

(2000) 10 BOM CK 0050

In the Bombay High Court

Case No : Criminal Application No. 1679 of 1999

Mehtab Khan and Others

APPELLANT

Vs

Sarfaraz Khan Hussain Khan and Others

RESPONDENT

Date of Decision : 05-10-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 202(2), 482

Citation : (2001) 5 BomCR 397 : (2001) CriLJ 895 : (2001) 1 MhLj 378

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : M.S. Shaikh, for the Appellant; Manoj Kumar Misra and Sanjeev Deshpande for respondents Nos. 2 to 4. and A.G.P. for non applicant No. 5., for the Respondent

Final Decision : Dismissed

Judgement

S.S. Parkar, J.—Heard Mr. M.S. Shaikh learned Counsel for the applicant and the learned Counsel appearing for the respondents.

2. This matter has a chequered history. Though complaints were lodged with the police in respect of the offence of murder the police had not taken cognizance and, therefore, a private complaint was lodged in the Court of Chief Judicial Magistrate, Nagpur. The case is still at the stage of committal after the process was issued by the Chief Judicial Magistrate. This is the second time that this case has travelled to this Court, both the times at the instance of the accused who were originally seven in number now reduced to five due to the death of two accused persons during the period from 1984 to this day. On the earlier occasion after examining about four witnesses before the Chief Judicial Magistrate, the case was committed to the Sessions Court after issuing process to the accused. That was challenged before the Sessions Court which made reference to this Court u/s 395(2), Cri.P.C. as to whether the process issued and committal order passed would be valid when all the witnesses were not examined before the Chief Judicial Magistrate before the issue of process. There the present applicants

succeeded and the matter was remanded to the learned Chief Judicial Magistrate after quashing the process earlier issued and the committal order passed by the Chief Judicial Magistrate, with a direction that the Chief Judicial Magistrate should examine all the witnesses before the issue of process. That is the requirement of proviso to sub-section (2) of section 202, Cri.P.C. In fact this point was decided by the Division Bench of this Court much earlier in the case of Shyamkant Wamanrao Pawar and others Vs. State of Maharashtra and others, , cited before me today by the learned Counsel for the applicant.

3. After remand of the matter to the Chief Judicial Magistrate, the complainants examined in all eleven witnesses and produced certain documents in the Court of the Chief Judicial Magistrate. The said Court having been satisfied that there was sufficient ground for proceeding against the applicants issued process against them and committed the case to the Session's Court again. The process was issued by the Chief Judicial Magistrate by the order dated 8-11-1995, followed by the committal order passed on 16-4-1996. This was challenged before the Sessions Court by the application Exhibit 9 challenging the order of issue of process again on the ground that all the witnesses, as per the list given by the complainants before the trial Court, were not examined. By the reasoned order dated 4-2-1998, the said application came to be rejected by the learned IInd Additional Sessions Judge, Nagpur. The applicants thereafter made an application for discharge before the Sessions Court on 5-3-1999 which came to be rejected by the order of the IInd Additional Sessions Judge, Nagpur dated 13th July, 1999, copy of which is annexed as Annexure 6 to this petition. Aggrieved by the aforesaid orders the applicants have again come to this Court, seeking their discharge.

4. The grievance made in this application is only one that the proviso to sub-section (2) of section 202, Cri.P.C. is mandatory and the complainants have not complied with the mandate of the said provision as all the witnesses were not examined before the process was issued by the Chief Judicial Magistrate or the committal order was passed. The argument is that since the mandatory provision is not adhered to, the accused are entitled to discharge. Reliance is placed on the Division Bench decision of this Court reported in Shyamkant Wamanrao Pawar and others Vs. State of Maharashtra and others, . No doubt in that case it was held by the Division Bench of this Court that proviso to sub-section (2) of section 202 Cri.P.C. is mandatory and process cannot be issued in the private complaint without examining all the witnesses. Since in that case all the witnesses were not examined, the process was quashed. Similar view was taken by the Division Bench of this Court in this very matter in Criminal Reference Case No. 3/91 decided on 20th March, 1991 a copy of which is annexed as Annexure II to this petition. There cannot be any quarrel with the view taken by the two Division Benches of this Court. The latter Division Bench accordingly had quashed the process issued by the Chief Judicial Magistrate, where only four witnesses were examined out of many listed by the complainant and the matter was remanded to the trial Court to examine all the witnesses. After the remand the

