

(1972) 04 BOM CK 0015
In the Bombay High Court

Smt. Yashodabai Keshav Thakur Desai	APPELLANT
Vs	
Bhaskar Moreshwar Kamat and Another	RESPONDENT

Date of Decision : 04-04-1972

Acts Referred:

Penal Code, 1860 (IPC) — Section 341, 504, 506

Citation : (1973) CriLJ 1007

Hon'ble Judges : Bhole, J

Bench : Single Bench

Judgement

Bhole, J.—The complainant, who is the landlady of the house and who is prosecuting her tenant, accused, for offences under Sections 323. 341. 354, 504 and 506,. IPC has come here in revision against the order of discharge passed by the learned Presidency Magistrate, 12th Court, Bandra, Bombay. The accused lives in the building belonging to the complainant and it is known as Krishna Bhuvan situate at Hindu Colony. Dadar. The accused who is the Inspector in the Customs department at Bombay is the tenant occupying a block on the second floor of the said1 building. On 25-12-70 at 5 p.m. the complainant went to her building to see her goods on the terrace as well as to inspect it. At the time when she was going down by the. 1 iron ladder from the third floor to the terrace on the second floor, the accused caught hold of her hand and pushed her and prevented her from going to the terrace. It is also her case that he assaulted her on the left side of the breast. He then asked his wife to bring a stick. But when the complainant shouted, the people gathered there. According to her the accused told her that the terrace was in his exclusive possession and .that she had no right to go there at all. The accused"s wife and other persons who gathered there intervened and the accused was taken to his block. The complainant, therefore, went and reported about this incident to Matunga Police Station. She was sent to Sitn Hospital and was treated there.

2. The learned Magistrate before framing the charge took the evidence of the complainant as well as her witness one Nilam Khot. It appears some litigation is

also going on in the Court of the Small Causes between the parties. The accused had filed a suit for declaration that he is the tenant of the terrace also and for an injunction against the landlady. He also obtained the injunction on 19-12-'70 by which he was allowed to use the terrace without any intervention of the landlady. The learned Magistrate after considering the evidence of the complainant as well as her witness appears to have misconstrued the order of injunction which is also on record. According to the learned Magistrate the complainant had no " right to go to the terrace at all; that the accused on the other hand had every right to prevent her from going to the terrace and that if the accused did any act in his right to defend his property, he cannot be said to have committed any offence. This impression of the learned Magistrate is quite contrary to what the injunction is. The injunction obtained by the accused is that the landlady should not restrain the accused from going to the terrace. There is no injunction that the landlady is prohibited from using the terrace or going to the terrace. The learned Magistrate, therefore, appears to have construed the evidence not only of the complainant but also her witness from the view that he had taken of the injunction. He had, therefore, committed an error by approaching the evidence in an improper manner.

3. u/s 252 (1) of the " Criminal Procedure Code, in any case instituted otherwise than on a police report, when the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. Evidently, therefore, the Magistrate has to proceed to hear the complainant and also hear all the witnesses that might be produced by him in support of the complaint. So far as the present complaint is concerned, the complainant cited as many as six witnesses. Only one witness, however, appears to have been examined at the trial. The Magistrate has not endorsed that the complainant did not want to examine any other witness. But the learned advocate for the respondent contends here that she ought to have examined all these witnesses cited by her in the complaint on the same day and the fact that she did not keep her witnesses present shows that she did not want to examine any further witnesses. But the record does not show that the complainant was not willing to examine her other witnesses. u/s 252 (1) of the Cr.PC the Magistrate shall proceed to hear the complainant and take all the evidence as will be produced. Before closing the evidence before charge, in my view, it was necessary for the Magistrate to ask the complainant if she wanted more of her witnesses to support her complaint- Because the complainant did not keep all the witnesses present on that day, therefore, it does not necessarily mean that she did not want to examine all the witnesses. The record, therefore, clearly shows that the learned Magistrate has also not complied with the requirement of Section 252 (1) of the Criminal Procedure Code.

