B.C.J. 265 and in the case of Moideenkutty Haji and Others Vs. Kunhikoya and Others, wherein it has been held that examination of all the witnesses cited in the complaint disclosing offence being exclusively triable by the court of sessions is condition precedent for issuance of process.

4. In the context of said ratio, learned Counsel appearing for the petitioners submits that the impugned order under which petitioners have been summoned u/s 204 of the Code of Criminal Procedure is quite bad as all the witnesses cited in the complaint have not been examined by the complainant before issuance of the process and hence, the order passed by the learned Magistrate and also the order of the revisional court under which said order has been affirmed are fit to be set aside.

5. It be stated that Full Bench of the Kerala High Court after taking into consideration various decisions rendered by the Kerala High Court and other High Courts and also taking into consideration the objects and the purposes recommended by the Law Commission for the new provision of Section 202 in the Act and also the intent of the legislature did hold that the legislature intended two different types of enquiries, a discretionary enquiry in ordinary complaint cases and a mandatory enquiry in complaint cases u/s 202. In the discretionary enquiry the Magistrate can either enquire into the case himself or direct himself or direct an investigation to be made by a police officer or such other person as he thinks fit. But in a mandatory enquiry in a complaint case that discretion is taken away by provision (a) to Section 202(1) and thereby the Magistrate will have to conduct the enquiry himself and he cannot order investigation.

6. It has been further held that in a discretionary enquiry in an ordinary complaint cases Section 202(2) gives the option to the Magistrate to take evidence of witnesses on oath or not as he thinks fit which means that he can even record a summary statement of the witnesses but in a mandatory enquiry in a complaint case that discretion is not there and the proviso to Sub-section (2) says that he shall call upon the complainant to produce all the witnesses and examine them on oath. Thus, 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. But the said proposition laid down by the Full Bench of Kerala High Court that it is mandatory on the part of the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath in a case triable by the court of sessions did not get approval of the Hon^{ble} Supreme Court in a case of Rosy and Another Vs. State of Kerala and Others, where

similar issue fell for consideration on the fact that when a complaint relating to offence triable by the court of sessions was laid before the Magistrate, learned Magistrate without examining any witnesses, though ten witnesses had been cited in the complaint, committed to the court of sessions. Learned Sessions Judge on committal of the case, proceeded with the trial. At the fag end of the trial, i.e. at the stage of adducing evidence to be laid of the defence, objection was taken before the learned Sessions Judge that the entire trial gets vitiated as the committing court without examining all the witnesses cited in the complaint, committed the case to the court of sessions and in support of that submission, decision rendered by the Full Bench of Kerala High Court was referred to. However, learned sessions Judge instead of deciding the issue made a reference to the High Court u/s 395(2) of the Code.

7. The appellant being aggrieved with the said reference filed a revision before the High Court.

8. Both the matters were disposed of by the High Court by holding that proviso to Section 202(2) is mandatory and, therefore, non-examination of the witnesses at that stage would result in substantial failure of justice and hence, the order of committal gets vitiated. Consequently, the Magistrate was directed to conduct a fresh enquiry in terms of proviso to Section 202(2) by examining all the witnesses. That order was challenged before the Hon^{ble} Supreme Court. Before indicating the ratio laid down by the Hon^{ble} Supreme Court it would be necessary to here look to the provisions as contained in Section 200 and also u/s 202 of the Code of Criminal Procedure, mandate of which is Section 200 requires a Magistrate taking cognizance of an offence on a complaint to examine upon oath the complainant and the witnesses present, if any. The proviso to the said section carves out an exception in cases where the complaint is filed by a public servant acting or purporting to act in the discharge of his official duties or in case where the Court has made the complaint, in such cases complainant and witnesses need not to be examined and if he is satisfied that there is sufficient ground of proceeding, he can straightway issue process or to dismiss the complaint or to hold an enquiry by himself or by directing investigation by the police or by other person.

9. I do further find that it is only if the Magistrate decides to hold an enquiry the proviso to Sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the Court of sessions, the Magistrate himself has to hold the inquiry and no direction for investigation by police shall then be made. Inquiry can be held by recording evidence on oath and if he thinks fit. Sub-section (2) of Section 202 gives discretion to the Magistrate to record evidence of witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the court of sessions, the Magistrate shall call upon the complainant to produce all his witnesses and examined them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issuance of

process.

10. As the clauses under proviso to Sub-Section (2) of Section 202 is couched, with the word 'shall' it was argued with all vehemence that the Magistrate will not be justified in issuing process unless the complainant examines all his witness cited in the complaint petition during inquiry.

11. However, the Hon'ble Supreme Court taking into consideration the legislative intent as enshrined u/s 200 and 202 did observe as follows:

It is no doubt true that by the use of the word 'shall', it appears that language used in the proviso is of mandatory nature. At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry u/s 202 is itself discretionary one giving option to examine or not to examine witnesses on oath. Hence, proviso to the said sub-section is required to be read accordingly though couched in mandatory term by using the word 'shall'. Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed, not by the public servant, and where the offence is exclusively triable by the court of sessions, the Magistrate should follow the proviso to Sub-section (ii) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath. This would be in consonance with the provision of Section 208 which inter alia provides for supply of copy of statements and documents to accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the Sessions triable case, u/s 226 the prosecution has to open its case by describing the charge brought against the accused and stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such consideration, if the Court finds that there is no sufficient ground for proceeding against the accused, he shall be discharged as provided u/s 227. In case, where there is sufficient ground, Court is required to frame the charge as provided u/s 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know allegation made against him as well as evidence in support thereof. However, in a case where complaint is filed by a public servant after holding inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance of proviso by the Magistrate in all Sessions triable cases is not a must and would not vitiate the further trial unless prejudice caused to the accused is established.

12. Further, in the context of the provision as contained in Sections 460, 461 and 465 it was held that the statute does not expressly provide for nullification of the order as a consequence of non-compliance of proviso to Sub-section (2) of

Section 202 but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry u/s 202 when Magistrate examines the witnesses on oath, as far as possible proviso is to be complied with but the mandate is not absolute.

13. In these circumstances, law laid down by the Full Bench of the Kerala High Court did not get approval by the Supreme Court.

14. Ultimately the following propositions of law were laid down.

I.(a) u/s 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;

(c) In such case Court may issue process or dismiss the complaint.

II.(a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorized by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant u/s 204(2) before issuance of the process.

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso, if he fails to raise such objection at the earliest stage, he is precluded from raising such objection later.

Thus, the ratio laid down by the Hon^{ble} Supreme Court is quite categorical that if a person takes an objection of an order being bad on account of non-examination of all the witnesses cited in the complaint, the said order does not get vitiated automatically, rather person who challenges that order needs to establish prejudice being caused or likely to be caused on account of noncompliance of the provision as contained in proviso to Sub-section (2) of

Section 202.

15. Here, in the instant case, nothing has been shown to me as to how prejudice has been caused or is likely to be caused to the accused person on account of non-compliance of the aforesaid provision.

16. Hence, I do not find any illegality in the order passed by the learned Magistrate or by the revisional court. Accordingly, I do not find any merit in this application. Hence, it is dismissed.