complainants examined in all 11 witnesses and filed the pursis Ex. 86 on 10-10-1995 stating that the complainants closed the evidence of the witnesses. After going through the evidence of all the eleven witnesses examined on behalf of the complainant and the documents produced before the learned Chief Judicial Magistrate, the Chief Judicial Magistrate, was satisfied that prima facie case was made out for the offence having been committed by the applicants accused and therefore, the process was issued and the order of committal was passed.

5. The main grievance in the present petition is that all the witnesses who are named in the list supplied by the complainants were not examined. The second grievance is that some of the witnesses examined on behalf of the complainants were not named in the list of the complainant. In my view, that is not the mandate or requirement of proviso to sub-section (2) of section 202, Cri.P.C. The object of the said provision appears to be that the accused should have before them the material that is going to be used against them at the time of trial just as the material is furnished to the accused in the form of charge-sheet, statements of the witnesses etc.; in a police case. When the complainants themselves wanted to examine eleven witnesses they cannot be forced to examine other witnesses whose names were given in the list of the witnesses. It is not un-common that in a trial based on a charge-sheet filed by the police the prosecution need not and does not examine all the witnesses whose names are given or whose statements are recorded by the police. Secondly, the complainant cannot be tied to the list of the witnesses furnished initially so that he cannot examine any other witness who was not named in the said list. It is not the grievance of the applicants-accused that the complainant wants to examine in the sessions trial some witnesses whose evidence was not recorded by the Chief Judicial Magistrate, in the preceding enquiry which was held u/s 202, Cri.P.C.

6. The Counsel for the applicant placed reliance on the decision of the Supreme Court in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, . That was a case where the Supreme Court has held that at the stage of issuing the process the Magistrate was mainly concerned with the allegations made in the complaint or the evidence led in support of the same and that he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused or not and it is not the province of the Magistrate to enter into detailed discussion of the merits or demerits of the case. When the High Court quashed the process issued by the Magistrate in that case the Apex Court reversed the order of the High Court of Karnataka and restored the order of the Magistrate issuing the process against the accused. In my view this judgment of the Apex Court does not support the contention raised by the applicants in this petition.

7. On the contrary the learned Advocate appearing for the respondents-original complainants had placed reliance on the decisions of the Single Judges of various High Courts including the one of this Court where the view taken is that it is in the discretion of the complainant to examine some witnesses and give up the

rest of the witnesses. He referred to the decision of this Court in the case of Gopal v. State 1991 Mh. L.J. 673 . Secondly, the decision of the Allahabad High Court in the case of Jumrnan and Others Vs. State of U.P. and Another, and thirdly, the decision of the Andhra Pradesh High Court in the case of Musara Narayana Reddy and Others Vs. Kanakanti Mal Reddy and Another, . The aforesaid decisions support the view which I have taken hereinabove.

8. The last argument advanced on behalf of the applicants that so many years have passed since the applicants are facing these proceedings and, therefore, they should be discharged is without substance. The second round has been started by the applicants on the same point which was the subject matter of the earlier challenge made upto this Court. The Division Bench of this Court had observed earlier as far as back as on 20th March, 1991 in the criminal reference decided by it that the matter was already delayed. Since then almost a decade has passed. It is high time that the trial commences as early as possible and the matter is disposed of as expeditiously as possible.

9. In the result this application is rejected and the Sessions Court is directed to complete the trial as expeditiously as possible giving the case top most priority. At this stage the learned Counsel appearing for the applicants seeks two months" stay of this order in order to challenge it before the Supreme Court. The stay granted earlier while pending this application is extended for a period of two weeks from today.