

(1973) 01 GUJ CK 0007
In the Gujarat High Court

Patel Dhanji Mavji and Others

APPELLANT

Vs

Gadhvi Govind Jiva and Another

RESPONDENT

Date of Decision : 22-01-1973

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 504, 506

Citation : (1974) CriLJ 241 : (1974) GLR 136

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Judgement

J.M. Sheth, J.—This is a revision petition filed by the original accused against the order passed by the learned judicial Magistrate. First Class. Gandal, in Criminal Case No. 410 of 1972 dated 27th July. 1972, regarding issue of summons against them for offences punishable under Sections 323. 504 and 506(1) of the Indian Penal Code.

2. The grievance made by the petitioners is that the learned Magistrate had no power or jurisdiction to issue such process till the complainant, who had taken out such a proceeding against them, has filed the list of the prosecution witnesses. That having been not done, this order regarding issue of process is invalid and bad in law. The petitioners had filed Criminal Revision Application No. 17 of 1972 in the Court of the Additional Sessions Judge, Rajkot District, Gondal, praying for revising the aforesaid order. That application has been dismissed by the learned Addl. Sessions Judge. The petitioners have, therefore, moved this Court.

3. The learned Additional Sessions Judge has observed in his judgment that the provisions of Section 204(1-A) of the Criminal Procedure Code (hereinafter referred to as the Code) are mandatory. But according to him. question of filing the list did not arise. His observations in this behalf are as under:

Till it is ascertained by the Court as to whether complainant has any other witnesses to be examined, it cannot be said that opponent has to examine other

witnesses. List of the witnesses is required to be furnished only if complainant wanted to examine other witnesses. It is, therefore, clear that list of the witnesses is required to be furnished only if it is clear that other witnesses are to be examined by the opponent and that can be ascertained only after the Court inquires from the complainant. In this case it is not clear that the Court had ever inquired from the complainant as to whether he intended to examine other witnesses. In the examination of complainant u/s 200. Criminal Procedure Code, the complainant has not stated that he intended to examine other witnesses. At this stage, therefore, it cannot be said that the complainant wanted to examine any other witnesses. Question of filing the list, therefore, does not arise.

Another ground indicated by him for noninterference is that it is not shown that material prejudice is caused to the petitioners and the order has resulted into miscarriage of justice.

4. In my opinion, the reasoning adopted by the learned Additional Sessions Judge does not appear to be correct. Sub-section (1-A) of Section 204 of the Code was added by Act No. 26 of 1955. To understand the object behind this sub-section, it is necessary first to refer to Section 204(1) of the Code which reads as under:

204(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which according to the fourth column of the second schedule a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which according to that column, a warrant Should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some either Magistrate having jurisdiction.

Section 204(1-A) of the Code reads:

204(1-A) No summons or warrant shall be issued against the accused under Sub-section (i) until a list of prosecution witnesses had been filed.

The reading of this Sub-section (1-A) of Section 204 of the Code clearly indicates that there is prohibition. It is couched in a negative language. Language makes it quite clear that the Court cannot issue summons or warrant against the accused under Sub-section (1) until a list of the prosecution witnesses has been filed. In the instant case, admittedly, such a list of prosecution witnesses has not been filed and in spite of it summons has been ordered to be issued against the petitioners.

5. Mr. Lathia, appearing for the petitioners, has invited my attention to two decisions in support of his arguments, which lend support to the aforesaid conclusion of mine.

6. In Chaturbhuj Vs. Naharkhan, a single Judge of the Madhya Pradesh High

Court has observed:

Having regard to the wording of Section 204. clauses (1-A) and (1-B), it is clear that the filing of the list of prosecution witnesses is essential unless the complainant is the only witness in the case and that along with the summons or warrant issued under Sub-section (1) copy of the complaint ought to be sent to the accused. It is, therefore, not competent for a Magistrate to issue process without complying with these mandatory provisions.

