

(1981) 10 BOM CK 0024

In the Bombay High Court

Case No : Criminal Application No. 425 of 1981

Shashi Nair

APPELLANT

Vs

R.C. Mehta and Others

RESPONDENT

Date of Decision : 16-10-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204(1), 204(1A), 204(1B), 204(2), 244(1)

Penal Code, 1860 (IPC) — Section 120B, 34, 406, 420

Citation : (1982) 1 BomCR 358

Hon'ble Judges : N.K. Parekh, J

Bench : Single Bench

Advocate : A.A. Bhore, for the Appellant; K.H. Chopda, Public Prosecutor, M.M. Dhru and S.S. Vedak for respondent No. 1, S.G. Shah, for the Respondent

Judgement

N.K. Parekh, J.—The petitioner in this matter is the original accused No. 1 in Case No. 227/W of 1978 on the file of the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay, being aggrieved by an order dated 24th November, 1980, the petitioner has filed the present application for quashing the proceedings in Case No. 227/W of 1978.

2. The facts that lead to this application are that one R.C. Mehta filed a complaint in the Additional Chief Metropolitan Magistrate's 37th Court at Esplanade, Bombay which came to be numbered as Case No. 227/W of 1978. There were four accused in this case, one being Shashi Nair, who was accused No. 1 (the petitioner herein), one Tatoba Shewale, who was accused No. 2; one Prabhakar Rawtoo, who was accused No. 3; and one Raymond M. Ruben, who was accused No. 4 (accused Nos. 2, 3 and 4 are the respondents No. 2 to 4 in this petition). (For brevity sake, the said R.C. Mehta is hereinafter referred to as the complainant whereas the said Shashi Nair is hereinafter referred to as the accused).

3. In this complaint, it was the case of the complainant that he was and is the

Export Manager of M/s. C. Ramon & Co. Pvt. Ltd. That the said company was concerned with exports of marine products. That the accused were dealing in sea-foods and trading in the name and style of Variety Food Exports. That in or about February 1977, the accused approached the said M/s. C. Ramon & Co. Pvt. Ltd., and represented to them that their firm enjoyed a high reputation and was willing to supply frozen shrimps. That they would execute all orders from time to time and carry out the processing and storing of the goods in the cold storage as also effect deliveries. The accused also agreed to get the goods processed, packed and stored in cold storage and export them in fulfilment of the contract arrived at between C. Ramon & Co. Pvt. Ltd., and their foreign buyers. That relying on these representations M/s. C. Ramon & Co. Pvt. Ltd., placed an initial order of 500 cases of H.B. frozen shrimps on the terms and conditions incorporated in a letter dated 23rd February, 1977 which the accused accepted. That the firm of M/s. C. Ramon & Co. Pvt. Ltd., had also agreed to advance to the accused 75% of the F.O.B. value of the goods, on the accused giving a specific undertaking that the amounts of advance would be applied by them only to acquire raw materials, grade the product and incur various expenses incidental to processing them. That it was also agreed that the goods acquired were also to be deemed to be hypothecated to M/s. C. Ramon & Co. Pvt. Ltd. It was also agreed that the accused also undertook to submit correct vouchers, statements, etc., in respect of the goods after properly processing, packing and storing them in the cold storage. That in pursuance of this agreement, the accused submitted invoices from time to time. That they in fact, submitted about 23 invoices giving the details of the goods, their grade numbers, slabs and the weight of the goods stored by them in cold storage. That relying on these details furnished to the company, the company advanced a sum of Rs. 4,77,966.96.

4. It is the case of the complainant that by reason of these 23 invoices, accused gave the company to understand that they had in fact packed and stored 13854 kgs. of H.B. frozen shrimps. However, at a later stage they found that although the accused had represented that they had stored 13854 kgs., they had in fact stored only 9200 kgs. It is the case of the complainant that on discovering this fact, they entered into correspondence. That they were finally constrained to file the said complaint, inter alia, charging the accused with having committed offences u/s 120B read with section 420 and section 406 of the Indian Penal Code and section 420 and section 406 read with section 34 of the Indian Penal Code.

