

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL. M.C. 3373/2008 & CRL. M.A. No. 12534/2008

Reserved on: 29th January, 2009

Date of decision: 13th February, 2009

GURANDITTA MAL & ORS. Petitioners
Through Mr. Maninder Singh with
Mr. Sanjay Chaubey, Advocates.

versus

STATE & ANR. Respondents
Through Mr. Sanjay Lao, APP.
Mr. Manish Gandhi, Advocate for R-2.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

13.02.2009

S. Muralidhar, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) challenges an order dated 6th September 2008 passed by the learned Metropolitan Magistrate (MM), Rohini Courts, Delhi in Criminal Complaint Case No. 2070 of 2007 titled “*Subhash Chander v. Guranditta Mal & Others*” whereby the petitioners have been summoned for the offence under Section 302/34 IPC.

Background facts

2. The background to the present case is that one Nand Lal, the father of Respondent No.2 Subhash Chander, gave on rent a shop on the
CRL.M.C. No.3373/2008

ground floor of the premises at C-8, Arya Samaj Road, Adarsh Nagar, New Delhi to late Mangha Ram, the father of Petitioner No.1 and the grandfather of Petitioners 2 and 3. The petitioners claim that after the death of Mangha Ram, the father of Respondent No.2 was treating the petitioners as tenants in relation to the shop in question. In 1990, however, the father of Respondent No.2 instituted proceedings to evict the petitioners. The eviction petition was dismissed and the dismissal was affirmed by the appellate authority. It is stated that the further appeal against the said order is pending in this Court.

3. In 2000, Petitioner No.1 filed an application under Section 44 of the Delhi Rent Control Act for permission to carry out repairs to the shop. It is the case of the petitioners that on 12th February, four days after the aforementioned order, they commenced the repair work in the shop. At around 3 pm on 12th February 2007, Respondent No.2, along with his son Manish Khera and his father Nand Lal started quarrelling with the petitioners. It is alleged that started abusing and physically handling the petitioners. It is alleged that Manish Khera ran to his house on the first floor, got a knife and caused a stab injury on the arm of Sanjay Kumar Chaudhary, the servant of Petitioner No.1 Nand Lal at that time went to his shop and hid himself there. The petitioners called the police and in the meanwhile Manish Khera ran away. FIR No. 75 of 2007 was registered at the instance of Sanjay Kumar Chaudhary against Mansih Khera. In connection with this FIR, Manish Khera has been charged under Section 324 IPC and is facing trial.

4. A counter version of the incident is found in FIR No. 76/2007 registered at the instance of Respondent No.2 Subhash Chander against the petitioners, Guranditta Mal, Ram Dass and Janki Dass. Subhash Chander stated that around 2.45 p.m., Nand Lal asked the above three persons to work carefully as the wall of the shop was getting affected. This incensed the petitioners who then started abusing Nand Lal. Subhash Chander stated that he then went to his house above the shop and called the police by which time he heard loud noises of quarrelling. When he looked from above, he found that Nand Lal was being caught hold of by Guranditta Mal and Janki Dass and that along with Ram Dass they were beating him by fists and kicks. Even as Subhash Chander rushed down to save Nand Lal, he saw Janki Dass and Ram Dass hitting Nand Lal on the chest with fists. As Nand Lal fell down, the three petitioners fled away. Nand Lal became unconscious. Subhash Chander took him to the BJRM Hospital where Nand Lal was declared brought dead. On the basis of the above allegations FIR No. 76 of 2007 was registered against the petitioners for the offence under Section 304/34 IPC.

5. The post-mortem of Nand Lal was conducted on 13th February 2007 around 11.45 a.m. The cause of death was indicated as “heart failure as a result of coronary artery disease & its sequelae”. The report also indicated the following four external injuries on the body of Nand Lal:

- “(1) Reddish Abrasion of size 3 x 1 cm present on the Rt front – paneral rel*
- (2) Lacerated wound of size 8 x 0.2 cm and xxxx*

(illegible) present on the bridge of nose.
(3) Xxxxx (illegible) abrasion of size 5 x 2.5 cm
present in the nose
(4) Reddish abrasion of size 1.0 x 0.5 cm present
on the middle of upper lip.”

