

(2022) 07 GAU CK 0019
In the Gauhati High Court
Case No : Criminal Petition No. 1313 Of 2019

Md. Abdul Kadir

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 28-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 190, 200, 202, 202(2), 482
Indian Penal Code, 1860 — Section 120B, 143, 147, 148, 294, 307, 325, 326, 354A, 354B, 436, 447

Citation : (2022) 07 GAU CK 0019

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : D. Talukdar, S. H. Bora, R. Ali

Final Decision : Dismissed

Judgement

1. Heard Mr. D. Talukdar, learned counsel for the petitioner. Also heard Ms. S. H. Bora, learned Additional Public Prosecutor, Assam appearing for the State respondent No. 1 and Mr. R. Ali, learned counsel for the respondent No. 2.

2. By this petition under Section 482 Cr.P.C., the petitioner has prayed for quashing of the proceeding of C.R. Case No. 633/2018, pending in the Court of learned Judicial Magistrate, Sankardev Nagar, Hojai (arising out of Murajhar P.S. Case No. 236/2016).

3. The petitioner's case, in brief, is that the respondent No. 2 had lodged an FIR before the Officer-in-Charge of Murajhar P.S., on 21.12.2016, alleging that on 19.12.2016 at about 12.15 am, his gumti shop was seen burning. Witnessing the incident, he stepped out of house and saw the petitioner running away from near his said burning gumti shop. It was further stated that the petitioner set the shop on fire. In the aforesaid incident, the respondent No. 2 alleged that the shop along with all the articles were burnt into ashes. Due to his illness, delay occurred in lodging the FIR.

4. Based on the above FIR, Murajhar P.S. Case No. 236/2016, dated 21.12.2016, was registered and after completion of investigation, the police submitted final report stating that although the burning of the informant's shop was true, there was no evidence that the present petitioner, who was named in the FIR, was involved in the aforesaid incident. Thereafter, on receipt of notice from the Court, the respondent No. 2/informant filed written objection against the aforesaid final report, on 19.06.2018, stating that he has sufficient witnesses to prove his case. Accordingly, the learned Court allowed the objection and registering C.R. Case No. 633/2018 rejected the Final Report. The learned Court, thereafter, examined the complainant under Section 200 Cr.PC., and also examined four other witnesses under Section 202 Cr.PC. After due inquiry, the learned Court on being satisfied and having found sufficient prima facie ground took cognizance of the offence under Section 436 of the IPC against the petitioner vide the impugned order, dated 25.09.2019, which is extracted herein below:-

"25.09.2019

Complainant is present and has vide Petn. 3821/19 submitted that he is unable to bring the remaining witnesses and as such necessary order may be passed.

The instant case has arisen out of a protest petition filed by the complainant after the investigating officer submitted final report in the FIR filed by him.

The complainant has already been examined.

As part of inquiry u/s 202 Cr.P.C., witnesses Sunita Begum, Sultanan Begum, Jahid Ahmed and Khairul Islam have been examined.

As the offence alleged by the complainant is u/s 436 IPC, which is exclusively triable by the Court of Sessions, my Ld. Predecessor had directed the complainant to produce all his witnesses.

Ideally the complainant must be able to produce all his witnesses as per the proviso to Section 202 (2) Cr.P.C.

In the instant case however one witness has remained unexamined.

That being said, the direction contained in the proviso to Section 202(2) Cr.P.C. is more directory than mandatory. Though the legislature has used the word 'shall', the non-examination of all the witnesses does not preclude the Court from proceeding with the case further.

In Shivjee Singh V/S Nagendra Tiwary and others reported in (2010) 7 SCC 578, the Hon'ble Supreme Court deemed it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that

there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2).

The Hon'ble Supreme Court further held that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint.

Hence, I see no legal encumbrance in proceeding with the case even though one listed witness has not been examined.

I have considered the statements of the complainant and the four inquiry witnesses. All have categorically stated that Abdul Kadir burnt down the shop of the complainant.

At the time of issuance of process, a magistrate is not required to dissect the statements of the complainant and witnesses. Prima-facie satisfaction is sufficient.

Based on the statements of the complainant and the enquiry witnesses, I find sufficient grounds for proceeding against Abdul Kadir for offence under Section 436 of the IPC.

Issue summons to the accused person.

Complainant to take steps.

Fix 15.11.2019 for appearance."