5. This complaint was verified on or about 13th October, 1978. On verification, the learned Magistrate proceeded to direct process to issue. That the matter was then proceeded with and the recording of the evidence of the complainant began on or about 6th August, 1979. The recording of evidence proceeded from time to time and the examination-in-chief of the complainant came to an end on or about 20th February, 1980. That on that i.e. 20th February, 1980, the accused presented an application, inter alia contending that the complainant had not given a list of witnesses in compliance of section 204(1)(a) and that since

process was issued without this list being furnished, the process was bad in law and the accused were entitled to be discharged. This application was stood over till the 10th of March, 1980. However, on 10th March, 1980, the learned Magistrate did not take his seat and the matter was again adjourned to 16th November, 1980. On that day, the learned Advocate on behalf of the complainant tendered a list of witnesses with a request to the learned Magistrate to take the same on file inasmuch as it was inadvertently left-out at the time of the filing of the complaint and in any event, before the process was issued. By his order dated 24th November, 1980, the learned Magistrate directed the list to be taken on file. Being aggrieved by this, accused No. 1, (the petitioner herein) has filed the present application to quash the proceedings on the ground that the order of the learned Magistrate was contrary to law.

6. At the hearing of this matter, Mr. Bhore, the learned Advocate for accused No. 1 urged that section 204 of the Criminal Procedure Code provided as follows :---

"204(1) If in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

a) a summons-case, he shall issue his summons for the attendance of the accused or

b) a warrant-case, he may issue a warrant, or if he thinks fit, summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time the Magistrate may dismiss the complaint.

5) Nothing in this section shall be deemed to affect the provisions of section 87".

That this section corresponds to section 204 of the old Code. That in order to simplify the law, sub-section (1) about issue of process which related to summons cases and warrant cases, was revised. That the effect of this has been that summons would be issued in all summons cases, and a warrant in all warrant cases except when the Magistrate orders otherwise. That sub-section (2) of the amended Code corresponds to the provisions of section 204 in the old Code. That this sub-section provides that the prosecution must file a list of witnesses on which it relies before the Court can issue process. That this is a mandatory provision. That a failure to comply with this provision must prove

fatal. Mr. Bhore argued, that in this matter, what had transpired is that at the time when the complaint was filed, the complainant did not file a list of witnesses, nor did he specify the names of this witnesses in the complaint. That even at the time when the complaint was verified, he failed and neglected to file list of witnesses. That even at the stage when the examination-in-chief commenced, i.e. on or about 6th August, 1979, the complainant did not file a list of his witnesses and right up to the 20th February, 1980, i.e. the date on which his examination-in-chief came to an end, he failed to do so. That it was in these circumstances that an application was made by accused No. 1 that since the list of witnesses was not filed there was no compliance with the provisions of section 204, sub-clause (2) and if process was issued, the process was bad in law and all the accused were entitled to be discharged. That the matter was however adjourned to 10th March, 1980. That on that day, the learned Magistrate did not take his seat and hence, the matter was stood over to 16th April, 1980. That it was on 16th April, 1980 that the complainant, who is the 1st respondent herein tendered a list of his witnesses to Court. That on 24th November, 1980, the learned Magistrate passed an order and inter alia directed the list of witnesses be taken on file. Mr. Bhore contended that if a list of witnesses had to be filed, then sub-section (2) made it abundantly clear that it ought to be filed before the process was issued and not thereafter. That if this process was issued without the list being filed, the process was bad. That the provisions of sub-section (2) were not only obligatory but were mandatory. In support of his contention, Mr. Bhore relied upon the decisions in the case of Ram Narain Vs. Bishamber Nath and Another, State of Bombay v. Janardhan and others, AIR 1960, Bombay, page 513: Subol Mondal and another v. The State, 1974 Criminal Law Journal 176: Patel Dhanji Mavli and others v. Gadhvi Govind Jiva and another, 1974 Criminal Law Journal, Page 241: Chaturbhuj Vs. Naharkhan, : Mowu Vs. The Superintendent, Special Jail, Nowgong, Assam and Others, . Mr. Bhore argued that in view of the ratios in all these decisions, it was apparent that compliance of sub-clause (2) of section 204 was obligatory and/or mandatory in character and the non-compliance thereof must now prove fatal to the complainant's case. That the Magistrate had acted illegally and contrary to law, and this was a fit case for exercising the powers u/s 482 of the Criminal Procedure Code.

