

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Revision Case No.171 of 2018

Between:

Pitta Chandramma
and 4 others.

... Petitioners

AND

The State of Andhra Pradesh
Rep. by Public Prosecutor,
High Court of Judicature at Hyderabad,
For the State of Telangana and
the State of Andhra Pradesh.

... Respondent

DATE OF JUDGMENT PRONOUNCED: 14.06.2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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... Respondent

! Counsel for Petitioner

: Sri Ramakrishna Pativada

^ Counsel for Respondent

: Public Prosecutor (Andhra Pradesh)

< Gist:

> Head Note:

? Cases referred:

- 1) MANU/UP/0306/1991
- 2) (2010) 7 SCC 578
- 3) 1988 CrL.LJ. 199
- 4) 2001(1) ALD (CrL.) 324

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Revision Case No.171 of 2018

ORDER:

This Criminal Revision Case is filed by the petitioners/A.1 to A.5 under Section 397 Cr.P.C, aggrieved by the order dt.05.01.2018 in CrI.M.P.No.274/2017 in S.C.No.140/2009 passed by the Assistant Sessions Judge, Vizianagaram, whereby the learned Judge dismissed the petition filed by the petitioners under Sections 202 and 309 Cr.P.C seeking to drop the evidence of LWs.6 to 12.

2) The petitioners/accused filed CrI.M.P.No.274/2017 on the submission that the witnesses, who were examined by the Judicial First Class Magistrate, Cheepurupalli under Section 202 Cr.P.C, are only to be examined before the Trial Court and since LWs.6 to 12, who were not examined by the learned Magistrate during the enquiry under Section 202 Cr.P.C, the Trial Court may drop the evidence of LWs.6 to 12. The said petition was dismissed by the learned Assistant Sessions Judge, Vizianagaram, in his order dated 05.01.2018 on the observation that the Court during trial stage cannot go beyond investigation and question the enquiry under Section 202 Cr.P.C or cognizance order.

Hence, the instant CrI.R.C.

3) Heard Sri Ramakrishna Pativada, learned counsel for petitioners and learned Additional Public Prosecutor for the State (Andhra Pradesh).

4) Learned counsel for petitioner would argue, Section 202 Cr.P.C. ordains that in a compliant case if it appears to the Magistrate that the same is exclusively triable by Court of Session, he shall direct the complainant to examine all his witnesses and commit the case to Sessions Court in terms of Sections 208 and 209 Cr.P.C. Non-examination of all list mentioned witnesses by a Magistrate is a grave procedural error. Further, even if the Magistrate without insisting examination of all the list mentioned witnesses and permit the complainant to examine only some of them and commits the case to Sessions Court, the said Court shall examine only those witnesses who were earlier examined before the Magistrate but not other witnesses who were not examined by the complainant. The reason is that under Sections 208 and 209 Cr.P.C., the Magistrate while committing the case to Sessions Court shall, furnish all the copies to the accused including the statements of witnesses recorded under Section 202 Cr.P.C. Naturally, the Magistrate can give copies of the statements of only those witnesses who were examined by the Magistrate but not others who were omitted. If during trial, the Sessions Court proposes to examine all the witnesses including those who were omitted to be examined before the Magistrate, then the accused can not have the advantage of their earlier statements so as to confront them during trial to point out any contradictions or improvements. Therefore, examination of the omitted witnesses for the first time in the Sessions trial would amount to gross-infracton of procedure contemplated under Sections 202, 208 and 209 Cr.P.C. He relied upon the decision reported in *Leela Dhar vs. State of UP*¹.

¹ MANU/UP/0306/1991

5) Per contra, learned Additional Public Prosecutor would argue that under Section 202 Cr.P.C. it is not mandatory that a complainant or the Magistrate shall examine all the witnesses mentioned in the list of witnesses in respect of a case exclusively triable by Sessions Court. The complainant has liberty to examine such of the list mentioned witnesses on whom he may repose confidence. Similarly, there is no embargo for Sessions Court during trial to examine only those witnesses who were examined earlier before the Magistrate. It can examine even omitted witnesses as well. There is no hard and fast rule that the Sessions Court shall examine only those witnesses whose 161 Cr.P.C. statements were recorded or those whose statements were recorded by the Magistrate before committal. He thus prayed to dismiss the revision case.

6) The following points would arise for determination.

1. *Whether a Magistrate shall invariably examine all the list mentioned witnesses in a complaint case exclusively triable by Court of Session?*
2. *If point No.1 is held in negative, whether Sessions Court during trial can examine only those witnesses whose statements were recorded by the Magistrate before committal or it can examine the omitted witnesses also?*

7) **POINT No.1:** As per proviso to Section 202 Cr.P.C., if it appears to the Magistrate the offence complained of is triable exclusively by a Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

8) The case on hand, admittedly, is triable by a Court of Session. Coming to fulfilment the aforesaid requirement, we have the decisions of Apex Court and this High Court to the effect that there is no requirement to examine all the witnesses mentioned in the complaint. The Courts in this regard, have explained the term “*all his witnesses*” appearing in proviso to Section 202(2) Cr.P.C.

9) In *Shivjee Singh vs. Nagendra Tiwary and others vs. Nagendra Tiwary and others*² it was held that even though in terms of proviso to Section 202(2) Cr.P.C. the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, however, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint, will not preclude a Magistrate from taking cognizance and issuing process or passing committal order, if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202 (2) Cr.P.C.

