

## Gurmeet Singh Bagga Vs State of Rajasthan and Another

**Court:** Rajasthan High Court (Jaipur Bench)

**Date of Decision:** Oct. 30, 2009

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 208, 226

**Citation:** (2010) CriLJ 1886

**Hon'ble Judges:** R.S. Chauhan, J

**Bench:** Single Bench

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

R.S. Chauhan, J.

This case raises two interesting legal issues : firstly, at the time of framing charge, whether the trial Court should consider

the evidence in favour of the accused, contained in the record of the case or not? Secondly, what criteria should be applied for while framing the

charge?

2. These issues arise in the following factual background:

In April, 1999, one Prabhu Dayal filed a criminal complaint before the Additional Civil Judge (Junior Division) Judicial Magistrate No. 6, Jaipur

City, Jaipur wherein he alleged that he is engaged in construction activities. According to him, in 1997, he had constructed petitioner"s house, for

which the petitioner owed him an amount of Rs. 1,76,000/-. On 21-2-1999, he, along with Kalu Ram Gurjar and Pappu Lal Saini, went to the

petitioner"s house for asking for the payment of the amount due. When he asked the petitioner to pay the amount, allegedly the petitioner started

assaulting him and also used foul language with regard to his caste status. The learned Magistrate sent the said complaint for investigation u/s

156(3), Cr. P. C. to the Police Station, Adarsh Nagar, Jaipur. The Police registered a formal FIR, FIR No. 64/1999, for offences under Sections

323, 341, 504, IPC and Section 3(1)(x) of SC/ST (Prevention of Atrocities) Act ("the SC/ST Act", for short). Since an offence under the

provisions of SC/ST Act was involved, the investigation was conducted by a Dy. S. P. After conducting a thorough investigation, the police

concluded that no such incident had taken place as claimed by the complainant. Therefore, it filed a negative final report. The complainant, in turn,

filed a protest petition. The learned Magistrate recorded the statements of the complainant and of his witnesses. Subsequently, notwithstanding the

negative final report, the learned Magistrate took cognizance for the offences under Sections 323, 341, 504, IPC and Section 3(1)(x) of the

SC/ST Act. Thereafter, the learned Magistrate committed the case for trial to the Court of Special Judge SC/ST (Prevention of Atrocities) Cases,

Jaipur. Vide order dated 8-7-2004, while the learned trial Judge discharged the petitioner from the offence u/s 341, IPC, he framed the charges

for the offences punishable under Sections 323 and 504, IPC and u/s 3(1)(x) of the SC/ST Act. Hence, this petition before this Court.

3. Mr. Vivek R. Bajwa, the learned Counsel for the petitioner, has raised a plethora of contentions: firstly, in cases instituted otherwise than on a

police report, according to Section 208, Cr. P. C. the accused is entitled to copies of the statements and documents. According to the said

provision, the accused is entitled to the statements recorded u/s 200 or 202, Cr. P. C. of all persons examined by the Magistrate, the statements

and confession, if any, recorded u/s 161 or 164, Cr. P. C. and lastly to every document produced before the Magistrate on which the prosecution

proposes to rely upon. According to the learned Counsel the accused is, thus, entitled to all the statements recorded u/s 161, Cr. P. C. by the

police, be the statement incriminatory or exculpatory in nature.

4. Secondly, according to Section 227, Cr. P. C., the learned trial Court is legally required to consider the record of the case and the documents

submitted therewith. The words ""record of the case"" and ""the documents submitted therewith"" would include the statements given to the accused

u/s 208, Cr. P. C. Thus, u/s 227, Cr. P. C. while considering the issue whether the accused should be discharged or not, the trial Judge is legally

bound to consider even those statements recorded by the police u/s 161, Cr. P. C. which are exculpatory in nature.

5. Thirdly, while considering the question of framing of charge or of discharge, the learned trial Judge should sift the evidence to see if a strong

prima facie case is made out against the accused. In case, there are two interpretations of the evidence, then the accused should be discharged.

6. Fourthly, the learned trial Court should not act either as a mouth-piece or as a post office for the prosecution.

7. Fifthly, that before the Judge can frame a charge against the accused he should sift through the evidence, contained in record of the case, and

form an opinion that there is reasonable likelihood of conviction. However, in the present case sufficient number of witnesses have claimed that no

such incident, ever took place, as alleged by the complainant. Thus, there is hardly any possibility of the petitioner's conviction by a Court of law.

8. Sixthly, there is no evidence to show that the offence u/s 504, IPC has been committed. For, the complainant does not claim, in his statement,

that he was intentionally insulted or provoked to the point that he would have breached public peace or would have committed any other offence.

