

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.635 OF 2022

Prakash Vasant Kuray, Age 65 years,
Occ.Retired, R/o.Chandrama,
Ground Floor, 21, Kala Nagar CHS,
Bandra East, Mumbai-400 051.

Petitioner

versus

1. The State of Maharashtra.
2. Ishwar Gulab Naik, Adult,
R/o.Chandrama, 2nd Floor,
Kala Nagar CHS, Bandra East,
Mumbai-400 051.

Respondents

Mr.Shekhar Ingawale with Mr.Prashant Relekar i/by Mr.Parth P. Shah,
Advocates for petitioner.

Mr.A.D.Kamkhedkar, APP, for respondent no.1 State.

Mr.Karansingh Rajput, Advocate for respondent no.2.

CORAM : PRAKASH D. NAIK, J.

DATE : 19th July 2022

PC :

1. The petitioner is aggrieved by order dated 20th December 2021 passed by Sessions Court setting aside the order dated 14th October 2019 issuing process and remitting the matter back to the stage of verification u/s.200 of Code of Criminal Procedure ('Cr.PC').

2. The petitioner is the original complainant in complaint bearing No.231/SW/2014. The complaint was filed seeking investigation u/s.156(3) of Cr.PC u/s420, 417, 467 of Indian Penal Code. Vide

order dated 27th October 2014 learned Metropolitan Magistrate, 32nd Court, Bandra, Mumbai directed inquiry u/s.202 of Cr.P.C. It was observed that there is no wide scope for investigation u/s.156(3) of Cr.P.C and that the inquiry into the allegations u/s.202 would be sufficient. It was directed that complaint be sent to Kherwadi Police Station for report u/s.202 of Cr.P.C.

3. Pursuant to the order dated 27th October 2014, negative report u/s.202 of Cr.P.C was filed by police. Learned Magistrate was pleased to reject the complaint vide order dated 20th January 2016 on the ground that police filed negative report. No case is made out against accused. Prayer for fresh investigation was rejected. Case was disposed off.

4. The petitioner-complainant challenged the order dated 20th January 2016 by preferring Criminal Revision Application No.386 of 2016 before Sessions Court, Greater Bombay. Learned Sessions Judge vide order dated 21st April 2016 allowed the revision application. The order dated 20th January 2016 was set aside and the matter was remanded back to Trial Court for fresh consideration. Learned Sessions Judge had observed that learned Magistrate has not considered the report in its proper perspective. He has not given any reason for accepting the report of police u/s.202 of Cr.P.C. Hence the matter is remanded back to the Trial Court for fresh consideration.

5. Respondent no.2 challenged the order dated 21st April 2016 before High Court by preferring Writ Petition No.1897 of 2016. This Court set aside the order dated 21st April 2016 and remanded the matter back to Sessions Court to consider the matter afresh and give

respondent no.2 an opportunity to put his case. Criminal Revision Application No.383 of 2016 was again heard and by order dated 17th September 2016 the revisional Court allowed the said revision application by setting aside order dated 20th January 2016 in C.C.No.231/SW/2014 and remanding the matter back to Trial Court for fresh consideration with reference to allegations in the complaint and the report submitted by police u/s.202 of Cr.PC.

6. Aggrieved by order dated 17th September 2016 passed by Sessions Court, the respondent no.2 again approached this Court by preferring Writ Petition No.4043 of 2016. Although interim relief was granted earlier, subsequently it was not extended and stood vacated.

7. The proceedings were again heard by learned Magistrate. Vide order dated 11th December 2018 the Court directed the police to continue further inquiry and submit report to the Court. The report of further investigation was submitted to the Court u/s.202 of Cr.PC. Learned Magistrate perused the report and by order dated 14th October 2019 issued process against accused for the offences under Sections 465, 467, 468 of Indian Penal Code.

8. Respondent no.2 preferred Criminal Revision Application No.198 of 2020 challenging order dated 14th October 2019. The application was opposed by the complainant by filing reply. The learned Sessions Judge by order dated 20th December 2021 allowed the Criminal Revision Application No.198 of 2020 and set aside the order issuing process passed by learned Magistrate and the matter was restored at the stage of verification u/s.200 of Cr.PC. While

passing the said order it was observed that the Court had taken cognizance without following procedure. Without recording verification statement, the Court had issued process.

9. Respondent no.2 has filed affidavit-in-reply and opposed the prayers sought in this petition.

10. Learned advocate for applicant submitted that impugned order is contrary to law. There were several rounds of litigation. Learned Sessions Judge ought not to have set aside the order of process on the ground that verification statement is not on record. Report u/s.200 of Cr.PC was already on record. Learned Magistrate considered the report, complaint, documents on record and issued the process. Section 202 of Cr.PC was only for the purpose of deciding whether or not there is sufficient ground for proceeding with the complaint. The 2005 Amendment clearly states that false complaints are filed against persons residing at far off places simply to harass them. The learned Magistrate after satisfying himself was pleased to send complaint for inquiry under Section 202 of Cr.PC.