10) In *Jumrnan and others vs. State of UP and another*³ similar question fell for consideration before Allahabad High Court. A learned single Judge observed thus:

“Para-13. Further elementary rule of interpretation is that the Statute must be read as a whole, in the instant case reading the entire Section 202 as a whole and particularly the Second Proviso to Section 200 makes it manifest that the intention of the legislature was not that the complainant may be compelled to examine all the prosecution witnesses

² (2010) 7 SCC 578

³ 1988 Cr.L.J.199

rather only those witnesses were to be examined who can be said to be 'his' witnesses. The emphasis by the Legislature appears to be on the word 'his' which cannot be ignored in making a proper interpretation. In order to ascertain as to whether the witnesses of the complainant on whom he places his reliance are his witnesses or not, a question may be put to the complainant as to who are the witnesses whom he wants to examine or when certain number of witnesses have been examined a question can be put to the complainant as to whether they are the only witnesses or some more witnesses are required. To ascertain number of witnesses or to put a question to the complainant, no special form has been prescribed under the Code nor any strict procedure has to be followed rather it has to be ascertained judicially. I am accordingly of the view that Section 202(2) (Proviso) does not connote that all the prosecution witnesses must be examined rather only those witnesses may be examined who are of the choice of the complainant or in whom the - complainant reposes the confidence.

Para-14. *The only limitation on the number of witnesses would be that no more witness would be permitted to be examined at the trial by the complainant in a case triable exclusively by the Sessions, when the case is committed to the Court of Session, under Section 207 or Section 208 of the Code a copy of the statement of witnesses to be examined by the complainant or other material on the record has to be given to the accused before the case is committed to the Court of Session. It is another matter that if the ends of justice require that some more witnesses are to be examined in that even after following the procedure under Section 311 of the Code, the Court can examine any other witness, but not as witness of the complainant or prosecution, rather as a court witness.”*

- 11) Subsequently, a Full Bench of this Court in ***G.Subba Naidu and others vs Talluri Mahalakshamma and another***⁴ also reiterated the same principle as follows:

⁴ 2001 (1)ALD (CrI.) 324

“Para-4...We are the view that the Legislature has qualified 'all' with the words 'his' and in case on the basis of the statement of the witnesses produced by the complainant the Magistrate finally takes the cognizance and commits the case in terms of Sections 208 and 209 he will be giving the copies of the statements of only those witnesses whose statements were recorded by him and Allahabad High Court in the judgment referred to above (supra) has correctly stated that, only those witnesses can be examined in the trial which were examined before the Magistrate. (Emphasis No.1). This view appears to be correct in view of sub-clause (c) to Section 209 of Cr.P.C. as well which lays down that the Magistrate shall send to the Court of Session the record of the case and the documents and articles, if any, which are to be produced in evidence. So, whatever the documents are sent under Section 209(c) by the Magistrate to the Court of Sessions including the statements of the witnesses can be relied at the time of trial. Therefore, it is not necessary in our view for the complainant to produce all the witnesses in an enquiry under Section 202 Cr.P.C.”(Emphasis No.2).

12) Therefore, the Apex Court and High Courts including ours were of the view that in a compliant case triable exclusively by Court of Session, the Magistrate need not direct the complainant to examine all the list mentioned witnesses but suffice for the complainant to produce “all his witnesses” which means those witnesses on whom the complainant repose confidence.

Thus, Point No.1 is answered in negative.

13) **POINT No.2:** Since Point No.1 is held in negative, the question would arise whether Sessions Court during trial can examine only those witnesses whose statements were recorded by the Magistrate before committal or it can examine the omitted witnesses also? The answer is not far to seek as it is no

more *res integra* for, in **Jumrnan**'s case (3 supra) High Court of Allahabad clarified this legal point also in para-14 of its judgment which is extracted supra. From the aforesaid judgment, it is clear that in a case triable exclusively by a Court of Session, the Magistrate need not direct the complainant to examine all the list mentioned witnesses but, suffice if the complainant examines all his witnesses on whom he reposes confidence. If their statements project sufficient material, the Magistrate can commit the case. The only limitation in such an instance as per Allahabad High Court is, during trial no more witnesses would be permitted to be examined by the complainant. However, if the ends of justice require that some more witnesses have to be examined, by following the procedure under Section 311 Cr.P.C., the Court can examine any other witness, but not as witness of the complainant or prosecution rather as a court witness. This view was approved by a Full Bench of our High Court also in **G.Subba Naidu**'s case also. (Vide Emphasis No.1).

14) The net result in view of above precedential jurisprudence is that learned Assistant Sessions Judge, Vizianagaram no doubt can examine the omitted witnesses i.e. LWs.6 to 12 or any other person as a witness in terms of Section 311 Cr.P.C. as a court witness if in his view the evidence of such witness is essential to the just decision of the case by giving reasons. If any such person is examined as court witness, needless to emphasize, the Court shall afford opportunity to prosecution and defence to cross-examine such witness.

This point is answered accordingly.

15) In the result, it is held that the Assistant Sessions Judge, Vizianagaram can examine either the omitted witnesses i.e. LWs.6 to 12 or any other person as a witness in terms of Section 311 Cr.P.C. only as a court witness, if in his view the evidence of such witness is essential to the just decision of the case by giving reasons. If any such person is examined as court witness, the Court shall afford opportunity to prosecution and defence to cross-examine such witness.

16) This Criminal Revision Case is disposed of accordingly.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 14.06.2018
Scs/Murthy
L.R. Copy to be marked.

U. DURGA PRASAD RAO, J