In Ram Narain Vs. Bishamber Nath and Another, I. D. Dua J. (as he then was) has observed;

According to our system of law, provisions in criminal statutes, meant for the protection of the accused persons are to be considered to be imperative or mandatory, because the laws of this country protect the innocent to the greatest degree; likewise when statutes provide for the doing of acts or for the exercise of power or authority, they are generally assumed to be mandatory or peremptory irrespective of the phraseology used, though manifest intention of the legislature may replace this assumption. A direction, if merely intended to guide the officer, in securing order and despatch in the conduct of the official business or proceedings, on which rights of the parties interested cannot be injuriously affected, may be considered to be directory, but not where the mandate in a statute is intended for the protection of the citizen, by a disregard of which his rights would be injuriously affected.

After referring to the aforesaid observations, in para 8, at page 174, the provisions of Section 204 (1-A) and (1-B) of the Code have been considered. It is observed:

The question is undoubtedly not free from difficulty. But, after considering the matter from all its aspects and in all its implications, I am inclined to think, as at present advised that the provisions of clause (1-B) of Section 204. Criminal Procedure Code, are merely directory in the sense that failure to attach a copy of the complaint with the summonses does not by itself completely invalidate or nullify the issue of the process....

...The provisions of clause (1-A) however, appear to me to be mandatory in the sense that a process issued before the filing of the list of witnesses would be invalid. This clause is couched in a negative language, and it seems to go to the power of the Magistrate to issue summonses or warrants, as the case may be. In coming to this conclusion. I have to a very large extent been influenced by the fact that the laws of our Republic jealously safeguard the liberties of the subject, and the provisions which enjoin the Courts to satisfy themselves about the prima facie nature of a criminal charge, before issuing a process must be intended, in the absence of a clear suggestion to the contrary to be mandatory.

The aforesaid two decisions clearly indicate that the provisions of Sub-section (1-A) of Section 204 of the Code are mandatory. They are for protecting the interest

of the accused. Accused would be in a position to know on filing of such list of the prosecution witnesses, as to the witnesses who are supporting the prosecution case. Looking to the negative language used in this sub-section I find that the ratio laid down in the aforesaid two decisions of High Courts is correct.

7. Mr. Patel appearing, for the complainant, has invited my attention to the decision of a single Judge of this Court in Bhimji Karsan Vs. Nanduben Nagji and Another, . In that decision, it has been observed:

Under Section 244 of the Criminal Procedure Code a duty is cast on the Court to take evidence that is produced by the complainant and the Court cannot decline to take that evidence on the ground that the witnesses who are sought to be produced and examined are those whose names are not mentioned in the list, initially filed with the complaint, Section 204(1-A) is not a proviso to Section 244. If after the evidence of the complainant is recorded he has kept the witnesses present, it is not open to the Court to refuse to record their evidence on the only ground that the names of these witnesses were not shown in the list.

This decision, in my opinion, does not directly or indirectly throw any doubt on the aforesaid ratio. This decision has, therefore, no application.

8. Mr. Patel has then urged that there is nothing to indicate that the complainant wanted to examine any other witnesses in support of his complaint. In my opinion, this argument is not well-founded. In the complaint itself, the complainant has stated that the accused of this case would destroy his evidence. That is his apprehension. He will therefore, produce his witnesses whenever directed by the court. It cannot, therefore, be said that the complainant was the only, witness. Complainant does refer to the fact that there are other witnesses and he has apprehension of those witnesses being tampered with by the accused. So, he will produce them as witnesses whenever called upon by the Court to do so.

9. There is nothing brought on the record by the complainant to indicate that he does not want to, examine any other witnesses and the complainant is the only solitary witness. If such a fact is brought on the record prior to the issue of the process, that would have been" sufficient. The Court has not made any such inquiry from the complainant and has not recorded any such fact. The order passed by the Court, therefore, regarding the issue of process without filing any such list as required u/s 204(1-A) of the Code, cannot be sustained in law.

10. The revision petition is allowed. The order passed by the learned Magistrate regarding issue of process, dated 27th July. 1972 is set aside and he is directed to make inquiry regarding witnesses from the complainant and if he (complainant) has to examine other witnesses, to get the list of such witnesses from the complainant prior to the issue of the process, as required u/s 204(1-A) of the Criminal Procedure Code. Rule is made absolute.