7. In reply to this contention, Mr. Dhru, the learned Counsel for the complainant/respondent No. 1 urged that the provisions of sub-clause (2) of section 204 were not mandatory in character but directory. That the object of the provision requiring the complainant to furnish a list of the witnesses to the accused at an early stage was to prevent the accused from being taken by surprise and that no prejudice should be accused to his defence. That in the present circumstances, it is true that at the stage of the filing of the complaint and the verification thereof, a list of the witnesses was not filed but this was entirely due to an oversight, but this omission cannot vitiate the proceedings. That it is an admitted position that once this was brought to the notice of the complainant, more particularly by the application of the accused on 20th April, 1980, the complainant had hastened to

give this list and the learned Magistrate had taken this list on file. That what is significant is that during the course of the entire argument, Mr. Bhore had not stated as to what was the prejudice caused to the accused/petitioner by the non-filing of the list before the process was served. That if he cannot satisfy the Court on this point, then the mere non-compliance of a technicality of law cannot be fatal to the complainant's case.

8. Mr. Dhru argued that section 204 falls into two parts. Sub-clause (1) provides as to what the learned Magistrate should do as and when he takes cognizance of a complaint. viz., that if on taking cognizance, he is satisfied he may direct process to issue. That this is a judicial act. Insofar as sub-clause (2) is concerned, sub-clause (2) provides that a list of witnesses should be filed before the actual process is issued. That this entails a ministerial act. That if there is an omission on this part inasmuch as a list of witnesses was not filed before process was issued, it does not mean that the process is bad in law. This at best would be an irregularity which can be cured by handing over the list at a subsequent stage, provided of course, no prejudice was or is caused to the accused. That in this case, this is exactly what has happened and the list has been furnished to the other side. That nothing has been shown that any prejudice was or is caused to the other side and the contention on behalf of the accused cannot survive. In support of his argument, Mr. Dhru relied upon two decisions, viz., in the case of *Madhaorao v. Yeshwant*, 1969 Maharashtra Law Journal, Page 21 in Criminal Application No. 341 of 1968, decided by Chandurkar, J., on 17-6-1969 and *Abdulla Bhatt v. Gulam Mohd. Wani*, 1972 C L J 277.

9. Now, considering the rival contentions, the short point that arises is whether the process that was issued by the learned Magistrate prior to the filing of the list of witnesses was bad and needs to be quashed, and it would be convenient to look at the decisions cited by the Counsel on both sides. Coming first to the decision of *Ram Narain Vs. Bishamber Nath and Another*, it appears that in that case the learned Judge held that insofar as the provisions of section 204 are concerned, the provisions of sub-clause (1)(b) were merely directory but nonetheless, the provisions of sub-clause (1)(a) were mandatory because that clause is couched in a "negative language". This case was considered in the decisions cited by Mr. Dhru and I shall advert to the same hereafter. In the case of *the State of Bombay v. Janardhan & others*, AIR 1960 Bom 513, the facts were that after a list of witnesses was filed, the complainant wanted to file an additional list of witnesses and an application was made, and the learned Judge held that such an application was maintainable and that the original list of witnesses given u/s 204(1) could be added to by further names and the witnesses so added could be examined. The ratio in this case is wholly besides the point. Coming next to the case of *Subol Mandal and another v. The State*, 1974 C L J 176 (Calcutta High Court), the facts in that matter were that on taking cognizance of an offence and examining the complainant, the Sub-Divisional Magistrate directed an inquiry by a first class Magistrate under report. Accordingly, the inquiring Magistrate recommended issue of summons, and

