

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.165 OF 2013

Shri Prakash s/o Shrihari Adhau
Aged about 50 years,
Occupation: Agriculturist,
R/o Khirala, Tq. Anjangaon Surji,
District Amravati.

..... **PETITIONER**

...V E R S U S...

1. Sau. Meena w/o Gopalrao Adhau
Aged about 35 years,
Occupation: Nil, R/o Khirala,
Tq. Anjangaon Surji,
District Amravati.

2. State of Maharashtra through
Police Station Officer,
Anjangaon, District Amravati.

..... **RESPONDENTS**

Mr. Amol B. Patil, Advocate for Petitioner.
Mr. Anand Deshpande, Advocate for Respondent 1.
Mr. S.S. Doifode, APP for Respondent 2/State.

CORAM: **ROHIT B. DEO, J.**
DATE: **9th March, 2021.**

ORAL JUDGMENT:

The petitioner is arraigned as accused 1 in Criminal Complaint Case 168 of 2007 instituted by respondent 1 under Section 294, 323, 324, 354, 447, 448, 504, 506 read with Section 34 of the Indian Penal Code.

2. The wife of the petitioner is arraigned as accused 2, the daughter and son of the petitioner are arraigned as accused 3 and 4 respectively and the petitioner's brother is arraigned as accused 5. However, the learned Magistrate was pleased to issue process only against the petitioner for offences punishable under Sections 354, 447 and 448 of the Indian Penal Code and the complaint is dismissed as against the accused 2 to 5.

3. Initially, the learned Magistrate rendered an order dated 08.02.2010 of issuance of process against the accused and his wife under Sections 323, 448, 504, 506 read with Section 34 of the Indian Penal Code. The said order was confirmed by the Revisional Court. This Court entertained an application under Section 482 of the Criminal Procedure Code, 1973 (Code) and vide order dated 17.11.2011 quashed the order of issuance of process and directed the learned Magistrate to pass a reasoned order.

4. The learned Magistrate then passed the impugned order restricting the issuance of process to the accused and under the sections of the Indian Penal Code referred to *supra*. The accused approached the Revisional Court in Criminal Revision 125 of 2011,

which came to be dismissed vide judgment dated 06.12.2012.

5. The accused is invoking the extra ordinary jurisdiction under Article 226 of the Constitution of India and the inherent powers under Section 482 of the Code, in assailing the order of issuance of process and the confirmation thereof by the Revisional Court.

6. The learned counsel for the accused Mr. Amol Patil would submit that the order of issuance of process is not a reasoned order in the sense that relevant material *inter alia* the contradictory statements of respondent 1, who shall be referred to as the complainant hereinafter, is not even touched much less considered. Mr. Amol Patil would submit that the complaint alleges that the incident occurred at 09:10 a.m. and in the verification statement the incident is alleged to have occurred at 09:30 a.m. Mr. Amol Patil then submits that the police record reveals that the complainant lodged a report in which the time of the incident is stated as around 10:00 a.m. This aspect is not considered while issuing the process, is the submission.

7. Mr. Amol Patil then submits that the accused, too,

lodged a report with Police Station Anjangaon Surji and the station diary records that the accused was at the police station at around 09:30 a.m. and that since he was bleeding profusely, after recording the report he was referred to the Government Hospital at 09:45 a.m. or thereabout. Mr. Amol Patil would submit that the station diary falsifies the allegation of the complainant that the incident allegedly occurred at the time mentioned by her in the complaint or the verification statement or then in the report lodged with the police.

8. Mr. Amol Patil then submits that there is a material contradiction between the complaint and the statement of the complainant recorded in the course of investigation. While the complaint avers that Mr. Gopal was not present when the incident occurred and that he was at the agricultural field from 07:00 a.m. to 11:00 a.m., the statement of the complainant given to the police is that she and her husband Mr. Gopal were present in the field and there was a quarrel between the accused and Mr. Gopal. Mr. Amol Patil submits that the material contradiction is not considered by the learned Magistrate while issuing process.

9. The next submission is that the learned Magistrate did

not give satisfactory reason to disagree with the report of the police which was submitted pursuant to the direction issued under Section 202 of the Code.

