

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

Criminal Petition No.12105 of 2017

Between:

K. Samba Murthy

and two others.

... Petitioners/Accused 1 to 3

AND

The State of Andhra Pradesh
Rep. by its Public Prosecutor,
High Court at Hyderabad,
and another.

... Respondents

DATE OF JUDGMENT PRONOUNCED: **21.06.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgment? 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

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! Counsel for Petitioners : Sri C.M.R. Velu

^ Counsel for Respondent No.1 : Public Prosecutor (AP)

^ Counsel for Respondent No.2 : Sri S.Dushyanth Reddy

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> Head Note:

? Cases referred:

- 1) (2014) 14 SCC 638
- 2) 2016 Law Suit (SC) 1198
- 3) AIR 1987 Kerala 184
- 4) (2010) 7 SCC 578

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CRIMINAL PETITION No.12105 of 2017

ORDER:

In this petition filed under Section 482 Cr.P.C., petitioners/A1 to A3 seek to quash the order dated 07.09.2017 passed in CrI.M.P.No.1929 of 2017 in Cr.No.428 of 2015 by the Judicial First Class Magistrate, Mydukur, YSR Kadapa District, allowing the protest petition filed by 2nd respondent/complainant.

2) Briefly stating the complainant allegations are that on 14.09.2015 at about 8:00 PM, petitioners/A1 to A3 went to the house of *de-facto* complainant, yelled and made galata and abused her in filthy language, demanding a share in the property lest they should kill her husband. In the meanwhile, neighbours—Shaik Shoukat Ali, Akula Hasan Basha, Peddireddy Upendra Reddy came there and in their presence, A1 caught hold tuft of the complainant and beat her with hands and abused. A2 and A3 also abused and attacked her.

a) Basing on the above said complaint, the police of Mydukur U/G PS registered a case in Cr.No.428 of 2015 under Sections 323, 354, 506, 509 r/w 34 IPC. The police after recording the statements of witnesses filed final report referring the case as 'FALSE'. Aggrieved, *de-facto* complainant filed protest petition under Section 190(1) (b) Cr.P.C. praying the Court to enquire into the mater. The trial Court upon hearing the parties and after perusing the material on record

allowed the petition on the observation that there are valid grounds to proceed against accused as *prima facie* case is made out against them.

Hence, the instant petition.

3) Heard arguments of learned counsel for petitioners, learned counsel for 2nd respondent and learned Addl. Public Prosecutor (AP).

4) Learned counsel for petitioner fulminated the order of the lower Court on two main grounds.

a) Firstly, that the Court took cognizance of the offence on a protest petition though no *prima facie* case is made out against the petitioners. The S.I of Police on a thorough investigation filed final report on the ground that except the interested statements of LW.1—the complainant and LW.2—their family friend, none of the LWs.3 to 9 supported their case. However, the lower Court basing on the very same statements of LWs.1 and 2, jumped into a wrong conclusion as if a *prima facie* case was made out against the petitioners for the offences under Sections 323, 354, 506 and 509 r/w 34 IPC and issued summons. He would submit that A.1, who was working as Senior Section Engineer, South Central Railway, Renugunta, was on duty from 14.09.2015 to 19.09.2015 and to this effect, the Assistant Divisional Engineer, South Central Railway, Renugunta, issued a certificate to Inspector of Police, Mydukur, which would manifest that there was absolutely no truth in the complaint allegations that on the night of 14.09.2015, A.1 along with other accused went to the house of complainant at Mydukur,

which is far-off from Renugunta, the work place of A.1 and abused and beat the complainant. Learned counsel would further submit that A.2—the wife of A.1 took treatment from 12.09.2015 to 19.09.2015 for her ill-health in the Railway Hospital, Renugunta and to that effect Additional Chief Medical Superintendent, South Central Railway, Renugunta, issued a certificate which would also belie the complaint allegations. The lower Court has not considered the above aspects in the right perspective.

b) Secondly, on point of law learned counsel argued that since all the accused are residing beyond the jurisdiction of the lower Court, it ought to have conducted enquiry as contemplated under Section 202(1) Cr.P.C, to confirm whether or not there is sufficient ground for proceeding further and to issue summons. The Trial Court violated this procedure and hence the impugned order is bad at law. To buttress his argument, he relied upon the following decisions:

i) *Vijay Dhanuka and others v. Najima Mamtaj and others*¹

ii) *Abhijit Pawar v. Hemant Madhukar Nimbalkar and another*².

