

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.254 OF 2019

Shri Varun Kudchadkar,
son of Shri Shantaram Kudchadkar,
aged about 33 years,
Developer & Builder
by occupation,
having office at Gurudev Mansion,
Near Kadamba Bus Stand,
Curchorem Goa. ... Petitioner

Versus

1. Shri Vishwas Gopinath Naik,
son of Shri Gopinath Naik,
Advocate, aged about 65 years,
Resident of H.No.431/7,
Ghanemorod-Xeldem, Quepem.
2. State of Goa,
Through the Public Prosecutor,
High Court of Bombay at Goa. ... Respondents

Mr. Shivan Desai, Advocate for the Petitioner.

Mr. I. Agha and Mr. K. Morajkar, Advocates for Respondent No.1.

Mr. G. Nagvenker, Additional Public Prosecutor for Respondent No.2.

Coram : M. S. SONAK, J

Date : 16th February, 2021

ORAL JUDGMENT

Heard Mr. Shivan Desai, learned counsel for the Petitioner,
Mr. I. Agha, learned counsel for Respondent No.1 and Mr. G.

Nagvenker, learned Additional Public Prosecutor for Respondent No.2.

2. Rule. Rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

3. The Petitioner assails the order dated 19th August, 2019 passed by the learned JMFC, Quepem, in Criminal Case No.37/P/2018/B issuing process against the Petitioner.

4. The impugned order dated 19th August, 2019 reads thus :-

“Issue process against accused r/o 19/9/19 at 2.30 p.m.

Sd/-

(Nilima S. Kankonkar)

JMFC 'B' Court

Quepem

Dtd: 19/8/19.

Quepem”

5. Now it is true that the Magistrate, at the stage of taking cognizance of the matter and issuing process is not required to record elaborate reason. However, at the same time it is equally true that the order taking cognizance and issuing process must reflect independent application of mind by Magistrate to the material placed before her.

6. In the precise context of such types of orders, the Hon'ble Supreme Court in the case of ***Rajendra Rajoriya Vs Jagat Narain***

Thapak and another¹, has made the following observations at paragraphs 16, 17 and 18.

"16. Now coming to the second aspect as to the legality of the order of the learned Magistrate taking cognizance of the matter. The standard required by the Magistrate while taking cognizance is well settled by this court in catena of judgments. In Subramanian Swamy vs. Manmohan Singh & Another, (2012) 3 SCC 64, this Court explained the meaning of the word 'cognizance' holding that :

"34....In legal parlance cognizance is taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially".

We may note that the Magistrate while taking cognizance has to satisfy himself about the satisfactory grounds to proceed with the complaint and at this stage the consideration should not be whether there is sufficient ground for conviction. It may not be out of context to note that at the stage of taking cognizance, the Magistrate is also not required to record elaborate reasons but the order should reflect independent application of mind by the Magistrate to the material placed before him.

17. On a perusal of the order of the learned Magistrate taking cognizance, it is apparent that the learned Magistrate observes that the Sessions Court has already made out a prima facie case. Such finding would be difficult to sustain as the Revisional court only observed certain aspects in furtherance of remanding the matter. Such observations could not have been made by the Magistrate as he was expected to apply his independent mind while taking cognizance. In the case on hand, we recognize the limitation on the appellate forum to review

¹ (2018) 17 SCC 234

subjective satisfaction of the Magistrate while taking cognizance, but such independent satisfaction unless reflected in the order would make it difficult to be sustained. There is no dispute that Justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is wrought in our constitutional tradition that we imbibe both substantive fairness as well as procedural fairness under our criminal justice system, in the sense of according procedural fairness, in the making of decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

18. On a different note, we may note that the Magistrates across India have been guided on number of occasions by concrete precedents of this Court to exercise utmost caution while applying their judicious mind in this regard. Unfortunately, we may note that number of cases which are brought before us reflects otherwise.”

7. Applying the principles laid down by the Supreme Court to the facts of the present case, the impugned order dated 19th August, 2019 will have to be set aside and the matter restored to the Court of JMFC 'B' Court at Quepem for a fresh consideration based on the complaint and material produced on record by the Complainant as well as the evidence which has already been led by the Complainant and his witnesses.

8. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

9. The Respondent No.1 i.e. the Complainant before the Magistrate now appear before the Magistrate on 8th March, 2021 at 10.00 a.m., and file authenticated copy of this order.

M. S. SONAK, J

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