10. Mr. Amol Patil would submit that there was no additional material on record apart from the material collected in the inquiry conducted by the police, and the order of issuance of process is therefore, vitiated.

11. Mr. Amol Patil would then submit that while two eye witnesses are named in the complaint and verification, they are not examined, which omission vitiates the order of issuance of process.

12. The learned counsel for the complainant Mr. Anand Deshpande would emphatically refute the submissions of Mr. Amol Patil. Mr. Anand Deshpande would submit that the limited sifting of material which is permissible is to ascertain whether a case is made out to proceed against the accused and that the learned Magistrate is not bound by the investigation/inquiry report submitted by the police. Mr. Anand Deshpande would then submit, that the learned Magistrate was not expected to conduct a

mini trial and to minutely assess the probative value of the material on record. The alleged *inter se* contradiction is a matter to be addressed in the trial, is the submission. Refuting the submission, that the order of issuance of process is not a reasoned order, and therefore, the direction of the High Court that a reasoned order be passed, is flouted, Mr. Anand Deshpande would submit that the order of the learned Magistrate is self-speaking and the thought process is clearly discernible. While the learned Magistrate was obligated to record reason, since such was the direction of the High Court, the learned Magistrate was not expected to pen an order as if writing a judgment of acquittal or conviction. Mr. Anand Deshpande would submit that it is clear from the order of the learned Magistrate that he did apply mind to the material collected in the inquiry conducted by the police and sufficient reasons are given not to agree with the view of the police officer who conducted the inquiry.

13. Mr. Amol Patil invited my attention to the decision of the Supreme Court in *M/s India Carat Pvt. Ltd. v. State of Karnataka and another* (1989) 2 SCC 132. The said decision is rendered in appeal by special leave directed against an order of the High Court which set aside the order of the learned Magistrate

of issuance of summons under Sections 408 and 420 of the Indian Penal Code.

The Investigating Officer sent a 'B' report to the learned Magistrate stating that further investigation was not required as the dispute was of a civil nature. The learned Magistrate however, took a view that a *prima facie* case was made out for issuance of summons under Section 204 of the Code. The High Court set aside the order of the learned Magistrate holding that the learned Magistrate should have issued notice to the complainant to find out whether he was disputing the correctness of the 'B' report and, if so, to comply with the requirements of Section 200 of the Code.

The Supreme Court took a resume of the statutory scheme and in the context of the case in hand, the following observations are relevant:

“16. The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused.

The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Section 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

*17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in *Tula Ram v. Kishore Singh* that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with”.*

14. In *M/s India Carat Pvt. Ltd.*, the following observation in *H.S. Bains v. State* (1980) 4 SCC 631 were referred to and

reproduced:

“The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307 Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under Section 324 Indian Penal Code only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye-witnesses to a murder but that for various reasons witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police”.

15. Mr. Amol Patil then invites my attention to a decision of a learned Single Judge in *Naresh Wamanrao Raut and others v. State of Maharashtra and another* 2017 SCC Online Bom 8212 and in particular to the following observations:

“15. So also, the observations of this Court in Captain Lance Irwin Lobo case (cited supra) and relevant portion is reproduced herein under:

“A conjoint reading of Section 203, 204, Cr.P.C. shows that process is to be issued after considering the statement on oath of the complainant and of the witnesses and the result of the inquiry or investigation, if any, under Section 202. The recording of the statement on oath of complainant under Section 200 Cr.P.C. is not an empty formality. Commonly it is nicknamed as verification. To verify means to establish the truth. In other words, verification is done in order to ascertain as to what is pleaded by the complainant is true or not. It is with a view to separate chaff from the grain as many a times complaints do contain unfounded allegations and it is the duty of the Court to ensure that what is stated in the complaint is also stated by the complainant on oath and it is only then that based on such statement that process can be issued.”