He would further argue that since one of the offences under Section 354 IPC is triable exclusively by the Court of Session, the lower Court by following the procedure under Section 202(2) Cr.P.C, ought to have examined all the six witnesses shown in the protest petition. However, in gross infraction of the aforesaid provision, the

¹ (2014) 14 SCC 638

² 2016 Law Suit (SC) 1198

Court examined only two interested witnesses and expressed the satisfaction about the existence of *prima facie* case. Hence, the impugned order is vitiated by law. On the necessity to examine all the witnesses in a case disclosing offence exclusively triable by Court of Session, he relied on the decision reported in ***Moideenkutty Haji and others v. Kunhikoya and others***³.

He thus prayed to allow the petition.

5 a) Per contra, learned counsel for 2nd respondent/complainant would argue that the allegations in the complaint were grave that all the accused went upon the house of complainant in the night time and not only abused her in filthy language, but also caught hold her tuft and beat her, which incident was witnessed by LW.2 and some others. Though the SI of Police filed a **final** report on a slipshod investigation, however, learned Magistrate considered the protest application in right earnest and took cognizance of the offence and the said order does not suffer the vice of perversity or illegality to interfere.

b) Regarding the legal aspects raised by the counsel for petitioners, he would argue that there is no violation of the procedure laid under Section 202 Cr.P.C, in any manner. In expatiation, he would submit that the lower Court has taken cognizance of the offence only after conducting a thorough enquiry and examining two witnesses and being satisfied with the existence of sufficient ground. Therefore, argument

³ AIR 1987 Kerala 184

of the petitioners that the lower Court took cognizance without conducting enquiry in violation of Section 202(1) Cr.P.C is fallacious.

c) Regarding non-examination of all the witnesses as mandated under the proviso(b) of Section 202(1) Cr.P.C, learned counsel argued that such necessity to examine all the witnesses would arise only when the case on hand is triable exclusively by the Court of Session. Here, the offence under Section 354 IPC as legislated by the Parliament is triable by a Magistrate but not by the Court of Session. Therefore, the requirement to examine all the witnesses does not arise.

He would alternatively argue that even assuming that the offence is triable exclusively by the Court of Session, still, the necessity to examine all the witnesses mentioned in the complaint does not arise because the term “all his witnesses” was interpreted by Apex Court in *Shivjee Singh v. Nagendra Tiwary and others*⁴, in the sense that complainant is not bound to examine all the witnesses named in the complaint but suffice, if he examines, only those witnesses, whom the complainant considers material to make out a *prima facie* case for issue of process. In that view, there is no violation of Section 202 Cr.P.C. He thus prayed to dismiss the petition.

6) Learned Additional Public Prosecutor adopted the arguments advanced by learned counsel for 2nd respondent.

⁴ (2010) 7 SCC 578

7) The points for determination are:

- 1) Whether the order in protest petition suffers the vice of perversity or illegality for lack of prima facie material?*
- 2) Whether the impugned order is bad at law for violation of the procedure contemplated under Section 202 (1) and 202 (2) Cr.P.C.?*

8) **POINT No.1:** The compliant allegations are that on the night of 14.09.2015 at 8.00 PM when the complainant, who is a lady aged about 45 years was alone at her house in Mydukur town, all the accused, in view of some property disputes, went upon her house and made a ghalata and abused her in filthy language and threatened her that if her husband do not give a share in the disputed properties, he would be killed. Hearing their yells, their neighbours—Shaik Shoukat Ali, Akula Hasan Basha, Peddireddy Upendra Reddy came there. In their presence A1 abused her in indecent language and caught hold her tuft and beat her. When the witnesses tried to rescue her, A2 and A3, who are the wife and mother of A1 abused her and beat her. The witnesses gathered there somehow rescue the complainant from their hold. While leaving the place, the accused again threatened her unless her husband part with a share in the property they would ruin them.