The investigation officer (IO) SI A.P. Singh of Police Station Adarsh Nagar sought a subsequent medical opinion in respect of the death of Nand Lal. In particular a query was raised “whether the injuries caused precipitated the heart attack or otherwise.”

6. The opinion given by Dr. Upender Kishore on 21st May 2007 in answer to the said query reads as follows:-

“In this case the deceased had previous heart-attacks which leads to scarring of the heart muscles as described in the pm report. The heart was sent for Histopathological examination for further confirmation of the gross findings.

In the absence of direct trauma to the heart in this case. It is not possible to comment, whether the injuries mentioned in the pm report could have precipitate the heart attack as the deceased had previous attacks.”

7. A charge sheet was filed in FIR No. 76 of 2007 against the petitioners for the offence under Section 304/34 IPC. The case was fixed for charge in the Court of the learned Additional Sessions Judge (ASJ) for 24th October 2008.

8. In the meanwhile, Respondent No.2 Subhash Chander filed a

complaint in the Court of the learned Metropolitan Magistrate (MM) on 20th September 2007. In this complaint he alleged that his brother-in-law (Jija) Shyam Lal Baweja had, at the time of the incident, i.e., around 2.45 p.m., on 12th February 2007, arrived at the site “in connection with some urgent financial requirement of Rs.25000/-.”

Thereafter in para 9 of the complaint, he stated as under:-

“9. That on reaching there, the said Sh. Shyam Lal Baweja saw the accused persons altercating and quarrelling with the father of the complainant while forcefully pushing him. The father of the complainant was requesting the accused persons not to altercate or quarrel as he was feeling pain in his chest due to heart problem and earlier heart attack and insisting the accused persons to pacify and talk to the complainant on his reaching back. However, the accused persons kept on abusing and forcefully pushing him from his chest, on which, the father of the complainant sat down and asked the said Mr. Shyam Lal Baweja to bring his medicines from his room in the house on the first floor (supra) as the chest pain was aggravating and the father of the complainant was feeling suffocation. However, the accused persons were still instigating each other to kill the father of the complainant and finish the ‘issue forever’ while saying that ‘Aaj isse khatam karke kissa bi khatam kar do’. The said Sh. Shyam Lal Baweja requested the accused persons to calm down and talk peacefully, however, seeing the said deteriorating condition of the father of the complainant, the said Mr. Shyam Lal Baweja rushed to the first floor while requesting the

accused persons to stop the altercation etc. while also screaming for help.”

9. Subhash Chander proceeded to describe in the complaint how the petitioners beat up his father Nand Lal with fists. In para 12 of the complaint it was stated thus:

“12. That due to the said fatal and deadly assault and beatings by the accused persons, the father of the complainant fell down and got unconscious, of which, the accused persons fled away. The father of the complainant was immediately taken to Babu Jagjiwan Ram Hospital, Jahangir Puri by the complainant, and Sh. Shyam Lal Baweja but was declared ‘brought dead’.

10. The explanation as to why the presence of Shyam Lal Baweja did not find mention in the earlier FIR was given as under in complaint in para 15 of the complaint:

“.....despite the fact that the said Sh. Shyam Lal Baweja tendered himself as witness on many occasions including at the initial stage of recording of the statement of the complainant but the investigating officer put off the complainant and said witness while saying that no further statement is required for the registration of the FIR while assuring to record the same at least before the submission of the charge-sheet and further that the charge sheet would be filed for appropriate provision of law i.e., Section 302 IPC, thereby succeeded in putting off the complainant and said witness.”

11. It was stated that in para 16 of the complaint:

“that the complainant visited the investigating officer on or about 17th September 2007 with Sh. Shyam Lal Baweja and requesting him to record the statement and book the accused persons under appropriate provisions of the law but the complainant jolted out of somnolence in the aftermath of the revelation by the investigating officer about the filing of the charge sheet under Sections 304/34 IPC and further without recording of the statement of the witnesses especially Sh. Shyam Lal Baweja.”

12. The complaint alleged that the police had failed to carry out a faithful and true investigation. The complaint listed as witnesses Subhash Chander, Shyam Lal Baweja, the Ahlmed of the Court of the MM with the complete charge sheet, an official of the Police Station Adarsh Nagar and the Record Clerk of the Record Room, Rohini, Delhi with the complete file of the case under Section 44 Delhi Rent Control Act.