In fact, he merely claims that when he was verbally abused, he simply walked away from the place. Hence, the essential ingredients of Section

504, IPC are non-existent in the present case. Despite the conspicuous absence of the essential ingredients, still the learned Judge has framed the

charge for offence u/s 504, IPC.

9. On the other hand, Mrs. Alka Bhatnagar, the learned Public Prosecutor, has contended that at the time of framing charge, the function of the

learned trial Judge is very limited. Firstly, he cannot meticulously examine the evidence. He is permitted to sift through the evidence to the limited

extent to see if "a strong prima facie case" exists with regard to the commission of offence by the accused. Therefore, the learned trial Judge need

not consider those statements which are exculpatory in nature. Secondly, that the essential ingredients of Section 504, IPC are made out. Hence,

she has supported the impugned order.

10. Heard learned Counsel for the parties and perused the material available on record.

11. Liberty is the soul of democracy. In fact, for the sake of liberty, many revolutions have been waged throughout the world. Keeping this sacred

ideal in mind, Article 21 of the Constitution of India protects the personal liberty of an individual from the onslaught of the State power. The

Judiciary, the arch-angel of the people, has been assigned the crucial role of protecting the people from the colossal powers of the State. While

exercising the criminal jurisdiction, the Courts cannot be oblivious to the fact that they have to protect the liberty of the people. After all, facing a

criminal trial is not a mere nuisance, it can be fatal to the social standing, the financial condition, the life and liberty of a person. Therefore, before

subjecting a person to the rigours of a trial, the trial Court should make every endeavour to protect the liberty of the alleged accused person.

12. Section 208, Cr. P. C. reads as under:

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session:

Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process u/s 204 that the offence is triable

exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the statements recorded u/s 200 or Section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded u/s 161 or Section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely;

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof,

direct that he will only be allowed to inspect it either personally or through pleader in Court.

13. Section 226, Cr. P. C. reads as under:

226. Opening case for prosecution: When the accused appears or is brought before the Court in pursuance of a commitment of the case u/s 209,

the Prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the

guilt of the accused.

14. Section 227, Cr. P. C. dealing with discharge reads as under:

227. Discharge: If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the

accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing.

15. Section 228 Cr. P. C. dealing with framing of charge reads as follows:

228. Framing of charge: (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the

accused has committed an offence which:

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the

Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant

cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the

accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

16. A bare perusal of these provisions clearly reveal that in a case instituted otherwise on a police report, i.e. in a complaint case, the accused is

entitled to receive copies of statements and documents. Those statements would also include the statements recorded by the police u/s 161 Cr. P.

C. Since the investigating agency is supposed to carry out an impartial investigation, it is duty bound to record both incriminatory and exculpatory

statements. Hence, u/s 208 Cr. P. C. the accused would be entitled to receive even those statements which are exculpatory in nature.

17. A holistic reading of Section 208 Cr. P. C. clearly brings out a distinction between "the statements" on the one hand, and "those documents on

which the prosecution wants to rely upon", on the other hand. While Section 208(i) and (ii) Cr. P. C. deal with "statements", Section 208 (iii) Cr.

P. C. deal with "documents on which the prosecution wants to rely upon". Interestingly, neither Section 208(i) Cr. P. C. nor 208 (ii) Cr. P. C. use

the words "on which the prosecution proposes to rely". Therefore, even those statements on which the prosecution does not wish to rely upon,

copies of even such statements would necessarily have to be given to the accused. Hence, obviously the statements which are exculpatory in nature

would also have to be provided, ipso facto, to the accused. Moreover, according to Section 208 (iii) Cr. P. C. those documents on which the

prosecution plans to rely upon, such documents should also be provided to the accused obviously, this is in fitness of things as the accused, who is

pitched against the phenomenal power of the State, would have to be armed with every piece of evidence with which he can protect his life and

liberty.

18. Furthermore, Section 226 Cr. P. C. deals with opening of the case by the prosecution. It permits the prosecution to open the case and to

reveal all the evidence on which it wants to rely upon in order to prove the guilt of the accused. At the initial stage, when the case is opened by the

prosecution, it can ignore the exculpatory statements and can concentrate on incriminatory ones. After all, the prosecution is presenting its side of

the story.