himself issued warrants of arrest because of the absence of the Sub-Divisional Magistrate. The order was stayed by the Sub-Divisional Magistrate. However, the stay was later vacated by another Magistrate who issued fresh warrants. It was in deciding this issue that it was held that the Sub-Divisional Magistrate who acted initially in taking cognizance alone was competent to issue warrants of arrests. The process was hence set aside. From a reading of this case, it appears that this was the main subject matter. However, it appears that during the course of attacking in the said order on the aforesaid ground what seems to have been canvassed is that the process was bad in law since the names of the witnesses was not filed prior to the issue of process. The learned Judge seems to have taken this submission into consideration and went on to hold that the process was bad. However, from a reading of the entire case, it is apparent that no issue was raised whether the provisions of section 204(2) were obligatory, mandatory or directory in character. This issue was not discussed nor touched upon and the ratio of that case hence can be of no assistance to Mr. Bhore in this matter.

10. Coming next to the case of Patel Dhanji Mavji and others v. Gadhvi Govind Jiva and another, 1974 C L J 241 (Gujaratha High Court), this case seems to have followed the case in Ram Narain Vs. Bishamber Nath and Another, and it was held that the provisions were mandatory in character. As stated earlier, this case at Ram Narain Vs. Bishamber Nath and Another, has been dealt by a Full Bench decision of the Jammu & Kashmir High Court to which I will advert to hereinafter.

11. Coming next to the case of Chaturbhuj Vs. Naharkhan, it was held in that case that having regard to the wordings of section 204, Clause (1-A) and (1-B), it was clear that the filing of the prosecution witnesses was essential unless the complainant was the only witness (in that case) and that along with the summons or warrant issued under sub-section (1) a copy of the complaint ought to be sent tot he accused. That it was, therefore, not competent for the Magistrate to issue process without complying with the said mandatory provisions. The learned Judge went on to hold that the provisions were mandatory in character. Insofar as the ratio of this case is concerned, it was the subject matter of a decision of this High Court to which I shall advert to hereinafter but suffice at this stage to state that I respectfully differ from the ratio laid down in the said case.

12. Turning next to the case of Shubрати Khan Vs. State, the question that arose in the above case was that whether the Magistrate had power to issue summons to witnesses whose names did not appear in the list of witnesses filed u/s 204(1-A) and the learned Judge went on to hold that the Magistrate could issue a summons against a witness who was not mentioned in the original list filed u/s 204(1-A) but I do not see how the ratio of this case can be of any assistance to the accused/petitioner.

13. Coming next to the case of Mowu Vs. The Superintendent, Special Jail, Nowgong, Assam and Others, , the facts in that case pertained a Habeas Corpus

petition. When the grounds pleaded in the petition failed, Counsel appearing in the matter sought to raise certain contentions which the Court allowed although they were not pleaded, that being a Habeas Corpus petition. The argument urged was that the District Magistrate, Kohima did not validity take cognizance of the offence with which the petitioners were tried, firstly, because he did not examine either on the 2nd or the 23rd December, 1969, the complainant and the said Lt. Col. H.L. Shethi, before issuing a non-bailable warrant against the petitioner, and secondly, because no list of witnesses were placed before him as required by section 204(1-A) of the Code, before he could issue any process. In paragraph 16 of the judgment, the learned Judge observed as follows :---

"It is true that section 204(1-A) requires that a Magistrate shall not issue a process until a list of the prosecution witnesses has been filed before him. This provision is intended to be a safeguard for an accused person so that he knows beforehand what evidence is likely to be produced against him."

Relying on these observations, Mr. Bhore the learned Advocate for the petitioner in this matter urged that this made it clear that the provisions of section 204(1-A) were and are mandatory. Since in this matter, the provisions concerned are the same, the same must prove fatal.

