

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 1210 OF 2022

Nilesh Vasant Patil ...Applicant

Versus

Sajith Kunimal Venugopal & Anr. ...Respondents

Mr. Raviraj Paramane for the Applicant.

Mr. M.K. Kocharekar for the Respondent No.1.

Mr. M.G. Patil, APP for the State-Respondent No.2.

BHALCHANDRA
GANGADHAR
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CORAM : SARANG V. KOTWAL, J.

DATE : 30th JUNE, 2023.

PC. :

1. The Applicant has challenged the order dated 21st May 2022 passed by the Judicial Magistrate First Class, 4th Court, Vashi in O.M.A. No. 89 of 2021, issuing process against the accused before him under Sections 342, 386, 420, 467, 468 and 474 of IPC. The present Applicant is accused No.3 before the trial Court.

2. The brief allegations in the complaint are that, all the accused together forced the complainant i.e. Respondent No.1 herein to put his signature on some documents against his wish; and hence,

committed all these offences. The accused No.1 was the Senior Inspector of Police, Local Crime Branch, Alibaug, Raigad.

3. At the first instance, the complainant i.e. Respondent No.2 herein, had prayed for directions for investigation under Section 156(3) of Cr.P.C. That prayer was rejected vide order dated 13th March 2021 and instead, the officer in-charge of Vashi Police Station was directed to conduct inquiry under Section 202 of Cr.P.C.

4. Learned counsel for the Applicant stated that two different reports under Section 202 of Cr.P.C. were filed on 17th September 2021 and 29th October 2021. After that, the learned Magistrate passed the order on 19th May 2022 as follows :

“Heard learned Advocate for the complainant. Perused Record. It is seen that inquiry officer has submitted report under Section 202 of Cr.P.C. However, before proceeding under Section 200 of Cr.P.C., the complainant is required to be examined. Hence, put up for verification.”

5. After this order was passed, the verification of the complainant was recorded on 21st May 2022 and after that, the impugned order of issuing process was passed.

6. Learned counsel for the Applicant submitted that the procedure adopted by the learned Magistrate was not in accordance

with law; and therefore, the order of issuance of process is required to be set aside. He submitted that, even before passing the order directing the police inquiry under Section 202 of Cr.P.C., the Magistrate was required to record the verification of the complainant under Section 200 of Cr.P.C. He relied on observations of a Single Judge Bench of this Court in the case of ***Ramesh Damodar Nagare Versus Ashok Damodar Nagare*** decided on 1st July 1997 in ***Criminal Revision Application No.147 of 1991***. He relied on paragraph No.4 of the said judgment, which reads thus :

“4. I have reflected over the said submission of Mr. Hardikar and find merit in it. A perusal of the provisions contained in section 200 Cr.P.C. would show that after a complaint has been filed, statement of the complainant and that of the witnesses, if present, shall be recorded. A perusal of section 200 Cr.P.C. r/w 202 Cr.P.C. would show that once the statement of the complainant and that of his witnesses, if present, has been recorded; a Magistrate may straight away summon the accused or may defer issuance of process against the accused till he enquires into the case himself or directs an investigation to be made by a Police Officer, or by such other person as he thinks fit. Section 202(b) of Cr.P.C. provides that where a complaint has not been made by a Court, (as is the case here) no direction for an investigation can be made, unless the complainant and witnesses present (if any) have been examined on oath under section 200 Cr.P.C.”

7. He therefore submitted that, since the proper procedure was not followed, there was no application of mind and it caused prejudice to the Applicant. Therefore, the impugned order is liable to be set aside.

8. Learned counsel for the Respondent No.1 could not really justify this procedural lapse on the part of the Magistrate. He submitted that, on merits, the Magistrate has not committed any error in issuing the process because the offence is clearly made out and even the police reports support the complainant's case.

9. I have considered these submissions. Sections 200 and 202 of Cr.P.C. are important for the purpose of the present Application. Sub-section 1 of Section 202 of Cr.P.C. with the proviso reads thus:

“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.”

Proviso (b) clearly lays down that when the complaint has not been made by the Court, such direction for investigation under Section 202 of Cr.P.C. could not be made unless the complainant and witnesses have been examined under Section 200 of Cr.P.C.

10. In the present case, it is an admitted position and it is also reflected from the record that the learned Magistrate first passed an order under Section 202 of Cr.P.C. for police inquiry; and after receipt of its report, recorded verification statement of the complainant under Section 200 of Cr.P.C. This procedure is in clear violation of proviso to Section 202(1) of Cr.P.C.

11. These procedural aspects are important and at the initial stage, they go to the root of the matter. Hence, on this ground alone the impugned order of issuance of process is required to be set aside. However, this lapse in the procedure can be cured by the learned Magistrate by following due procedure laid down under Sections 200, 202, 203 and 204 of Cr.P.C. Just because of this lapse, the

complainant's case cannot be thrown out of the Court. A fair chance must be given to the complainant as well. Therefore, the proceedings will have to be considered by the learned Magistrate from the stage of Section 200 of Cr.P.C. Hence, the following order :

ORDER

- i. The order dated 21st May, 2022 passed by the Judicial Magistrate First Class, 4th Court, Vashi in O.M.A. No.89/2021 issuing process against the accused is set aside.
- ii. Since the learned Magistrate has already recorded the verification of the complainant, he shall proceed from that stage onwards. All the options laid down by the aforesaid Sections are available with the Magistrate to take further steps.
- iii. It is made clear that this Court has not expressed its opinion on the merits of the matter. All the contentions, on merits, of both the parties are specifically left open.
- iv. With these directions, the Application is disposed of.

(SARANG V. KOTWAL, J.)