

(1979) 04 KAR CK 0001
In the Karnataka High Court

Nemichand and Others

APPELLANT

Vs

The State of Karnataka and Another

RESPONDENT

Date of Decision : 12-04-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200
Penal Code, 1860 (IPC) — Section 323, 504

Citation : (1980) CriLJ 751

Hon'ble Judges : M. Nagappa, J

Bench : Single Bench

Judgement

M. Nagappa, J.—The petitioners, Who were the accused before the lower court, have challenged in this revision petition the legality, correctness and propriety of the order dated 16-6-1978 passed by the Judicial Magistrate First Class, Shorapur, in C. C. No. 464 of 1978, registering a case against the accused for offences punishable under Sections 504 and 323 of the I.P.C. and issuing summons to them.

2. Few facts of the case are that the complainant, who is the second respondent herein, filed a complaint before the Judicial Magistrate, Shorapur, stating the the accused persons are related to each other and they are residing at Kabadgera in Shorapur town. On 14-6-1978 at about 11 a. m., it is alleged by the complainant, that he was repairing the "katta" in front of his house bearing No. 1-13-43 situate at Kabadgera in Shorapur town and at that time the accused persons came there and objected for the repairs of the "katta", for which the complainant said that if they had got any objection, they may approach the Municipality of Shorapur and file objections. According to him for repairing the "katta" permission is not necessary from the municipality. At that time A-1 to A-3 dragged the complainant and assaulted him and the rest of the accused persons abused him in vulgar language and as such he felt insult and pain in the body due to beating. The accused persons assaulted and abused the complainant without any reason or provocation, and therefore, they have committed the aforesaid offences intentionally. The said complaint was filed on 16-6-1978

before the Magistrate. The order sheet dated 16-6-1978 of the Court below reads thus:

Complainant present. Presented the complaint through his counsel. Sworn the contents and made out a prima facie case against all the accused. Hence Register a case u/s 504 and 323 1.P.C. and issue S. S. to the accused by-7/5.

Aggrieved by the above order, as already stated, the petitioners have approached this Court challenging its legality, correctness and propriety.

3. Sri. T.N. Raghupathy the learned Counsel for the petitioners, contended that the order dated 16-6-1978 passed by the learned Magistrate taking cognizance and issuing process against the accused persons is illegal inasmuch as the learned Magistrate has not followed the mandatory provisions envisaged u/s 200 of the Code of Criminal Procedure. Further, he submitted that the allegations in the complaint taken as a whole do not indicate that the ingredients of the offences alleged are made out and as such the learned Magistrate ought to have rejected the complaint. His further submission was that the learned Magistrate has not examined the witnesses on behalf of the complainant present on that day and that therefore he has not conformed with the mandatory provisions of Section 200 of the Code of Criminal Procedure and therefore the entire proceedings are vitiated and the complaint should have been rejected. On the other hand, the learned High Court Government Pleader contended that the order taking cognizance is legal and is based upon the complaint as also the sworn statement of the complainant recorded by the learned Magistrate.

4. The main attack of the learned Counsel for the petitioners is that the learned Magistrate ought to have examined the witnesses present on behalf of the complainant on 16-6-1978 along with the complainant and then only he should have come to the conclusion whether it was a fit case to take cognizance and issue process against the accused persons. The non-examination of the prosecution witnesses cuts at the very root of the complainant's case and as such the complaint should have been dismissed on all probability. In support of that proposition, he relied upon a decision of the Calcutta High Court in *Mac Culloch v. State* 1974 CrL LJ 182 wherein it has been laid down that the provisions of Section 200 of the Cr P. C. are not a mere formality, but have given intended by the legislature to be given effect to for the protection of the accused persons against unwarranted complaints. It is also laid down in the said case thus:

It is pertinent in this context to refer also to a recent case of the Supreme Court viz. the case of *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, . Mr. Justice Shelat delivering the judgment on behalf of himself, Mr. Justice Dua and Mr. Justice Khanna observed at p. 2646 that "the object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person". The

