

(2014) 03 KL CK 0136
High Court Of Kerala
Case No: Crl. M.C. No. 1123 of 2014

Nirmala Devi

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: March 7, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 200, 202, 202(1), 204
- Penal Code, 1860 (IPC) - Section 376, 406

Citation: (2014) 2 ILR 252 : (2014) 2 KHC 378 : (2014) 2 KLJ 616 : (2014) 2 KLT 254

Hon'ble Judges: N.K. Balakrishnan, J

Bench: Single Bench

Advocate: P. Venugopal and Sri M. Revikrishnan, Advocate for the Appellant; Rajesh Vijayan, Public Prosecutor, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.K. Balakrishnan, J.

This petition is filed by the complainant in a private complaint filed against the respondent/accused alleging offences punishable under Secs. 376 and 406 I.P.C. The complainant was married by one Bhaskaran Nair in the year 1980. In that relationship a son was born to them. Bhaskaran Nair died in 1984. The complainant was working in a foreign country (Oman). While she was working there the accused approached her and expressed his willingness to marry her. Both of them decided to marry after they reached their native place. It is stated that on 22-8-2005 while the complainant was staying at the residence of her elder sister the accused reached there and discussed about the marriage and they agreed to have the marriage solemnized as per the Hindu religious rites at Guruvayoor Temple on the next day itself. On the day of discussion, the accused stayed in the house of the complainant's sister. The complainant was also staying in that house on that day. It is alleged that on that night the accused had sexual intercourse with her repeating

his promise of marriage. On the next day their marriage was conducted at Guruvayoor Temple.

2. It is also her case that thereafter both of them left for Oman and lived there as husband and wife for about 8 years. Her further allegation is that during that period the accused had misappropriated 15 sovereigns of gold ornaments and also committed criminal breach of trust in respect of about 10 lakhs of rupees. According to her, thereafter he came back to her native place in July 2013. Though she tried to contact the accused she could not contact him. Later, she could realise that the accused was a married man having wife and two grown up children. Thus, the complainant contends that the accused has committed the offence punishable under Secs. 376 and 406 IPC stating that her consent was obtained by misconception or by false promise. This in short is the gist of the complainant's case.

3. This complaint, C.M.P. 9000/2013, was filed on 22-11-2013, admittedly after about 8 years of the alleged incident. It is true, usually in such cases the complaint is forwarded to the police for investigation under Sec. 156(3) Cr.P.C. so as to avoid the time of the court being wasted for conducting enquiry. But in the instant case the learned Magistrate has chosen not to forward the complaint to the police under Sec. 156(3) Cr.P.C. but proceeded to conduct enquiry in the matter as provided under Secs. 200 and 202 Cr.P.C. That order is challenged in this petition.

4. It is submitted by Sri Ravikrishnan, the learned counsel for the petitioner that in view of the proviso to Sec. 202 of Cr.P.C. the complainant is bound to produce all witnesses whom she intends to examine before the Sessions Court. It is further stated that medical examination of the complainant and the accused is necessary to prove the allegation made by the complainant and also to prove that the accused is not impotent.

5. According to the complainant it may not be possible for her to produce such medical evidence by herself. It is further contended that since there is a specific allegation that 15 sovereigns of gold ornaments and an amount of Rs. 10 lakhs were misappropriated by the accused unless it is investigated by a competent police officer, the required material for a successful prosecution cannot be collected. Therefore, the learned counsel for the petitioner submits that the procedure adopted by the learned Magistrate in a case of this nature is not justifiable and so the order passed by the learned Magistrate is to be quashed and a proper direction is to be issued to the learned Magistrate directing the Magistrate to forward the complaint for investigation under Sec. 156(3) Cr.P.C. or at any rate, to reconsider the request made by the petitioner.

6. It is important to note that the incident even according to the complainant took place about 8 years back. It is also the admitted fact that the accused had married earlier and two children were born to him. Therefore, the question of getting a

potency certificate may not be of that much relevancy. Similarly, medical examination report of the complainant also is not of much relevance since the alleged incident took place 8 years back. She was admittedly a married woman having a son born in the earlier wedlock. Then what remains is only the evidence she may have to adduce with regard to the alleged promise made by the accused or the misconception of facts which the complainant had and so there is no necessity of conducting investigation by the police, it may be argued. As to whether any gold ornament or amount was taken away by the accused and whether he misappropriated the same are also matters in respect of which the complainant can adduce evidence, if the allegations are true.

7. When a complaint is filed, the learned Magistrate can either forward the same for investigation under Sec. 156(3) Cr.P.C. or follow the procedure prescribed under Chapter XV of Cr.P.C. As could be seen from the complaint, the accused stayed in the house of the complainant on the previous day of the marriage and on that day the accused had sexual intercourse with her. It is also the admitted fact on the next day their marriage had taken place in front of Guruvayoor Temple. Though the marriage was not registered, even according to the complainant, there was a marriage and they lived together as husband and wife for about eight years while they were working in the foreign country (Oman). If the complaint is simply forwarded for investigation under Sec. 156(3) Cr.P.C. the police would be bound to register the F.I.R. incorporating an offence under Sec. 376 IPC in which case the right and liberty of the accused would be in peril. In the normal course, the accused may not be in a position even to get bail unless all these factors are brought before Court. The prejudice and the grievance that may be caused to the accused cannot be lost sight of. The learned Magistrate has applied his mind and decided to find out the truth by examining the complainant and by resorting to the procedure prescribed under Sec. 202 Cr.P.C.