11. Learned counsel for petitioner has relied upon following decisions :

- (i) Shivjee Singh Vs. Nagendra Tiwary and others¹;
- (ii) Kuldeep N. Sharma-IPS Vs. State of Gujarat and another²;

12. Learned Advocate for respondent no.2 submitted that without recording verification statement of complainant, the Court cannot

1 (2010)7-SCC-578

2 Special Criminal Application No.1467/2011 decided on 11-5-2012 by Single Bench of Gujarat High Court

issue process. The order of process is contrary to law. There is no infirmity in the order passed by Sessions Court remanding the case back to Trial Court for fresh consideration. It transpired during the course of hearing that verification was not recorded by Trial Court before issuing summons. Roznama dated 4th October 2021 of the Sessions Court makes it clear that record and proceedings was called on the basis of submissions made by advocates representing both sides. Advocate for petitioner admitted before Sessions Court, as reflected in roznama dated 26th November 2021, that verification was not on record of Trial Court and order of process should be set aside and Trial Court may proceed from stage of verification under Section 200 of Cr.PC. Even otherwise, the complaint is devoid of merits.

13. Learned advocate for respondent no.2 has relied on following decisions :

- (i) Rajesh Gulab Patil Vs. Shankar Rama Parad and another³;
- (ii) S.R.Sukumar Vs. S.Sunaad Raghuram⁴;
- (iii) Madhao and another Vs. State of Maharashtra and another⁵
- (iv) Supreme Bhiwandi Wada Manor Infrastructure Pvt.Ltd. Vs. State of Maharashtra and another⁶.

14. The petitioner has filed complaint before the Court of Magistrate. From the record it is apparent that there are several rounds of litigation. The prayer for investigation u/s.156(3) of Cr.PC was not granted. Learned Magistrate issued process vide order dated

3 2019-SCC OnLine-Bom-10768

4 (2015)9-SCC-609

5 (2013)5-SCC-615

6 (2021)8-SCC-753

14th October 2019 without recording verification statement. Learned Sessions Judge has set aside the order of process dated 14th October 2019 and restored the case back to the Trial Court for verification u/s.200 of Cr.P.C. In spite of giving opportunities, the verification statement was not produced. Thus, it is not in dispute that verification was not recorded before process was issued on 14th October 2019.

15. Strong reliance is placed by advocate for petitioner on the decision of Gujarat High Court in case of Kuldip N. Sharma (supra). In the said decision it was held that it is mandatory to record verification of complainant before proceeding further. However, the Court observed that in the said case, the Court has come to the conclusion that Section 200 insofar as it obliges the Magistrate to record the verification of complainant on oath upon taking cognizance is mandatory, but the question is whether really the petitioner therein is prejudiced and will it vitiate the proceedings. If an object of an enactment is defeated by holding the same directory, it should be construed as mandatory, whereas, if by holding it mandatory serious general inconvenience will be created to general public without much furthering the object of enactment, the same should be construed as directory, but all the same, it would not mean that the language used in the provision would be ignored altogether. The Court is of the firm view that had it been the case where the Magistrate would have issued the order of process under Section 204 of the Code straight away without recording verification of complaint on oath, then in that case, the proceedings would definitely stand vitiated because the accused would definitely get prejudiced, but like in that case, though there was failure to record the verification of

complainant on oath, the Magistrate did not proceed to straight away issue the order of process under Section 204 but rather thought fit to initiate Magisterial inquiry under Section 202 of the Code and by ordering such inquiry, the Magistrate recorded statement of complainant and his witnesses to ascertain as to whether there was a prima facie case for the purpose of proceeding against the person against whom complaint came to be lodged. The Court held that in the facts of the case non examination of the complainant on oath or omission to record the verification of the complainant on oath before proceeding with Magisterial inquiry under Section 202 of the Code by itself will not render the order of process illegal and will not vitiate the proceedings. The object of Section 200 of the Code is not frustrated in the said case because care which the Magistrate ought to have taken at the stage of inquiry under Section 200 has been taken care of at the stage of inquiry under Section 202 of the Code. Had it been a case that Magistrate would have issued process straight away without any inquiry under Section 202 of the Code in the absence of verification of the complainant on oath, then in that case the Court would have been left with no other option but to quash the order of process only on that ground and remand the matter for fresh consideration before the concerned Magistrate. It should not be understood that examination of complainant under Section 200 of Code is not essential or important. The Court did not quash order of process on the ground of non-compliance of Section 200 of Cr.P.C. The Court also considered proviso to Section 200 of Cr.P.C and observed that object of Section 200 of the Code requiring complainant and the witnesses to be examined is to find out whether there are sufficient grounds for proceeding against the accused.

16. In the case of Shivjee Singh Vs. Nagendra Tiwary and others (supra), the question before the Court was whether examination of all witnesses cited in the complaint is *sine qua non* for taking cognizance by Magistrate in a case exclusively triable by the Court of Session. The Court held that the word 'shall' appearing in the proviso to Section 202(2) is qualified by the word 'his'. This implied 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. Only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. This decision is apparently relied upon by advocate for petitioner since it has been relied upon by Gujarat High Court, in the aforesaid decision for interpretation of word 'shall'.