a) On her complaint Cr.No.428 of 2015 was registered by the police of Mydukur (U/G) PS and investigated into. Ultimately the SI of police filed final report observing that complaint was false. He arrived at such conclusion on the observations that his confidential enquiries

revealed there were property disputes between accused and complainant's family as complainant's husband is none other than the brother of A2 and the father of A2 executed agreement granting some share in the property to A2 which was not relished by the complainant and her husband; except LW1—complainant and LW2 who is the friend of complainant's husband both of which are interested witnesses, none of the remaining witnesses i.e. LWs. 3 to 9 supported the complainant's version. Further, as per the version of LWs.8 and 9, at the time of alleged incident A1 was on duty and A2 was taking treatment in the hospital. On the aforesaid reasons, he submitted final report before the Magistrate. However, on the protest made by the complainant in CrI.M.P.No.1929 of 2017, learned Magistrate conducted enquiry and examined LW1—complainant and LW2—Peddireddy Upender Reddy and basing on their statements came to conclusion that their version manifests that A1 to A3 abused the complainant and beat her with hands and legs and thus there were valid grounds to proceed against A1 to A3 since the material disclose a *prima facie* evidence. Accordingly the learned Magistrate took cognizance of the case for the offences under Sections 323, 354, 506 and 509 r/w 34 IPC against A1 to A3.

b) Now, the contention on behalf of petitioners is absolutely no case is made out except the interested statements of complainant and their family friend, independent witnesses did not support their version. Further, alibi is pleaded for A1 and A2.

c) On a conspectus of material, I am unable to accede the argument of the petitioners.

d) The version of LWs.1 and 2 sheds light on the incident. LW1 is the victim and LW2 is ofcourse their family friend. However, at this stage, their statement cannot be shelved as interested. A victim can never be called as interested witness. The veracity of their statements can be tested only at the relevant stage of trial. Some of the cited witnesses did not support the complainant's version that cannot be a ground at this stage to discard complainant's case in its entirety. Similarly, the pendency of civil disputes between parties is not a ground to hold the complaint allegations as false. At times, due to civil disputes, the parties may resort to attack their opponents. Regarding *alibi* plea, the burden as per law, will be on the accused to plead and establish during trial and at this stage the complaint cannot be quashed on that ground. The distance between Renigunta and Mydukur, the possibility or impossibility of A1 to visit the house of complainant during the night time to commit the offence though attending duty in the morning hours are all facts to be considered on the strength of evidence placed. Similarly, A2 is concerned, it appears she took only outpatient treatment in Railway Medical Hospital. In that scenario, how far her plea is genuine is a matter of scrutiny by the Court. Therefore, in view of strong *prima facie* material, the order of the trial Court cannot be found fault.

9) **POINT No.2:** The legal point raised by the petitioner is in terms of violation of Section 202 Cr.P.C. The said section reads thus:

“Sec. 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, 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,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; 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 witnesses 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.”

Thus, Section 201 (1) Cr.P.C. lays down that where a Magistrate before whom a complaint which he is authorized to take cognizance is filed or which is made over to him under Section 192, and wherein the accused are residing at a place beyond the jurisdiction of the Magistrate, a duty is cast on him before issuing process to either enquire 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. The words “and shall, in a case where the accused is residing at a place beyond the areas in which he exercises his jurisdiction” was inserted by Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005) w.e.f. 23.06.2005. The object behind such insertion is that false complaints are filed against persons residing at far-off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons the aforesaid clause was inserted in Section 202(1) Cr.P.C. to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation to be made by a Police Officer or by such person as he thinks fit for finding out whether or not there was sufficient ground for proceedings against the accused. In the instant case, the accused are residents of Renigunta in Chittoor District which is beyond the jurisdiction of Judicial Magistrate of First Class, Mydukur. Hence, the point is whether the procedure envisaged in 202 (1) is followed.

10) As can be seen, in protest petition six witnesses were cited, of which, the Court besides the complainant, examined list cited witness No.1—P.Upendar Reddy and came to conclusion about the existence of *prima facie* material. Therefore, it cannot be complained that the Court has not conducted the enquiry by itself before issuing process against the accused as mandated by Section 202(1) Cr.P.C. I am fortified by the decision in *Vijay Dhanuka* (1 supra) cited by the petitioner himself, wherein the Apex Court while expounding the word “shall” employed in Section 202(1) Cr.P.C, observed that in its opinion the use of the expression shall and background purpose for which the amendment (Cr.P.C (Amendment) Act, 2005) has been brought, the Court has no doubt that the enquiry or the investigation is mandatory before issuance of summons. While thus, holding that the enquiry or investigation is mandatory, the Apex Court explained what would constitute the term “enquiry”. It held thus:

