

(2014) 08 AHC CK 0014

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 13437 of 2014

Sabdar Husain and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 192, 200, 202
Penal Code, 1860 (IPC) — Section 307, 504, 506

Citation : (2015) 2 ALJ 157

Hon'ble Judges : Ranjana Pandya, J

Bench : Single Bench

Advocate : Javed Habib and Asgar Ali, Advocates for the Appellant

Judgement

Ranjana Pandya, J.—This writ petition has been preferred against the order dated 06.09.2013 passed by Judicial Magistrate-I, Bareilly summoning the revisionists in Complaint Case No. 66 of 2013, Police Station Bhamora, District Bareilly, under Sections 307, 504 and 506 I.P.C. and order dated 02.05.2014 passed by Additional District and Sessions Judge, Court No. 11, Bareilly, in Criminal Revision No. 318 of 2013. I have heard, the learned counsel for the petitioners, learned A.G.A. and perused the material available on record.

2. Perusal of the evidence on record shows that an application under Section 156(3) Cr.P.C. was moved by the opposite party No. 2 with the allegations that opposite party No. 2 used to sell biscuits to run his family: Sabdar Husain, Shamshul Hasan, Irfan and Gulfam had fight among themselves which was calmed down by the opposite party No. 2 due to which the accused persons have enmical relation with the opposite party No. 2. On 27.05.2012 at about 09:00 p.m. when the opposite party No. 2 was returning home after selling biscuits, suddenly Sabdar Husain, Shamshul Hasan, Irfan and Gulfam were sitting near the majar. They stopped the opposite party No. 2 and started abusing and assaulting him. The opposite party No. 2 shouted for help, suddenly Sabdar Husain with intention to kill opposite party No. 2 fired by his country made pistol

which hit the opposite party No. 2 on the left palm and wrist. Opposite party No. 2 fell down and the accused persons thinking that the opposite party No. 2 to be dead, fled away. Witnesses Ikrar, Kalloo and other people came from the village who saw the occurrence and saved the opposite party No. 2. In the night, opposite party No. 2 went to the police station from where he was sent for medical examination along with the Home guard. The original papers relating to the medical examination were kept by the police which were not returned to the opposite party No. 2 and signatures were taken on a blank papers from the opposite party No. 2. When nothing was done in the matter, the opposite party No. 2 had moved an application under Section 156(3) Cr.P.C.

3. The police submitted its final report after investigation against which a protest petition was submitted by the opposite party No. 2 which was treated to be a complaint. The complainant examined himself under Section 200 Cr.P.C. and the statements of PW-1 Kalloo, PW-2 Ikras, PW-3 Azad, PW-4 Kalakter and PW-5 Dr. Kamal Kumar were recorded under Section 202 Cr.P.C.

4. The learned lower court after examining all the evidences on record summoned the accused person under Sections 307, 504 and 506 I.P.C.

5. Feeling aggrieved the present writ petition has been preferred.

6. The three fold arguments have been adduced on behalf of the petitioners. Learned counsel for the petitioners has argued that the medical evidence is not in consonance with the oral testimony of the witnesses, hence the order is liable to be quashed. Once the complainant and witnesses have stated that gun shot was fired with intention to kill the complainant, I think, it will suffice because at the stage of summoning under Section 202 Cr.P.C., the only thing which the summoning court has to see is whether there are sufficient grounds to proceed against the accused or not. Learned counsel for the petitioners has further argued that the learned lower court has not followed the process prescribed by law and thus all the proceedings have been vitiated. Section 202 Cr.P.C. reads as under:--

"202. Postponement of issue of process--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made -

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section

200.

(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 his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

7. This is according to the provisions of Section 202 proviso, it is incumbent upon the Magistrate to examine all the witnesses if the case is triable by the court of sessions.

8. In the operative portion of order under challenge, learned Magistrate has also directed the complainant to file list of witnesses along with the pairvi. There is nothing on record to show that the learned Magistrate has directed the complainant opposite party No. 2 to produce the list of witnesses before the court.

9. In Dinesh Chand Sinha Vs. Rahmatullah and Another, , the Hon''ble Court has held that:--

"It is clear from a plain reading of the proviso to Sub-section (2) of Sec. 202 Cr.P.C. that the Magistrate is bound to examine all the witnesses who are to be produced on behalf of the complainant before summoning the accused in cases which are exclusively triable by the court of session. If, therefore, a Magistrate summons an accused in a case triable exclusively by the court of session without examining all the witnesses who are to be produced by the complainant the order summoning the accused would be illegal. Any other interpretation would do violence to the mandatory provision contained in the proviso referred to above. Before summoning the accused it is not open to the Magistrate to insist upon the production of all the witnesses cited by the complainant in his complaint. He can summon the accused even after some of the witnesses cited in the complaint have been examined by the complainant but he can do only in the event when the complainant makes it clear that the witnesses examined by him were the only witnesses on whom he intended to rely upon. If the names of some persons to be examined as witnesses are not specifically mentioned in the complaint the Magistrate will call upon the complainant to disclose their names and examine them also if he so wished or give them up if he does not want to examine them. The Magistrate can certainly summon the accused even after examining some of the witnesses mentioned in the complaint but the complainant has to make it clear that the witnesses examined on his behalf were the only witnesses on whom he intended to rely upon. If the complainant does not make this position

clear then it is not open to the Magistrate to summon the accused without examining all the witnesses either mentioned in the complaint or in the list accompanying the complaint."

10. It appears that the Magistrate had in mind about the provisions because the doctor has been examined and witnesses of fact and even hearsay witnesses have also been examined but there is nothing on record to prove that the complainant was called upon to make it clear that the witnesses examined by him were the only witnesses on whom he has intended to rely. The complainant had examined the doctor whose name was not mentioned in the complaint. Thus, it was also incumbent upon the Magistrate to have directed the complainant to disclose the names of all the witnesses he proposed to examine at the trial stage, which has not strictly been done in this case. Hence the writ petition is liable to be allowed. The order under challenge is quashed. Learned Magistrate is directed to comply with the aforesaid provisions as mentioned above and pass a fresh order according to law.