13. When the complaint came before the learned MM on 13th March 2008, it was stated that in relation to the same incident an FIR had already been registered and cognizance had already been taken under Section 304 IPC. Inasmuch as the complaint sought to persuade the learned MM into taking cognizance of the offence under Section 304 IPC, the learned MM noted that the charge sheet having already been filed in FIR No. 76 of 2007 and cognizance had already been taken

therein “no further cognizance of the offence can be taken.”

Accordingly, the complaint case was dismissed.

14. Aggrieved by the dismissal of the complaint case, Subhash Chander filed Criminal Revision Petition No.26 of 2008 in the Court of the learned ASJ. By an order dated 5th July 2008 the said revision petition was allowed. It was held by the learned ASJ that the learned MM was required to follow the procedure under Section 200 to 204 CrPC. Accordingly the case was remanded to the learned MM with a direction to the complainant to remain present.

15. On remand, on 6th September 2008 the learned MM recorded the pre-summoning evidence of both Subhash Chander and Shyam Lal Baweja. Subhash Chander more or less stuck to what he had stated in the complaint. Inter alia, he stated as under:

“On the basis of the report and statement Dt 12-2-07 the FIR No. 76/07 was lodged & the copy is Ext. CW1/1. However the police has colluded with the accused persons and registered the case for milder offence. The investigation officer deliberately avoided the recording of statement of Mr. Baweja though he tendered himself on many occasions. The IO kept of assuring us that the proper investigation would be arrived out and the case would be registered u/s 302IPC and also that the statement of Mr. Baweja would be recorded before filing the charge sheet. I came to know about the filing of charge sheet on 17.08.2007 and that too without the recording of statement of Mr.

Baweja and also for milder offence. I never gave my statement dt 21.5.07 thereby stating to the police that the accused persons were not aware of heart problem of my father. I gave only statement dt 12-2-7 & 13-2-07 and the aforesaid alleged statement Dt 21-5-07 was never given by me and the IO fabricated the same in connivance of the accused persons. Appropriate action be taken against the accused persons. My statement is correct.”

16. Shyam Lal Baweja CW-2 stated that on 12th February 2007 he called his brother-in-law on telephone for arranging the sum of Rs. 25,000/- “as I had to pay the same to someone”. He claimed to have been present there and witnessed the accused persons beating his father-in-law. He then added that “although the police registered the FIR and I tendered myself as a witness on many occasions but he IO said that my statement would be recorded at the appropriate stage. I went to IO on 17-09-07 with Subhash Chander but came to know that the IO has already filed the charge sheet without recording my statement”.

17. On the basis of the above statements, the learned MM passed an order on 6th September 2008 summoning the petitioners for the offence under Section 302/34 IPC. The learned MM observed: “Looking into the facts and circumstances and the specific averment against the accused persons, I am of the opinion that and considering the order of the learned ASJ, prima facie ingredient of Section 302/34

IPC are attracted here against all three accused persons.” Aggrieved by the said order, the present petition has been filed.

Submissions of Counsel

18. Learned counsel for the petitioners submits that the complaint is nothing but an abuse of the process of law. It was filed malafide only with a view to falsely implicate the petitioners for a heinous crime despite the police having already investigated the FIR in depth and having filed the chargesheet for the offence under Section 304/34 IPC. The impugned order of the learned MM was in the teeth of the medical opinion which ruled out the cause of death as the external injuries of the deceased. Moreover, the version of Subhash Chander in the complaint was a desperate attempt at falsely implicating the petitioners as is evident from the fact that the alleged presence of the brother-in-law was introduced for the first time in the complaint. The obvious attempt was to embellish the facts and the learned MM was therefore right in the first order to decline taking cognizance of the offence, since it was already the subject matter of an FIR. Reliance is placed on the judgment of the Supreme Court in ***State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335.***

19. On behalf of the Respondent No. 2 Subhash Chander it is submitted by learned counsel that the learned MM was at the stage of summoning only required to look into the complaint and the pre-summoning evidence to come to a prima facie conclusion whether the offence in question was made out. He was not expected at that stage

to examine the evidence in depth and form a definite conclusion. It was possible in terms of Section 210 CrPC for the complaint and FIR in relation to the same offence to be tried together and therefore there was no illegality committed by the learned MM in summoning the petitioners for the offence under Section 302/34 IPC. The pre-summoning evidence was in the nature of a statement under Section 161 CrPC and the veracity of the statements made therein would be tested only at the time of trial. Reliance is placed on the decisions in *Nagawwa v. Veeranna AIR 1976 SC 1947*, *Saran Dass v. Ram Singh 1997 Cri LJ 2021* and *Om Wati v. State 2001 (3) AD (SC) 165*.

