

(2014) 11 MAD CK 0427**Madras High Court (Madurai Bench)****Case No:** CrI.O.P. (MD)No. 21514 of 2013, M.P. (MD)Nos. 1, 2 of 2013 and 1 of 2014

Y. John Nicholson

APPELLANT

Vs

O. Homerlal

RESPONDENT

Date of Decision: Nov. 20, 2014**Acts Referred:**

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 202, 204(4)
- Penal Code, 1860 (IPC) - Section 294(b), 341, 506(i)

Hon'ble Judges: S. Vimala, J**Bench:** Single Bench

Judgement

@JUDGMENTTAG-ORDER

S. Vimala, J.

Liberty, the natural and inalienable right of every human being is the most precious one, which is universally recognised. Liberty may be that of the complainant or the accused, but it is for the Criminal Court to ensure that the liberty is not put into jeopardy.

2. The Court must ensure that the criminal prosecution is not used as an instrument of harassment or for wrecking private vengeance, or with an ulterior motive to cause threat.

3. Time and again, it has been held that it is the duty and obligation of the Criminal Court to exercise a great deal of caution in issuing the process.

4. Whether the Court below has exercised that caution in issuing process to the accused, is the issue raised in this petition.

5. The nature and content of the complaint with brief facts:

5.1 The petitioner herein has been called upon to answer the offences under Sections 294(b), 506(i) and 341 IPC, based upon the private complaint filed by the respondent herein. The complaint has been preferred against 5 persons out of whom the petitioner herein is shown as the second accused and the fifth accused is stated to be an identifiable unknown person.

5.2 The case of the respondent herein is that on 06.07.2009, while he was returning from his family graveyard after burying the dead body of his father at Sirayankuzhi, Kanchiracode, Kanyakumari District, he was intercepted by accused 3 to 5 and he was abused in filthy language. It is alleged that the accused 3 to 5 caught hold of him and the first accused attacked him on his head with an iron rod stating that he should be eliminated as told by the second accused. When the neighbouring people gathered there, the accused persons left the scene of occurrence saying that the complainant would not be spared as instructed by the second accused.

5.3 The complainant lodged a complaint on 06.07.2009 with the Inspector of Police, and as no action was taken, he preferred the private complaint, which has been taken on file in Cr.MP No. 6450 of 2010.

5.4 The complainant has been examined as P.W.1 and one Lazer and Bennett has been examined as P.Ws.2 and 3. No documentary evidence has been adduced. The Judicial Magistrate has chosen to take the case on file and has ordered issuance of summons as contemplated under Section 204(4) Cr.PC.

6. Whether the Judicial Magistrate is justified in issuing process to the accused is the issue raised. In other words, whether there are materials which would warrant issuance of summons to the accused, is the issue to be considered.

7. Before going into the merits of the matter, it is necessary to consider the nature of duty and responsibility imposed upon the Magistrate while deciding to issue process to the accused. The decision reported in [Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others](#), is directly on the point which is relied upon by the learned counsel for the petitioner.

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the

truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

8. As per this decision, the Magistrate is expected to examine the nature of the allegations made in the complaint and the evidence, both oral and documentary in support thereof and to find out whether the materials are sufficient to form an opinion as to whether process should be issued or not. The scope of enquiry under Section 202 Cr.PC is for the purpose of finding out whether a prima facie case for issue of process has been made out on the materials placed by the complainant.

9. In order to find out whether the Magistrate has applied his mind while deciding to issue process, it is necessary to look into the order passed by the Magistrate. The order simply is an extraction of the evidence of the complainant and the two witnesses and a direction issuing summons with the only finding that the complaint and statement of witnesses prima facie make out an offence under Sections 341, 294(b) and 506(i) IPC. But there is no basis for the finding, as the omission in the order indicates. The learned Magistrate has omitted to note the following factors:

(a) In the complaint, the name of the fifth accused is left blank, but described as person unknown but identifiable. There is no effort on the part of the Court to send the complaint to the police for investigation to find out who was that fifth accused.

(b) It is not ascertained as to whether there was an earlier complaint to the police and whether that complaint was registered or not / investigated or not.

(c) The Court has not taken any steps to find out the result of investigation if any, to have been made by the concerned Jurisdictional Police.

(d) In the statement of witness Bennett it is simply stated that under the leadership of Edward Semraj, i.e., the first accused, four persons came with crowbar (kadapparai) and attempted to inflict injury to the de facto complainant, but the complainant escaped. It is not even the case of the complainant that the second accused, the petitioner herein was physically present in the scene of occurrence. The witness Bennett did not even spell out the names of the accused persons, excepting the name of the first accused.

(e) The details of the incident, as spoken to by the witness is totally different from the version of the complainant himself. The case of the complainant is that he was beaten with iron rod, but the case of the witness is that there was attempt, using crowbar (kadapparai),

(e.1) probably with a view to escape from the necessity of answering the question as to why no medical records are produced, the witness might have stated that there was only an attempt to beat. But, the Magistrate did not think it proper to raise that question.

(f) The Magistrate did not take note of the fact that the evidence adduced by witness Lazer is not admissible in evidence as he is a hearsay witness. In his evidence also, he did not speak about the name of the persons involved in the occurrence.

(g) It is not known how this kind of evidence was considered sufficient to issue process against the petitioner herein.

(h) The only statement made by the complainant with regard to this petitioner was that the accused persons while attacking, said that they are doing so according to the instructions from the second accused. Even for this version, there is no consistency. If this kind of complaints are taken on file, then it is possible to implicate anybody and to imprison their liberty.

(i) The complaint is silent about origin of occurrence and no reason has been stated as to why the accused person should do so, as alleged.

10. The petitioner herein is stated to be DIG of Police. It is claimed that too many cases are pending against the respondent herein.

10.1 When a person wield statutory authority, two things are possible, i.e., either the authority vested in the person may be misused or for having exercised the authority, some body may try to wreck vengeance. Therefore, when a complaint is laid against a public servant, the Court should be vigilant and exercise caution in finding out prima facie whether the complaint is bona fide or mala fide. Unless such care is taken, neither abuse of authority by the official concerned, nor abuse against the official concerned, can be put under check.

11. The materials placed before the Court does not justify the Magistrate to take the case on file and the materials placed do not make out any of the offences alleged against the petitioner herein. Under Article 21 of the Constitution of India, nobody can be deprived of life or liberty except according to procedure established by law. If Article 21 of the Constitution of India is telescoped towards the order passed under Section 204(4) Cr.P.C., then the inevitable conclusion is that the order has to be quashed. Therefore, it is a fit case to quash the proceedings and it is accordingly quashed.

12. In the result, the Criminal Original Petition is allowed. Consequently, the connected miscellaneous petitions are closed.