*“**Para 14:** In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word “inquiry” has been defined under Section 2(g) of the Code, the same reads as follows:*

“2. (g) ‘inquiry’ means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;”

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are

examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

Para 15: *In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.*

Para 16: *In view of what we have observed above, we do not find any error in the order impugned [Vijay Dhanuka, In re, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal)]. In the result, we do not find any merit in the appeals and the same are dismissed accordingly.”*

In **Abhijit Pawar**'s case (2 supra), the Apex Court also reiterated the need for conducting enquiry or investigation before issuing process in terms of Section 202(1) Cr.P.C. There is no demur about the legal proposition, which is complied with in the instant case.

11) Then requirement under Section 202(2) Cr.P.C is concerned, as per its proviso, 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. The nub of the point is whether in the instant case any of the offences are triable exclusively by a Court of Session. Admittedly, the offences under Sections 323, 506, 509 IPC are triable by Magistrate and controversy to some extent is only with regard to the offence under Section 354 IPC. As per the Criminal Law (Amendment) Act, 2013

(Act 13 of 2013), the offence under Section 354 IPC is triable by any Magistrate vide First Schedule to the Code of Criminal Procedure—Classification of offences under IPC. Be that it may, the State Government of A.P, have under the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 (Act 3 of 1992) (w.e.f.15.02.1992) brought an amendment to Section 354 IPC, whereunder, the offence under Section 354 IPC was held triable by Court of Session. With regard to the term of punishment also an amendment was made, with which, we are not concerned. Therefore, in view of the AP Act 3 of 1992, there was a repugnancy between the Criminal Law (Amendment) Act, 2013 and A.P Act 3 of 1992, with regard to the jurisdiction of the Court to try the offence under Section 354 IPC. It is argued on behalf of the petitioners that the A.P Act, 3 of 1992 obtained assent of the President and therefore, under Article 254(2) of Constitution of India, the A.P Act 3 of 1992 will prevail in the State, in which case, since the offence under Section 354 IPC is triable exclusively by the Court of Session, all the witnesses shall be examined by the Magistrate but he failed to do so and hence the impugned order is hit by Section 202 (2) Cr.P.C. This argument smacks sound but bereft of substance. It is true that as per Article 254(2) of the Constitution, where the law made by Legislature of State with respect to one of the matters enumerated in the concurrent list, contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then the law

so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. In view of said provision, A.P Act 3 of 1992 should generally prevail over the Central legislation i.e, Criminal Law (Amendment) Act, 2013 with regard to Section 354 IPC. However, that is not the end of the matter. There is a proviso to Article 254(2), which says that nothing in Article 254(2) shall prevent Parliament from enacting at any time, any law, with respect to the same matter, including the law, adding to, amending, varying or repealing the law so made by Legislature of the State. It should be noted that Section 354 IPC was amended by Criminal Law (Amendment) Act 2013 and as per Section 24 of the said Act (w.e.f. 02.04.2013), the offence under Section 354 IPC is held triable by any Magistrate. There are some other amendments brought to Section 354 IPC with which we are not concerned. Thus in essence, as per the Criminal Law (Amendment) Amendment Act, 2013, the offence under Section 354 IPC is held triable by any Magistrate. Since the Central legislation is subsequent to the A.P Act 3 of 1992 and it in its effect, varying and repealing the law made by the legislature of A.P State, in terms of proviso to Article 254(2) of Constitution, the Criminal Law (Amendment) Act, 2013 will prevail in my considered view. The net effect is that since the offence under Section 354 IPC is triable by a Magistrate, the mandate under Section 202(2) Cr.P.C proviso will have no effect. Consequently, the decision in *Moideenkutty Haji* (3 supra) cited by the petitioners

holding that in a complaint case disclosing offence exclusively triable by the Court of Session, examination of all witnesses of complainant before issue of process is a condition precedent has no application to the facts of the present case.

12) Even otherwise also, in view of the decision in *Shivjee Singh* (4 supra), the necessity to examine all the witnesses mentioned in protest petition does not arise even if for arguments sake it is conceded that the offence under Section 354 IPC is triable exclusively by Court of Session. In the said decision 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, 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 later 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. Accordingly, this point is answered.

13) In the result, this Criminal Petition is dismissed.

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

U. DURGA PRASAD RAO, J

Date: 21.06.2018
Scs/Murthy