

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 4930 OF 2015

Sunil Yashwant Padekar	...	Petitioner
vs.		
The State of Maharashtra	...	Respondent

Mr. Amod Kumar, Advocate for the petitioner.
Ms. A.A.Mane, APP, for the State.

CORAM: SMT. SADHANA S.JADHAV, J.
DATE : 7th June, 2016.

P.C.

Rule. Rule made returnable forthwith with consent of the parties.

2. The learned counsel for the petitioner seeks liberty to delete respondent Nos. 2 to 6. Liberty as prayed for is granted. Amendment to be carried out forthwith.

3. The petitioner herein is the original complainant. It is the case of the petitioner that his son had met a homicidal death. He had made attempts to lodge complaints against respondent Nos. 2 to 6 (who stand deleted). He had even approached this Hon'ble Court by filing Writ Petition No.1124 of 2009. The said petition was heard by the Division Bench and was disposed of by an order dated 25.2.2010. The Hon'ble Division Bench

had granted liberty to the petitioner to file a complaint seeking a relief under Section 156(3) of Cr.P.C. The said complaint was registered as RCC No.246/2010. The learned Magistrate was pleased to pass an order under Section 156(3) of Cr.P.C. And had directed the concerned police to file the compliance report by an order dated 9.8.2010. On 9.8.2010 itself the said RCC no.246/2010 was disposed of. Pursuant to the order of investigation, the police of Chakan Police Station had investigated into the case and had registered Crime No.17 of 2010 against the proposed accused for the offence punishable under Sections 302, 201, 506 read with Section 34 of Indian Penal Code and after completion of investigation filed the final report.

4. The police had filed the report that there was no substantive evidence against the accused persons and had filed the final report. The learned Magistrate before accepting the report filed by the police, had issued notice to the complainant. After going through the report, the complainant had filed a Protest Petition. The said Protest Petition was registered as M.A. No.187/2013. The complainant examined his wife Jyoti Padekar (PW-1) and one Shankarprasad Iyyer as witnesses. On 10.2.2015, the complainant had filed a Purnis that he does not desire to examine any

other witness to substantiate his case.

5. On 30.4.2014, the learned Magistrate had passed an order that it is incumbent upon the complainant to examine all the witnesses cited in the complaint as the case was exclusively triable by the Court of Sessions. The learned Magistrate had relied upon sub-section (2) of Section 202 of Cr.P.C. Which reads as follows :-

“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, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] 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
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(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.”

6. Needless to say that the complaint, which was registered as RCC No.246/2010, was a complaint seeking the relief under Section 156(3) of Cr.P.C. And the same was disposed of on the very day on which the order under Sec. 156(3) was passed. It is true that the proviso to sub-section (2) of Section 202 contemplates that the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. However, in the present case, in the complaint registered as RCC No.246/2010 the complainant had cited six witnesses. The present stage was at the stage of protest petition i.e. to decide as to whether the report filed by the police ought to be accepted or not. The protest petition was independently registered. In the protest petition also the complainant had examined two witnesses and had filed a Pursis stating that he does not desire to examine any more witness. The evidence of the two witnesses would be sufficient to decide the protest petition, which was only for the

purpose of accepting the police report or not and in the protest petition, the learned Magistrate could not take recourse to the proviso of sub-section (2) of Section 202 of Cr.P.C. The learned Magistrate ought to have considered that the substantive evidence of the witnesses was recorded in the protest petition as RCC No.246/2010 was disposed of. In view of this, the order dated 20.10.2015 passed by the learned Magistrate in M.A. No.187/2013 deserves to be quashed and set aside. It is directed that the learned Magistrate shall consider the protest petition on its own merits in view of the evidence produced by the complainant.

7. The learned counsel for the petitioner has placed reliance upon a Judgment of the Hon'ble Apex Court in the case of **Shivjee Singh vs. Nagendra Tiwary and Ors. 92010) 7 SCC 578**. The Hon'ble Apex Court has held as follows :-

“ The use of the word “shall” in the proviso to Section 202(2) is prima facie indicative of mandatory character of provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and section 465 would clearly show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the Magistrate concerned of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word “all” appearing in the proviso to Section 202(2) is qualified by the word “his”. This implies that the complainant is not bound to

examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process.

23. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say, whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused.”

8. The learned APP submits that no reliance can be placed on the said Judgment as it pertains to the stage of issuance of process and cannot be considered in the present case as the order is passed in the protest petition. The said submission is unwarranted. The Hon'ble Apex Court has clarified the mandate of sub-clause (2) of Section 202 of Cr.P.C. as to whether the complainant is bound to examine all the witnesses cited in the original complaint.

9. In view of this, the Petition deserves to be allowed. The impugned order dated 20.10.2015 passed by the learned Magistrate in M.A. No.187/2013 is hereby quashed and set aside. The learned Magistrate shall hear the protest petition on its own merits in view of the evidence adduced

by the complainant and dispose of the same within eight weeks from the date of receipt of this order.

10. Petition is disposed of. Rule is made absolute accordingly.

(SMT.SADHANA S.JADHAV, J.)