Was the complaint maintainable in terms of Section 210 CrPC

20. A reading of Section 210 CrPC shows that it envisages the following sequence. A case has to be instituted as a complaint case during enquiry of which it has to be brought to the notice of the MM that a police investigation is already underway. In such event, the MM is expected to stay the proceedings in the complaint case and called for a report from the police. Certainly, that is not the situation in the instant case. The FIR No. 76 of 2007 was registered on 12th February 2007. The investigation was undertaken and the police filed the challan on 5th June 2007. Cognizance of the offence under Section 304/34 IPC was taken on the basis of the police report by the learned MM on 5th June 2007 and summons was issued to the accused. The criminal complaint was filed by Subhash Chander on 20th September 2007, more than three months thereafter. The

complaint was taken up by the learned MM on 13th March 2008 by which time the investigation by the police pursuant to the FIR was already complete and cognizance of the offence on that basis had already been taken.

21. Section 210(2) talks of the situation where after the MM has taken cognizance of an offence on the basis of the police report, it is realized that the person against whom such cognizance taken “is an accused in the complaint case”, the MM will try to hear both the complaint case as well as the police case. This, therefore, envisages that at the time the cognizance is taken on the police report, the accused is already summoned in the complaint case for only then will he be considered to be an “accused”. Again this is not the situation in the instant case. As already noticed the complaint was taken up by the learned MM first only on 13th March 2008 and dismissed. Thereafter on remand by the learned ASJ, the petitioners were summoned only by the impugned order dated 6th September 2008.

22. In *Saran Dass Chela Basant Muni v. Ram Singh* (supra) a learned Single Judge of the Punjab & Haryana High Court it was held that in terms of Section 210 CrPC it was possible to file a complaint after the Magistrate had already taken cognizance of an offence on the basis police report. However, as already noticed, in order to direct that the two cases must be tried together, the person arrayed as Respondent in the complaint should have been summoned as an accused. In the instant case, the petitioners had not yet been

summoned in the complaint case and therefore were not ‘accused’. In fact the challenge in this petition is to their being summoned for the offence under Section 302/34 IPC. The stage for the applicability of Section 210 (2) CrPC would arise only if the said summoning order is sustained. IN the considered view of this Court the submission of the learned counsel for Respondent No.2 as regards the applicability of Section 210 (2) CrPC is untenable.

Is the complaint legally sustainable?

23. Extensive arguments were addressed both by the counsel for the petitioner as well as the respondent on whether the learned MM could have summoned the petitioners on the complaint subsequent to the cognizance having been taken on the basis of the police report by the court. Reference was made by counsel for Respondent No.2 to the decisions in *Nagawwa v. Veeranna* and *Om Wati v. State* to contend that as long as there are statements in the complaint and the pre-summoning evidence justifying the formation of a prima facie view that the accused should be summoned for the offence under Section 302 read with 34 IPC this Court should not in the exercise of its powers under Section 482 CrPC interfere with such an order.

24. The impugned summoning order dated 6th September 2008 passed by the learned MM is surprisingly cryptic. It simply states “complainant’s witness has been examined. The averment so made in the complaint are also perused and considered”. Thereafter the learned MM says that “thus looking into the facts and circumstances

and the specific averment against the accused persons.....and considering the order of the learned ASJ, prima facie ingredient of Section 302/34 IPC are attracted here against all three accused persons”. In the considered view of this Court, the summoning order is unsustainable in law given the background of the case and the patently contradictory stands taken by Subhash Chander in his earlier statements and in the complaint now given to the Court. The learned MM could not have afforded to overlook the background of the case particularly since it was being sent to him on remand by the learned ASJ. The reference in the summoning order to the order of the learned ASJ as supplying the reasons for summoning the petitioners was also unwarranted. The order passed by the learned ASJ only discusses the legal position that arises when a complaint is filed after cognizance has been taken by the learned MM of the same offence on the basis of a police report. The learned ASJ only directed that the learned MM should follow the procedure under Sections 200 to 204 CrPC and examine “whether any offence different from the one arising out of the police report is made out from the private complaint filed.” That order therefore cannot and does not supply the reasons on merits.