4. We have on record the complaint of the complainant which clearly makes out a case against the accused. We have also her evidence on oath as well as the evidence of Nilam Khot. Both of them did depose about the going of complainant

to her building; she was on the terrace of the third floor; she wept down to the second floor using the stair-case; when she was using the iron stair-case going down to the second floor, the accused rushed at her; the accused caught hold of her and drove her out and the complainant started shouting- Now the point, therefore, that arises here for consideration is whether all this evidence is or is not enough to frame a charge against the accused. u/s 253 (1) of the Criminal Procedure Code if upon taking all the evidence referred to in Section 252 and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. The point is whether the evidence as it is. is or is not enough, if unrebutted, to warrant a conviction, of the accused, in my view the evidence is quite adequate. The Magistrate u/s 253 (1) of the Criminal Procedure Code has no power to pass an order until he examines all the witnesses produced by the complainant. The record shows that he has not so examined all the witnesses. The order of discharge can be made, when, according to the wording of the Section, no case has been made out. which if unrebutted. would warrant the conviction of the accused. In my view there is evidence, which, if unrebutted, would justify the conviction. If that is the case, then it is always better to frame a charge and dispose of the case finally than to discharge the accused. So far as the present case is concerned, the complaint prima facie discloses the offence; the evidence led by her also discloses the offence; the charge made against the accused by the complainant cannot be said to be groundless; it is not that the complainant's complaint is such that the Magistrate can come to the conclusion that the defects, if any. in the complainant's case cannot be made good even if all her other witnesses state everything in her favour. The complaint in my view cannot be said to be "groundless unless the evidence of not only the witness who is examined but also of those who are to be examined is fully appraised. It does not therefore appear to me, that the order of the learned Magistrate is proper.

5. Mr. Mehta, the learned advocate for the respondent, invited my attention to *Emperor v. Parsharam Bhika* 35 Bom LR 245 : (1933) 34 Cri LJ 564. That was a case where one Rupchand had filed a suit against one Jaffar Ali. Rupchand was complainant and Jaffar Ali was accused. The suit was postponed for settlement to 14th of March 1932. The complainant alleged that on that day accused Nos. 1, 2 and 3 came to his house under the pretext of settling the matter. They overpowered the complainant by throwing him down and snatching away an account book from him. which was mentioned for the purpose of settlement. Accused No. 3 ran away with the book and accused Nos. 1 and 2 followed him. They ran to the motor car in which accused Nos. 4 and 5 (Police constables") were sitting, the complainant pursuing them. Accused Nos. 4 and 5 tore the book and gave some pages to accused No. 1 and some to accused No. 2. Accused No. 2 went away in a motor car. Accused Nos. 4 and 5 arrested the complainant and forcibly took him to the Police Station along with accused No. 1. The complainant prosecuted accused Nos. 1-3 under Sections 395, 323, 451 and 342 of the Indian

Penal Code read with Section 114, and accused Nos. 4 and 5 under Sections 395, 342 and 220 read with Section 114 of the Code. The trial Magistrate recorded the evidence for the prosecution and came to the conclusion that there was no evidence of conspiracy between accused Nos. 4 and 5 and the other accused to help the latter. He, therefore discharged accused Nos. 4 and 5 u/s 253, Criminal Procedure Code and framed charges against accused Nos. 1, 2 and 3. The Sessions Judge set aside the order of discharge passed by the Magistrate and directed that accused Nos. 4 and 5 be committed for trial to the Court of Session along with accused Nos. 1 to 3. There was therefore, revision application to this Court. Mr. Justice Broomfield, who delivered the Judgment after referring to the other case and also *Manikka Padaychi v. King Emperor*. ILR 48 Mad 874 : (1925) 26 Cri LJ 1570, has observed as follows:

ILR 48 Mad 874 : (1925) 26 Cri LJ 1570 was also cited as laying down the proposition that whenever the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and weighing it. the Magistrate must commit the accused to the Sessions: but if the evidence be of such a nature that no reasonable person would ever on that evidence hold the accused guilty, he must be discharged under S, 209. That is the judgment of a single Judge and it appears to us to go further in limiting the discretion of the Magistrate than the decisions of this Court would warrant. The view we take is that the Magistrate is both entitled and bound to value and weigh the evidence and that, if he disbelieved the evidence and makes an order of discharge, the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with. it. but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence.

6. It is, therefore, contended by Mr. Mehta that the order of the Magistrate from the point of view of this ruling is quite a reasonable order and according to him it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to evidence. I do not think so. The learned Magistrate appears to have misconstrued the order of injunction and thought that it is a prohibitory order and therefore the accused can do anything to prevent his landlady from going on the terrace. It is only on this approach that he appears to have assessed the evidence. The complainant's evidence as well as the evidence of her witness do prima facie show that the offence was committed by the accused. The evidence is such that if it is unrebutted, it can lead to the proof of the guilt of the accused. In that view of the matter, therefore, the order passed by the learned Magistrate is erroneous,

7. I, therefore, allow this revision application, set aside the order of discharge passed by the learned Magistrate and send back the record and proceedings to the lower Court for disposing of the case according to law.

8. Rule made absolute.