19. But the trial Court cannot be swayed merely by the story of the prosecution, while dealing with the issue of framing of the charge. According to

Section 227 Cr. P. C, if upon consideration of the record of the case and documents submitted therewith and after hearing the submissions of the

accused and the prosecution, if the trial Judge considers that there is no sufficient ground for proceeding against the accused, he is duty bound to

discharge him and to record his reasons for doing so. Section 227 Cr. P. C, therefore, imposes a duty on the trial Judge, firstly, to hear both the

sides, i.e. the prosecution and the accused, and secondly, to consider the record of the case and the documents submitted therewith. Naturally "the

record of the case" would include the statements given to the accused u/s 208 Cr. P. C. Thus, at the time of framing of the charge, the learned trial

Judge has to examine even the exculpatory statements, copies of which were given to the accused u/s 208 Cr. P. C. After all, throughout the

criminal proceeding the Judge cannot act either as a spokesman for the prosecution, or as a post-office for the prosecution. Being an impartial

umpire, he is legally bound to equally weigh both the sides after examining the complete record of the case. Therefore, while framing the charge he

must consider the exculpatory statements which were supplied to the accused and form part of the record of the case.

20. In the case of State of Madhya Pradesh Vs. Sheetla Sahai and Others, the Apex Court observed as under:

But, we are unable to persuade ourselves to agree with the submission of Mr. Tulsi that where the entire materials collected during investigation

have been placed before the Court as part of the chargesheet, the Court at the time of framing of the charge could only look to those materials

whereupon the prosecution intended to rely upon and ignore the others which are in favour of the accused. The question as to whether the Court

should proceed on the basis as to whether the materials brought on record even if given face value and taken to be correct in their entirety disclose

commission of an offence or not must be determined having regard to the entirety of materials brought on record by the prosecution and not on a

part of it.

21. The issue whether the accused is entitled to receive exculpatory evidence and the issue whether the Court can rely on such exculpatory

evidence, these issues are not peculiar only to India. These issues have taxed the judicial imagination in almost all the democratic countries.

22. In the case of John L. Brady v. State of Maryland 373 U.S. 83 the Supreme Court of United States was concerned with the question whether

suppression by the prosecution of evidence favourable to an accused would violate the due process of law or not? In the said case, Justice

Douglas, speaking for the Court, held that the "suppression by the prosecution of evidence favourable to an accused upon request violates due

process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution". This opinion came to

be known as "the Brady's principle". And the evidence suppressed by the State is referred to as "materiality". According to Brady's opinion, it

was for the accused to ask for the exculpatory evidence to be given to him. However, this part of the opinion was subsequently changed by the

United State's Supreme Court in subsequent cases.

23. In the case of Curtis Lee Kyles v. John P. Whitely 514 U.S. 419 the Supreme Court of United States held that "in case State failed to

disclose favourable evidence to the defendant and in case it was reasonably probable that such a disclosure would have made a different result of

the case, then the failure would amount to violation of due process of law as held in Brady's case.

24. In fact, in the case of Curtis, Lee Kyles (supra), the American Supreme Court went a step further from Brady's case, while observing that

defendant's failure to request favourable evidence does not leave government free of all obligations to disclose such evidence to defendant". It

further held that "in determining whether evidence that government failed to disclose to defendant satisfied "materiality" test of Brady, question is

not whether defendant would more likely than not have received different verdict with evidence, but whether in its absence he received "fair trial",

understood as a trial resulting in verdict worthy of confidence". It further said that it was not essential to demonstrate by preponderance that

disclosure of suppressed evidence would have resulted ultimately in defendant's acquittal; rather, the test is whether such evidence would have

reasonably probalitized a different result.

25. Keeping these principles in mind, as we are also wedded to the concept of fair trial, and due process of law, u/s 208 Cr. P. C. the Court is

duty bound to give copies of even exculpatory evidence to the accused. Moreover, since a trial is said to commence from the moment of framing

of charge, then keeping the concept of fair trial in mind, under Sections 227 and 228 Cr. P. C. the learned trial Judge is legally bound to consider

the exculpatory evidence in favour of accused.

26. Section 228 Cr. P. C. further lays down that after considering record of the case and after hearing both the parties, if the Judge is of the

opinion that there is ground for presuming that the accused has committed the offence, then he shall frame the charge in writing against the accused.

The consideration of the record of the case and formation of the opinion has elicited a number of responses from the Hon"ble Supreme Court.

27. In the case of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, the Apex Court laid down certain principles in the following

words:

Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the

evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will

be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal

application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving

rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act

merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence

and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however, does not mean that the Judge

should make a roving enquiry into the pros and cons of the matter and weight the evidence as if he was conducting a trial.

28. In the case of Vishwa Kumar Sharma Vs. State of Rajasthan and Another, this Court also dealt with the interpretation of Section 228 Cr. P.