8. An efficient, alert and vigilant Magistrate will certainly go through the complaint to find out whether it is a matter to be forwarded to the police so as to collect materials for a successful prosecution against the accused or whether it is a matter which should be inquired into by the Magistrate himself. When a complaint is filed, usually it may be forwarded to the police under Sec. 156(3) Cr.P.C., sometimes casually or mechanically, without advertent to the facts stated in the complaint and without application of mind. Here the learned Magistrate has applied his mind to find whether it is a matter to be enquired into by himself. The Magistrate should not adopt the easy way of forwarding the complaint under Sec. 156(3) of Cr.P.C. in such cases, unmindful of the consequences of forwarding such complaints and irrespective of the fact whether on the face of it, it requires an enquiry by the Magistrate himself. There lies the solemn duty of the Magistrate. The court has a duty to protect the interest of the respondent/accused also since at the time of conducting inquiry or forwarding of the complaint to the police under Sec. 156(3) Cr.P.C. the accused does not get any right of hearing. Therefore, the Magistrate

should certainly scrutinize the allegations in the complaint and the evidence that may be adduced under Sec. 200 or 202 of Cr.P.C. to prevent a person being unnecessarily summoned to the Court to face such a serious allegation of rape.

9. The learned Magistrate has forwarded a report as to why he has chosen to conduct enquiry u/s 202 Cr.P.C. It seems the learned Magistrate has drawn inspiration from the decisions of the Supreme Court in [Superintendent of Police, C.B.I. Vs. State of Kerala](#), , Aral V. Nair v. State of Kerala 2007 (4) KLT 921 and [Smt. Mona Panwar Vs. The Hon"ble High Court of Judicature at Allahabad and Others](#), .

10. It is vehemently argued by the learned counsel for the petitioner that in order to have a successful prosecution the potency certificate of the accused and the medical examination report of the complainant has to be obtained. It has already been said that the accused, even according to the complainant, is a married man, having two grown up children. The incident in this case took place about 8 years ago. If for any reason the complainant wants herself to be examined by a lady doctor then the learned Magistrate can order her examination to be done by the doctor and a report can be obtained. For that purpose the complaint need not be forwarded to the police under Sec. 156(3) Cr.P.C. Similarly, the question of getting a potency certificate would arise only if the accused raises any plea to the contrary. Not only that if the complainant requires or if the court finds the requirement of such a certificate that also can be obtained at the relevant time, if necessary, by invoking the power u/s 311 of Cr.P.C. For that purpose also, the investigation under Sec. 156(3) of Cr.P.C. is not required.

11. It was held by this Court in [V.K. Sreenivasan Vs. D.G. Nair and Others](#), :

There is no provision of law which compels a Magistrate to refer the matter to the police. When a person files a complaint, the discretion is that of the Magistrate. He may either take cognizance or refer the matter to the police. The complainant has no legal right or privilege to insist that the Magistrate shall not take cognizance and without taking cognizance, refer the matter to the police. In [Emperor Vs. Morarji Jivraj](#), , it was held as follows:

Secondly, the complainant has certainly no "rights and privileges" under this section to require the Court to refer the case to the police.....

The option whether to refer the complaint to the police for investigation under S. 156(3) before cognizance or under S. 202(1) after cognizance is to be exercised by the Magistrate.

The learned Magistrate has two options: He may either apply his mind for the purpose of proceeding under Sec. 200 and the succeeding Sections in Chapter XV of Cr.P.C. or may instead of proceeding under Chapter XV, order investigation under Sec. 156(3) Cr.P.C. Same is the view taken by this Court in [Aloshia Joseph Vs. Rev. Dr. Joseph Kollamparambil and Another](#), .

12. It was also held by the Hon"ble Supreme Court in [Smt. Mona Panwar Vs. The Hon"ble High Court of Judicature at Allahabad and Others, .](#)

Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of the complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

Normally, a Magistrate may not proceed to examine the complainant under Secs. 200 and 202 of Cr.P.C. since it would consume valuable time and so lest such valuable time should be wasted in enquiring into the matter it would be forwarded to the police for investigation. If on a reading of a complaint, the Magistrate finds that the allegations therein disclose cognizable offence and forwarding of the complaint to the police for investigation under Sec. 156(3) Cr.P.C. will not be conducive to justice, he will be justified in adopting the course prescribed under Sec. 200 and the succeeding provisions of Cr.P.C. That is a discretion to be judicially exercised by the Magistrate in consonance with the scheme of the Code. If the Magistrate has exercised that discretion judicially and judiciously it cannot be simply interfered by this Court.

13. Enquiry under Sec. 202 of Cr.P.C. is not an empty formality. The duty of the Magistrate is to scrutinize the materials made available by the complainant during the enquiry under Sec. 202 Cr.P.C. to find whether it is a matter where process is to be issued under Sec. 204 Cr.P.C. There is no illegality, irregularity or incorrectness in the procedure followed by the learned Magistrate in ordering inquiry under Sec. 202 of Cr.P.C. It is actually a case where the learned Magistrate was cautious and zealous of the consequence of forwarding the complaint under Sec. 156(3) Cr.P.C. The learned Magistrate has exercised his judicial discretion judiciously. It warrants no interference.

Hence, this CrI.M.C. is dismissed.