Supreme Court further proceeded to observe that such examination is provided therefore to find out whether there is or not sufficient ground for proceeding. I respectfully agree with the said observations and I ultimately hold that the provisions of Section 200 are not a mere formality, but have been intended by the legislature to be given effect to for the protection of the accused persons against unwarranted complaints. It was urged by Mr. Sur on behalf of the State that the defect if any is cured u/s 537, Cr.P.C. and that there has been no prejudice because the learned Chief Presidency Magistrate before issuing processes not only examined the complainant on solemn affirmation but also perused the relevant papers. It is difficult to agree with this view inasmuch as the non-conformance alleged is a non-conformance to the mandatory provisions of the statute resulting in a nonconformance to the procedure established by law. There are no materials on the record to establish that besides the complainant, other witnesses were not. present in court on the date when cognisance was taken and processes were issued. The complainant has thrown no light on the point at issue and there is also no finding thereupon. In view of the facts and circumstances and in view of the position in law, I uphold the objection raised in this behalf by Mr. Ray on behalf of the accused-petitioner, that the proceedings have been vitiated and any further continuance thereof would be an abuse of the process of the court. Defects in procedure brought to the notice of the court should be set right at the earliest stage as otherwise there will ultimately be prejudice to all concerned. Mr. Hossain lastly submitted that a direction may be given for a fresh prosecution in accordance with law. This will be travelling beyond the ambit of the Rule. No such directions by the Court are necessary, if such a prosecution otherwise hes and the complainant chooses to do so. The third and last dimension of Mr. Ray's contentions accordingly succeeds.

The learned Counsel for the petitioners also relied upon the decision in P.S. Ramaswami Nadar Vs. R. Viswanathan and Another, to further substantiate his said contention, wherein the learned Judge by adverting to the provisions of Section 200 of the Criminal P. C. has held thus:

Section 200, as amended, is mandatory, and it is therefore obligatory on the part of the Magistrate to examine not only the complainant, but also the witnesses who are present in Court. The Magistrate will do well in asking the complainant, as soon as he is examined on oath whether any witnesses are present in Court, and if witnesses were present, it is his duty to examine them on oath; but if no witnesses are present he will do well to mention in the order itself that no witnesses were present according to the statement of the complainant or the advocate who appeared in Court. Under the new section, it makes it incumbent on the Magistrate to examine the witnesses who were present in Court on oath, and he can apply Section 203 only if, after examining the complainant and the witnesses who are present in Court, he finds a sufficient ground for not proceeding with the case. Where this procedure has not been followed, the complainant gets a grievance and the order dismissing the complaint u/s 203 should be set aside.

The bone of contention of the learned Counsel for the petitioners is that it was incumbent upon the Magistrate not only to examine the complainant on oath but also the witnesses present and if it is found that the witnesses of the complainant are not present on that day, he should have made a note of the same in the order-sheet instead of not mentioning anything about the presence or otherwise of the witnesses. The amendment which has been brought out under the new Code is caused nugatory if the mandatory provisions are not at all complied with. If the witnesses were not present, then the Magistrate would have done well in asking the complainant whether any witnesses are present in Court and if witnesses were present it was his duty to examine them on oath, but if no witnesses were present, he would have done well in mentioning in the order-sheet itself that no witnesses were present according to the statement of the complainant or the Advocate who appeared in the Court. For the aforesaid reasons, he submitted that there is a defect in the procedure followed by the learned Magistrate, and therefore, the entire proceedings are vitiated and any further continuance of the proceedings would amount to an abuse of the process of Court.