5. Mr. D. Talukdar, learned counsel appearing for the petitioner, submitted that the petitioner has been subjected to face multiple criminal cases by the side of the respondent No. 2. Mr. Talukdar submitted that prior to filing of the FIR in Murajhar P.S. Case No. 236/2016, the respondent No. 2 had filed another FIR on 19.12.2016 against him and others, which was registered as Murajhar P.S. Case No. 235/2016 under Sections 120B/147/148/447/326/354B/325/307 of the IPC, where the police submitted charge-sheet against them and presently, the said case being G.R. Case No. 2528/2016 is pending in the Court of learned Judicial Magistrate, Sankardev Nagar, Hojai at evidence stage. Mr. Talukdar further submitted that the respondent No. 2's sister had filed another FIR against the petitioner, on 04.07.2015, which was registered as Murajhar P.S. Case No. 141/2015 under Sections 143/447/325/294/354A of the IPC, where the police submitted charge sheet and the aforesaid case is presently pending at the evidence stage in G.R. Case No. 1339/2015 before the same Court of learned Judicial Magistrate, Sankardev Nagar, Hojai. In regard to the impugned order of taking cognizance of the offence against the petitioner in C.R. Case No. 633/2018, Mr. Talukdar submitted that the statements recorded under Sections 200 and 202 Cr.PC., despite revealing no implicating material against the

petitioner, he is roped into a false and fabricated case to wreak vengeance for complainant's enmity with the petitioner.

6. Opposing the petition, Ms. S. H. Bora, learned Addl. Public Prosecutor appearing for the state respondent No. 1, submitted that as the complaint and the statements recorded by the learned Judicial Magistrate under Sections 200 and 202 Cr.PC disclosed the offence under Section 436 of the IPC against the petitioner, the petitioner may be directed to appear before the Court and prove his innocence instead of quashing the impugned order.

7. Mr. R. Ali, learned counsel for the respondent No. 2/complainant, submitted that the learned Judicial Magistrate has assigned good reasons for taking cognizance of the aforesaid offence against the petitioner and, as such, no interference is called for in the impugned order.

8. I have given due consideration to the above submissions made by the learned counsel of both sides and perused the record of C.R. Case No. 633/2018.

9. It may be mentioned that under Section 190 Cr.PC., the Magistrate is empowered, inter-alia, in the event a protest petition is filed against the final report of the police that no case was made out, to treat the same as a complaint petition and proceed under chapter XV Cr.P.C., and if prima facie case is made out, to issue process against the accused taking cognizance of the offence disclosed. However, the proviso to Sub-Section (2) of Section 202 Cr.P.C. enjoins that a Magistrate, who has taken cognizance of an offence exclusively triable by the Court of learned Sessions Judge shall call upon the complainant to produce all his witnesses and examine them on oath and thereafter, issue process if satisfied that a prima facie case has been made out against the accused.

10. In the instant case, it is noticed that in course of inquiry, the learned Magistrate examined the complainant and four other witnesses out of listed five witnesses and on being satisfied that there is a prima facie case, by the impugned order issued summons to the accused petitioner under Sections 436 of the IPC, which is a Session triable offence. The learned Magistrate in spite of being conscious of the aforesaid provision under the proviso to Section 202(2) Cr.P.C., issued summons without examining one listed witness namely Ashim Uddin holding the view that the aforesaid provision is directory although the legislature used the word 'shall' relying on the principle laid in Shivjee Singh -Vs- Nagendra Tiwary and others, reported in (2010) 7 SCC 578.

A perusal of the statements recorded under Sections 200 and 202 Cr.P.C., it is revealed that the complainant examined, besides himself, his daughter-in-law (C.W.1), daughter (C.W.2), grandson (C.W.3) and one neighbour (C.W.4). Out of the said witnesses, all of them except C.W.4 implicated the accused petitioner while all the CWs testified to burning of the shop of the respondent No. 2/complainant. C.W.4 specifically stated that he did not see who set on fire to the shop. At this stage of inquiry under Sections 200 and 202 Cr.PC., the Magistrate is required to record his satisfaction as to whether there is a prima facie case or

not to issue summons to the accused without going deep into the statements of the witnesses examined by the complainant in the light of the Evidence Act as to the tests of credence, which is the subject matter of trial. In *State of Haryana - Vs-Bhajan Lal*, reported in 1992 Supp (1) SCC 335, it has been held that quashing under Section 482 Cr.PC is permissible where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. In this petition, the accused petitioner has mentioned two numbers of cases, which were filed by the family of the respondent No. 2/complainant and his sister, where police, after completion of investigation, submitted charge-sheets against him and resultantly, he has been facing trial in the Court. Both the aforesaid cases are serious in nature. Contrary to it, there is no indication that due to any case filed by the accused petitioner against the respondent No. 2/complainant, the latter has filed the instant false complaint to wreak vengeance on him. The allegation made in the complaint and the statements given by the witnesses in support of the same, at their face value, does prima facie disclose the ingredients of the offence under Section 436 of the IPC. The question of intrinsic evidentiary value of the aforesaid statements cannot be looked into at the inquiry stage taking into consideration of the extraneous defence case. Therefore, the judicial discretion exercised by the learned Magistrate in issuing summons to the accused petitioner being based on some amount of prima facie evidence, the same cannot be considered to be capricious and arbitrary requiring interference of this Court in exercise of its extraordinary inherent jurisdiction under Section 482 Cr.P.C.

For the reasons, set forth above, the petition stands dismissed.

Accordingly, the petition is disposed of.