16. *In the present case, it is not in dispute that only statement of complainant was recorded on oath by the learned Magistrate at initial stage, however after having the said statement on oath the learned Magistrate was not satisfied and therefore, he directed for conduction of inquiry under Section 202 of the Code of Criminal Procedure. The investigating officer recorded the statements of various witnesses. According to the investigating officer their statements does not disclose the occurrence of any offence. The learned counsel invited my attention to page no.77 of the compilation which is in the nature of the chart which shows that which witnesses named the names of the applicants. The said aspect is also not disputed. From the aforesaid page, it is clear that all the witnesses are not stating the names of all the applicants. Same names are being seen from the statements of same witnesses. In my view, much importance cannot be given to this. In my view, what is important is that learned Magistrate has relied upon the statements of these witnesses-persons whose statements are recorded under inquiry*

under Section 202 of Code of Criminal Procedure. It is not the case of the non-applicant no.2 that after the statements of the witnesses were recorded by the investigating officer those persons were presented by the non-applicant no.2-complainant in his complaint and their statements on oath were recorded by the learned Magistrate. Thus, learned Magistrate has relied upon the statements of witnesses which were not on oath. In my view, here the learned Magistrate has committed mistake in law in view of provisions of Section 203 of the Code of Criminal Procedure. Section 203 of the Code of Criminal Procedure clearly shows that the statement of complainant-witness has to be on oath and after considering their such statements if no case is made out the complaint has to be dismissed”.

16. Mr. Amol Patil then refers to the decision of the Supreme Court in *Mohammad Ataullah v. Ram Saran Mahto* (1981) 2 SCC 266 in which the Supreme Court observes that when the learned Judicial Magistrate First Class took cognizance of the case and ordered issuance of process there was no additional material before him except the material which was already there when he directed an investigation under Section 202 of the Code and that the learned Chief Judicial Magistrate without any reference to any further material, took cognizance of the case merely on the basis of the opinion expressed by the Executive Officer, Samastipur Municipality, which was an error.

17. Mr. Anand Deshpande relies on the decision in *Jagdish Ram v. State of Rajasthan and another* (2004) 4 SSC 432 and in particular the observation in paragraph 10 which reads thus:

“10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record

reasons. (Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal)”.

18. I am not persuaded to agree with most of the submissions canvased by Mr. Amol Patil since in my considered view, too minute examination of the material on record on the touchstone of probative value is not expected at the stage of issuance of process. The discrepancy as to the time of the incident and similar discrepancies which are referred to by Mr. Amol Patil would not vitiate the order of issuance of process. However, Mr. Amol Patil is indeed justified in the submission that having found it necessary to postpone the issuance of process, and to direct an investigation under section 202 of the Code, the learned Magistrate erred in issuing the process without considering the material collected in the investigation.

19. It is trite law that the Magistrate is not bound by the report submitted by the inquiring or investigating authority. Notwithstanding the opinion of the Investigating Agency that no offence is made out, it would be open to the Magistrate to consider the material on record independently and to issue process if a case is made out to proceed against the accused. Be it

noted, that while the learned Magistrate is not bound by the opinion expressed by the Investigating Agency, it would do violence to the statutory scheme to assume that the learned Magistrate can straightway ignore the material emerging in the investigation. When the Magistrate decides to postpone the issuance of process and finds it necessary to direct an inquiry under section 202 of the Code, it is obvious that the Magistrate was satisfied at that stage that the material on record is not sufficient to straightway issue process, and therefore, an enquiry under section 202 is necessary. Having received the report of the inquiry or an investigation, if the Magistrate opts not to even consider the material collected during the course of the inquiry or investigation, he would be issuing process without there being any additional material on record, i.e. material other than that was already on record when he decided to postpone the issuance of process. Such a course is clearly not permissible under the statutory scheme. The learned Magistrate clearly erred in not considering the statements of the witnesses recorded during the course of the enquiry under section 202 of the Code.

20. The order of the learned Judicial Magistrate First Class, Anjangaon Surji dated 08.11.2011 in Regular Criminal Case

168/2007 and the order of the learned Additional Sessions Judge-1, Achalpur dated 06.12.2012 in Criminal Revision 125/2011 are quashed and set aside.

21. The matter is remitted to the learned Magistrate for fresh consideration and decision on issuance of process, in the light of the report received under Section 202 of the Criminal Procedure Code, 1973, and in the light of the observations in this judgment.

22. Rule is made absolute in the aforestated terms.

JUDGE