5. Though the contentions of the learned Counsel are supported by two decisions referred to above, I am of the opinion, that the proceedings would not be vitiated only because the Magistrate do not mention in the order-sheet whether (there were) any other witnesses on behalf of the complainant present or not, if it turns out to be that after the examination of the complainant on oath there is no mention about the presence or otherwise of the witnesses of the complainant. For proper appreciation of the import of Section 200 of the Cr.P.C., it would be necessary to examine the provisions of the said section, which reads as follows:

Examination of complainant-A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the sub-stance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

(proviso omitted as unnecessary)

So, Section 200 Cr.P.C. is a mandatory provision and certainly not discretionary and further the observance is not a mere formality and non-conformance thereto, will be a non-conformance to the principle established by law. But, then the fact remains whether the Court is bound to make a mention of the presence or otherwise of the witnesses of the complainant as per the submissions of the complainant or his counsel. It is incumbent upon the Magistrate who is taking cognizance of an offence on a complaint to examine the complainant on oath and the witnesses present, if any, and to reduce in writing the sub-stance of such examination and the same shall be signed by the complainant and the witnesses as also by the Magistrate. The Magistrate is enjoined under this Section to examine upon oath the complainant and the witnesses present if any. The words "witnesses present, if any" are preceded by the conjunction "and" which indicate

that the witnesses present is a separate phrase altogether by itself which has no connection whatsoever with the word "complainant" which precedes the word "and". Further, the words. "If any" appearing immediately after the words "witnesses present" is a clear indication that the Magistrate is enjoined to examine the witnesses only if they are present and not otherwise. So, if the witnesses are present in the Court, the Magistrate is bound to examine not only the complainant but also his witnesses who are present in Court. But to read something more into this phrase is to explain the intention of the legislature to mean that even if the witnesses are not present in the Court, the Magistrate is bound to make a mention of the same in the order-sheet after ascertaining from the complainant or the counsel appearing for him that no witnesses are present. It would appear reasonable for the Magistrate to ascertain from the complainant as soon as he is examined on oath whether any witnesses are present in Court and make a mention of the same in the order-sheet regarding the presence or otherwise of the witnesses, but to say that non-mention of the presence or otherwise of the witnesses of the complainant would vitiate the proceedings In my opinion, is not warranted from the Intention that could be gathered by reading the provisions of Section 200 of the Cr.P.C. The words "if any" immediately after the words "and the witnesses present" is a clear indication that the Magistrate shall examine the witnesses of the complainant, if they are present and if they are not present the Magistrate is not bound to examine any of them or make a mention of the same in the order-sheet, though it is desirable for the Magistrate to mention it in the order-sheet about the presence or otherwise of the witnesses. I therefore, with great respect, disagree with the interpretation put on the words "and the witnesses present, if any," appearing in Section 200 Cr.P.C. by the Calcutta and Madras High Court.

6. The submission of the learned Counsel for the petitioners that the Magistrate after examining the complainant on oath did not mention in the order-sheet whether there were any other witnesses present or not, would therefore, in my opinion, will not vitiate the proceedings. Hence, I do not agree with the observations made by the learned Judges in those cases referred to above that it is obligatory on the part of the Magistrate and he would have been well advised to make a mention whether any of the witnesses of the complainant were present or not In Court and the same Is therefore to be rejected.

7. The next submission of the learned Counsel for the petitioners that even if the entire allegations made in the complaint as also the statement recorded on oath by the Magistrate are taken into consideration no offence has been made out against the accused also cannot be acceded to at this stage. The Court is only bound to ascertain at this stage whether there Is a prima fade case to proceed against the accused or not and not to go into for the details and come to the conclusion whether those allegations are sufficient to convict the accused or not. The allegations In the complaint read with the sworn statement of the complainant clearly indicate that the overt acts attributed to the accused are sufficient at this stage for issuing process against the accused for the aforesaid

offences and in that view of the matter it cannot be said that there ere no prima facie grounds at all for the Magistrate to proceed against the accused. But however, it is made clear that any of the observations made in this order shall not be construed to mean the expression of any opinion with regard to the merits of the case.

8. In the result, for the reasons stated above, this petition fails and the same is dismissed.