
(2007) 10 OHC CK 0022
In the Orissa High Court

Meghanad Bhainsal and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 12-10-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2008) 105 CLT 55 : (2007) 2 OLR 286 Supp

Hon'ble Judges : Pradip Mohanty, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Pradip Mohanty, J.—In this revision, the Petitioners challenge the Order Dated 07.11.2006 passed by the S.D.J.M., Sundargarh taking cognizance of the offence under Sections 302/201/34 IPC against them in I.C.C. Case No. 17 of 2005 instituted by Opposite Party No. 2.

2. Brief facts of the case is that Opposite Party No. 2 initially lodged an FIR before the OIC, Hemagiri PS. against Petitioner No. 1 and another co-accused, namely, Abhimanyu Patta, with the allegation of murder of his son. Accordingly, Hemagiri P.S. Case No. 36 of 2005 was registered and after investigation final form was submitted against two accused persons, namely, Arjun Bhoi and Ajaya Kumar Mod Bahali. Thereafter, Opposite Party No. 2 filed the above noted complaint case before the S.D.J.M., Sundargarh against the Petitioners and another co-accused Abhimanyu Patta. After registration of the complaint case, the complainant examined himself u/s 200 Cr.P.C. and some of the witnesses mentioned in the complaint petition u/s 202 Cr.P.C. The S.D.J.M., by the impugned order, took cognizance against the Petitioners and another co-accused, namely, Abhimanyu Patta under Sections 302/201/34 IPC and issued process against them for their arrest.

3. Mr. Mohapatra, Learned Counsel for the Petitioners, submitted that there is non-compliance of the proviso to Sub-section (2) of Section 202 Cr.P.C. as the

complainant has not examined all the witnesses mentioned in the complaint petition. Proviso to Sub-section (2) of Section 202 Cr.P.C. is mandatory and as that has not been complied with by the Learned Magistrate, the order of taking cognizance and issuance of process is bad in law and liable to be set aside. He further submitted that there is no material against the Petitioners and in an arbitrary and mechanical manner the S.D.J.M. has taken cognizance and issued process to them. The complainant has developed the prosecution story from stage to stage and there are lots of contradictions appearing in the evidence of the witnesses.

4. Mr. Jena, Learned Counsel appearing for Opposite Party No. 2 supported the impugned order passed by the S.D.J.M. He submitted that it is the duty of the Court while taking cognizance to see whether prima facie case exists to proceed against the accused persons. He further submitted that "sufficient grounds" means prima facie case and does not mean sufficient ground for conviction.

5. The contention raised by Mr. Mohapatra has some force with regard to non-compliance of Section 202(2) Cr.P.C. The question is whether the Magistrate should have examined all the witnesses of the prosecution before the case was committed to the Court of Session or before process was issued to the accused. For ready reference, Sub-section (2) of Section 202 is quoted below:

202. Postponement of issue of process.-

(1) xx xx (2) In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness 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 the witnesses and examine them on oath.

From the bare reading of the proviso to Sub-section (2) of Section 202 Cr.P.C. it is crystal clear that during inquiry, the Magistrate may, if he thinks fit, take evidence of witnesses on oath. But, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, it is mandatory for him to call upon the complainant to produce all the 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. This principle has been decided by the Hon''ble Apex Court in *Rosy v. State of Kerala* (2000) 18 OCR (SC) 490 and by this Court in *Sangram Keshan'' Mishra v. Niranjana Senapati* (2000) 18 OCR 764.

6. In the instant case, admittedly eight witnesses have been examined by the complainant including the doctors and a memo has been filed by the complainant declining to examine other witnesses. After considering the statement of the witnesses, since there existed prima facie evidence against the Petitioners, the S.D.J.M. took cognizance and issued process against them. The choice being of

the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the time of trial. It is the settled principle of law that at the stage of issuing process the Magistrate is not required to enter into detailed discussions about the merits or demerits of the case, that is to say, whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists a prima facie case or whether there is sufficient ground for proceeding against the accused or not. Since prima facie case was found to be made out, no illegality has been committed by the S.D.J.M. at the stage of enquiry u/s 202 Cr.P.C. Therefore, the impugned order of the S.D.J.M. is not required to be disturbed.

The revision is accordingly dismissed.