17. In the case of Madhao and another (supra), it is observed that where Magistrate chooses to take cognizance he can adopt any of the alternatives, such as, (i) he can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so, he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses, (ii) the Magistrate can postpone the issue of process and direct an inquiry by himself, (iii) the Magistrate can postpone the issue of process and direct an inquiry by any other person or an investigation by the police.

18. In the case of S.R. Sukumar Vs. S. Sunaad Raghuram (supra), this Court has observed that Section 200 of Cr.P.C provides for procedure for the Magistrate taking cognizance of an offence on complaint. The Magistrate is not bound to take cognizance of an

offence merely because the complaint is filed before him when in fact the complaint does not disclose a cause of action. The language in Section 200 of Cr.PC clearly suggest that for taking cognizance of an offence on complaint, the Court shall examine the complainant upon oath. The object of examination of the complainant is to find out whether the complaint is justifiable or is vexatious.

19. In the case of Supreme Bhiwandi Wada Manor Infrastructure Pvt.Ltd, it is held that power of Magistrate u/s.156(3) to direct investigation is an independent power to take cognizance. There is no requirement to Magistrate to examine complaint on oath as required u/s.200 of Cr.PC.

20. In the case of Rajesh Gulab Patil Vs. Shankar Rama Parad and another (supra), this Court had observed that failure to comply the procedure contemplated in Chapter XV of Cr.PC, the order calling for a report u/s.202 of Cr.PC prior to recording of verification as well as order issuing process cannot be sustained.

21. Sections 200, 202 and 204 of Cr.PC reads as follows :

“S.200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate :

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 :

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.”

“S.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,-

(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.”

“S.204. Issue of Process.- (1) *If in the opinion of a Magistrate taking cognizance of an offence there is*

sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.”

22. It is settled position of law that Magistrate has various options provided when the complaint is filed before Court. For initiating action u/s.156(3) of Cr.P.C, recording of verification statement is not warranted. It is a pre-cognizance stage. However, for issuing process u/s.204, learned Magistrate has to follow the mandate of Section 200 of Cr.P.C. Even if the Magistrate decides to postpone issuance of process and issues directions u/s.202 for making an inquiry by police or even making inquiry by himself, Section 200 cannot be excluded. Gujarat High Court has drawn an analogy from Sections 200, 202 and 204 of Cr.P.C and distinguished the facts of that case by observing that there was report u/s.202 of Cr.P.C before the Court before issuing process. The purpose of verification was served by inquiry under Section 202 of Cr.P.C. The Court has observed that in

the event the Magistrate directs inquiry under Section 202 of Cr.PC and conducts inquiry himself and records the statement of complainant or his witnesses in inquiry under Section 202 of Cr.PC, the order of process issued without recording verification statement would not be initiated. In the present case inquiry under Section 202 of the Code was directed to be conducted by Police. The Court has held that recording verification statement under Section 200 is mandatory but in the facts of the case before the Court, the order of process would not vitiate. Apart from the fact that this case can be distinguished on facts, it is not possible to hold that while an inquiry is conducted under Section 202 of Cr.PC, the order of process issued thereafter without recording verification statement would not vitiate. Section 200 of Cr.PC clearly suggest that for taking cognizance of an offence on complaint, the Court shall examine the complainant upon oath. The exception is in respect of public servant. The Magistrate can postpone issue of process by directing inquiry under Section 202 of Cr.PC. However, even for directing inquiry under Section 202, the requirement of recording statement of complaint is mandatory. Relying on statement, if any, recorded during inquiry under Section 202 of the Code to dispense with verification statement required under Section 200 of the Code would be contrary to procedure under Section 200, 202 and 204 of Cr.PC. In this case verification statement could not be produced and it is not established that such statement was recorded before inquiry under Section 202 and order issuing process. It is pertinent to note that even for issuing directions u/s.202 for inquiry by police, the Court is required to record verification statement of complainant.

23. Considering the aforesaid circumstances, I do not find any

infirmity in the impugned order passed by Sessions Court remanding the matter back to the Magistrate Court for fresh consideration.

ORDER

- (i) Writ petition No.635 of 2022 is rejected and disposed of;
- (ii) The learned Metropolitan Magistrate, 32nd Court, Bandra, Mumbai shall proceed with C.C.No.231/SW/2014 as per direction of learned Additional Sessions Court, Mumbai issued in order dated 20th December 2021 passed in Criminal Revision Application No.198 of 2020;
- (iii) The learned Magistrate shall proceed with further proceedings in C.C.No.231/SW/2014 expeditiously;
- (iv) The complainant shall appear before the Trial Court on 30th July 2022. The learned Magistrate shall record the verification statement of the complainant within a period of two weeks thereafter and proceed with complaint in accordance with law.

(PRAKASH D. NAIK, J.)

MST