14. Now, as regards this argument, it may be stated that what transpired in that case was that the attention of the Court was drawn to section 204(1-A) and the Supreme Court observed that the provisions was intended to see that no prejudice was caused to the accused. The question as to whether the said provision was mandatory or directory in character was neither urged nor discussed. Moreover, in that case, the Court went on to observe---

"In any event, the objection that the Magistrate could not issue any process without there being a list of witnesses filed before him as required by section 204(1-A) cannot be sustained by reason of the fact that in Nagaland it is the procedure laid down in the Rules for the Administration of Justice and Appeals in Naga Hills Districts, 1937, which applies and not the procedure laid down in the Code. Under these rules, since the Code is not in force in Nagaland, the procedure to be followed is according to the spirit of the Code and not strictly according to the terms of its provisions."

In view of all this, I do not see how the said case can be of any assistance to the petitioner herein.

15. As stated above, the case of Ram Narain Vs. Bishamber Nath and Another, the State of Bombay v. Janardhan and others, AIR 1960 Bom 513, Chatrubhuj v. Naharkhan, AIR 1968 M.P. 28 and Shubrati Khan Vs. State, were all considered by a Full Bench of the Jammu & Kashmir High Court in the case of Abdulla Bhat v. Ghulam Mohd. Wani, 1974 C L J 277 and the learned Judges did not accept the contention that the provisions of section 204(2) were mandatory in character. What in fact the learned Judges went on to hold was that the Criminal Procedure Code was essentially a procedural law and, therefore, any error or irregularity in

the mode or method of trial does not necessarily go to the jurisdiction of the Court but was curable u/s 537 of the Criminal Procedure Code.

16. As stated earlier, the decision in Ram Narain Vs. Bishamber Nath and Another, and Chaturbhuj Vs. Naharkhan, were also considered by Chandurkar, J., in a matter in this High Court viz. in the case of Madhaorao Pandurang v. Yeshwant, in Criminal Revision Application No. 341 of 1968 decided on 17th June, 1969 and the learned Judge, after considering the case held that the object of putting sub-sections (1-A) and (1-B) of section 204 of the Criminal Procedure Code was to give sufficient notice to the accused of the allegations which are made against him on which he is sought to be prosecuted and also of the nature of the evidence which the prosecution proposes to adduce against the accused. The jurisdiction of the Magistrate u/s 204(1) to issue a summons or a warrant in the first instance, as the case may be, if he is satisfied that there was sufficient ground for proceeding cannot be taken away by the failure on the part of the complainant to file a list of prosecution witnesses. Section 204(1-A) does not control sections 244(1) or 244(2) which were not amended after sub-section (1-A) was added in section 204 of the Code by Act No. 26 of 1955. There is nothing in section 244(1) or (2) which restricts the power of the Magistrate to take evidence only of those witnesses whose names are not mentioned in the list referred to in section 204(1-A). Therefore, the provision regarding submission of a list of witnesses in section 204(1-A) cannot be considered as mandatory so as to control the jurisdiction of the Magistrate to proceed with the trial of the accused and record his plea. The provisions of section 204(1-A) of the Criminal Procedure Code were not mandatory in nature and if before the list of witnesses is filed the Magistrate issues a summons to the accused after he is satisfied that there is sufficient ground for proceeding against the accused, he does not act without jurisdiction and further proceedings, after the appearance of the accused are not invalid. Unless clear prejudice is shown to have been caused to the accused by a late submission of the list of prosecution witnesses, the order issuing a summons to him cannot be said to be vitiated. Though the provisions of section 204(1-A) were directory it is the duty of the Magistrate to secure compliance with the requirement of section 204(1-A) at the earliest possible stage of the proceeding to avoid any prejudice to the accused if for some reason he did not insist on the list of witnesses to be filed along with the complaint.

Since this point has now been covered by the judgment of this Court, I may only add that I respectfully agree with the finding of the learned Judge.

17. In the result, it cannot be said that the order of the learned Magistrate is bad in law and there is no warrant for any interference in this matter. This is not a proper case to exercise powers u/s 482 of the Criminal Procedure Code. The rule is discharged. The stay, if any, vacated. The party will appear before the learned Magistrate on 2nd December, 1981.