C. and observed as under:

In the case of discharging the accused or in the case of framing of the charge, the Judge is required to take certain concrete steps: firstly, to

consider the record of the case and the documents submitted therewith." Secondly, to hear both the Prosecution and the accused. Thirdly, after

hearing both the parties, in case he "considers that there is not sufficient ground for proceeding against the accused", then he shall discharge him.

Fourthly, in case the accused is to be discharged, the Judge must record reasons for such discharging.

But, in case "after such consideration and hearing, the Judge is of the opinion that there is ground for presuming that the accused has committed an

offence" (Emphasis added), then he should follow the procedure laid down in Section 228 of the Code. Thus, the Judge must consider if there is

sufficient evidence to formulate an opinion that the offence has been committed by the accused. Consideration of the facts has to be a substantial

consideration and not an illusionary one. To consider means to examine with judicious mind. The phrase "of the opinion" has been interpreted to

mean to come to a conclusion after weighing the evidence. Of course, at the moment of framing of charge, the Judge should not undertake a

meticulous examination of the evidence. But nonetheless, he must sift the evidence to see if there is "sufficient" evidence to constitute the ingredients

of the offence and to connect the accused to the offence. "Sufficient" has been interpreted to mean the existence of "grave suspicion" and not

merely likelihood or mere "suspicion". Since charge is framed after hearing both the parties and after examining the evidence produced by the

Investigating Agency, more than mere "suspicion" should exist in order to warrant the framing of the charge. A "grave suspicion" should connect

the accused to the alleged crime.



29. In the case of Vishwa Kumar Sharma (supra), this Court further differentiate between ""taking of cognizance"" and ""framing of charge"" and

observed as under:

Of course, both the acts require the application of judicious mind. However, the former is done without hearing both the parties. Cognizance is

taken without the accused being heard. The latter is done after hearing both the parties. In the former, the Judge examines the evidence to see if an

offence has been committed. In the latter, the Judge examines the commission of the alleged crime by the accused. In the former, mere "suspicion

about the commission of an offence" is enough for taking of the cognizance. In the latter, ""grave suspicion about the commission of the crime by the

accused"" should exist before a charge can be framed. In the former, the Judge is not supposed to sift through the evidence. In the latter, a limited

sifting of the evidence is permissible therefore, when the phrase ""prima facie evidence"" is used, it is used for two different sets of examinations at

two different stages of the criminal process. One has to realize that the trial progresses through different stages. Hence, appreciation of evidence

has to be of different quality. While at the stage of cognizance it is mere "suspicion", at the stage of framing of charge it is "grave suspicion", and at

the end of trial, it is "a critical analysis and a meticulous examination of the entire evidence produced by the Prosecution and the accused".

Therefore, the appreciation of evidence at the stage of framing of charges is at micro level; at the end of the trial it is at macro level. Hence, the

mental level of appreciation changes at every stage of the criminal process: from a cursory appreciation to a critical one.

30. In the case of Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra, the Hon"ble Supreme Court has held thus:

15. It is trite that the words ""not sufficient ground for proceeding against the accused"" appearing in the Section postulate exercise of judicial mind

on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in

assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case

against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither

feasible nor desirable to lay down a rule of, universal application. By and large, however, if two views are equally possible and the Judge is

satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to

discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the

materials on record, if un rebutted, makes a conviction reasonably possible.

31. In the case of State of Madhya Pradesh Vs. Sheetla Sahai and Others, the Hon"ble Supreme Court held as under:

The prosecution, having regard to the right of an accused to have a fair investigation, fair inquiry and fair trial as adumbrated under Article 21 of the

Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself has placed on record. If

upon perusal of the entire materials on record, the Court arrives at an opinion that two views are possible, charges can be framed, but if only one

and one view is possible to be taken, the Court shall not put the accused to harassment by asking him to face a trial.

32. A bare perusal of the charge-sheet submitted by the police clearly reveals that number of witnesses have stated that no such incident took

place as claimed by the complainant. Despite the existence of these statements, the learned trial Judge has not considered them while passing the

impugned order. Therefore, the learned trial Judge has failed to exercise a jurisdiction vested in him.

33. Although Mr. Bajwa has raised contentions with regard to non existence of ingredients of Section 504 IPC, as the case is being remanded

back to the trial Court, it would not be proper for this Court to express its opinion with regard to the said plea. However, the petitioner shall be at

liberty to raise his objections with regard to ingredients of Section 504 IPC and with regard to ingredients of other offences, for which cognizance

has been taken.

34. For the reasons mentioned above, the revision petition is, hereby, allowed. The impugned order dated 8-7-2004 is quashed and set aside. The

case is remanded back to learned trial Judge for re-framing the charge in accordance with law.