25. The question then arises if the learned MM was justified in coming to the conclusion that when the complainant the pre-summoning evidence were examined, a prima facie case was made for summoning the petitioners for the offence under Section 302/34 IPC. Viewed in the background of the entire case including the previous litigation between the petitioners on the one hand and the

complainants on the other in the Court of the Rent Controller, the case now sought to be set up by the complainant about the presence of Shyam Baweja (the son-in-law of the deceased Nand Lal and the brother-in-law of Subhash Chander) on the fateful day appears, on the face of the complaint, to be unbelievable. A perusal of the statements made by Subhash Chander to the police earlier, and the statements made in the complaint three months after the filing of the challan show that the presence of the brother-in-law was being adverted to for the first time in the complaint only to justify the summoning of the petitioners for the offence under Section 302/34 IPC.

26. The pre-summoning evidence of these two persons in support of the complaint cannot erase the subsequent medical opinion of the doctor which was unable to confirm categorically that the external injuries precipitated the heart attack particularly since the deceased has had previous heart attacks. That medical opinion ruled out the offence under Section 302 IPC. There is nothing in the pre-summoning evidence to contradict this. The learned MM could not have possibly ignored this material since it pertained to the same incident which when investigated in detail by the police revealed prima facie the commission of the offence under Section 304/34 IPC and not Section 302/34 IPC.

27. The attempt by Subhash Chander in the complaint to accuse the police of acting malafide is indeed a desperate attempt to explain away the FIR and the charge sheet filed pursuant thereto. In his pre-

summoning evidence, he states “I gave only statement dt 12-2-7 & 13-2-07 and the aforesaid alleged statement Dt 21-5-07 was never given by me and the IO fabricated the same in connivance of the accused persons.” This is a bald self-serving statement made in order to wriggle out of a difficult situation. In the view of this Court, it is extremely unlikely that the presence of Shyam Lal Baweja would not have been mentioned by Subhash Chander at any of the earlier stages of the investigation including the statements made by him on 12th February 2007 and 13th February 2007 which in any event he does not deny having given. A relative as close as a brother-in-law who was an alleged eye witness to the incident could not have possibly been left out by Subhash Chander even by accident. Subhash Chander has absolutely no explanation to offer why he did not even remotely advert to the presence of Shyam Lal Baweja when he made the earlier statements to the police. And why did he wait three months after the challan was filed to come up with this version of the presence of the brother-in-law at the place and time of the incident. The attempt by both complainant witnesses to discredit the police at the subsequent stage does not impress this Court.

28. For the aforementioned reasons this Court holds that a reading of the complaint in Complaint Case No. 2070 of 2007 and the pre-summoning evidence as a whole does not offer even a prima facie credible basis for summoning the petitioners for the offence under Section 302/34 IPC.

29. This Court however clarifies that if during the course of the trial, the trial court considers it necessary, in the light of the evidence that emerges, to exercise its powers under Sections 311 or 319 to summon any person then this order will not preclude the trial court from doing so. Likewise, if in light of the evidence that emerges in the course of the trial, the trial court concludes that the accused should be tried for a more serious offence then it is not precluded, only by virtue of this order, from proceeding in accordance with law by following the procedure prescribed under the CrPC for the purpose.

30. The purport of the present order is this. The learned MM erred in summoning the petitioners for the offence under Section 302/34 IPC on the basis of the complaint in Complaint Case No. 2070/07 and the pre-summoning evidence led in support thereof. Complaint Case No. 2070/07 deserves to be quashed as being unsustainable in law.

31. Accordingly, the impugned order dated 6th September 2008 passed by the learned MM in Complaint Case No. 2070/07 is hereby set aside. Complaint Case No. 2070/07 titled *Subhash Chander v. Guranditta Mal and Ors* and all proceedings consequent thereto hereby stand quashed. The petition is accordingly allowed. The application stands disposed of.

S. MURALIDHAR, J

FEBRUARY 13, 2009
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