Uttam Vs Omprakash and Others

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Feb. 20, 2015

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 244, 244(1), 245(1), 246, 482
Penal Code, 1860 (IPC) - Section 177, 181, 419, 420, 465

Citation: (2015) ALLMR(Cri) 2390 : (2015) 4 BomCR(Cri) 226 : (2015) 3 Crimes 458

Hon'ble Judges: S.B. Shukre, J.

Bench: Single Bench

Advocate: S.B. Wahane, for the Appellant; P.S. Wathore, Advocates for the Respondent

Final Decision: Allowed

Judgement

S.B. Shukre, J.
Heard. Admit. Heard finally by consent.

2. By this application, the applicant has challenged the order refusing his discharge under Section 245(1) of Code of Criminal procedure from

Criminal Case No. 36 of 1988.

3. Respondent no. 1 filed a criminal complaint against the applicant alleging that being a public servant, during his tenure as Sub Divisional officer,

Malkapur, from the year 1985 to 1988, the applicant gave false information to the Government by issuing false documents in respect of one Kisan

Sampat Gavhane relating the Family Planning operation being conducted during that period of time and claimed for himself reward of Rs. 20/-from

the Government. Under this scheme, Government had announced financial rewards not only to the adult males who would undergo vasectomy

surgeries but also to the officers who would encourage such adult males to undergo vasectomy operations. It has been alleged by respondent no. 1

that on 22.2.1987 the applicant submitted a Form containing false information that Kisan Sampat Gavhane, resident of Ward No. 15, Malkapur,

had undergone vasectomy operation and that he was encouraged to undergo the operation by him and thus claimed a reward of Rs. 20/- for

himself. It has, therefore, been prayed in this complaint that action against the present applicant for commission of offences punishable under

Sections 420, 465, 177 and 181 of Indian Penal Code be taken.

4. After verification of the statements of the complainant and other witnesses, process for the offences punishable under Sections 420, 465, 177

and 181 of Indian Penal Code was issued. Thereafter, evidence before charge was recorded, as contemplated under Section 244 of Code of

Criminal Procedure. Some of the witnesses, who were examined at this stage, were not cross-examined by the applicant Learned counsel for the

applicant stated that the applicant reserved his right to cross-examine these witnesses after charge. On the basis of such evidence, as required

under Section 245(1) of Code of Criminal procedure, the learned Magistrate considered the necessity of discharging the applicant and proceeding

further in the matter so as to frame a charge as required under Section 246 of Code of Criminal Procedure. The learned Magistrate found that

prima facie offences under Sections 177, 419, and 465 of Indian Penal Code were made out and, therefore, by his order dated 11.4.2011

directed that charge be framed for the said offences against the applicant.

5. The applicant challenged the order dated 11.4.2011 by filing a criminal revision, being Criminal Revision No. 44/11. By the order dated

5.4.2012, the order of learned Magistrate dated 11.4.2011 was confirmed and the revision was dismissed by the learned Additional Sessions

Judge, Malkapur. Being aggrieved by the said order, the applicant is before this Court in this application under Section 482 of Code of Criminal

procedure.

6. According to learned counsel for the applicant, even if the evidence before charge is accepted as it is, still, no case can be seen to be made out

warranting conviction of the applicant for any of the offences stated above. Therefore, he submits that both the orders passed by the Courts below

are against the well settled principles of law and deserve to be interfered with.

7. Learned counsel for respondent no. 1 submits that perusal of the evidence before charge would be sufficient to conclude that prima facie case

for the offences under Sections 177, 419 and 465 IPC has been made out and, therefore, no interference with the impugned orders is necessary.

He submits that the applicant has not cross-examined P.W.1 Omprakash and P.W.2 Prabhat and that would mean that whatever has been stated

by both these witnesses in their examination-in-chief, at this stage, would have to be accepted as it is for the purpose of framing of charge against

the applicant. He points out from the evidence of these witnesses that both the witnesses have consistently stated that Kisan Sampat Gavhane

never resided in Ward No. 15. He, therefore, submits that the certification made by the applicant in the concerned Form that Kisan Sampat

Gavhane was residing in Ward No. 15 is false and is sufficient to attract the provisions of Sections 177 and 465 of Indian Penal Code. He further

submits that this evidence would also be sufficient to conclude, at this stage, that no such person as one Kisan Sampat Gavhane ever existed and

therefore even offence under Section 419 of Indian penal Code is prima facie made out.

8. Learned APP has adopted the arguments of learned counsel for respondent no. 1.

9. Before dealing with the rival arguments, it must be understood as to what procedure the learned Magistrate would have been required to follow

in this case. This was a complaint case instituted otherwise than upon a police report and so would attract warrant trial procedure. Therefore, after

issuance of process and appearance of the accused before the Court, the learned Magistrate would have been obliged to proceed in the case by

recording evidence as required under Section 244 of Code of Criminal Procedure, which evidence admittedly has been recorded in this case. At

this stage of the case, it was open to the applicant/accused to cross-examine the witnesses. But, it appears that out of three witnesses, cross-

examination of two witnesses has not been taken by the applicant and he has reserved his right to cross-examine these witnesses after charge.

After recording of evidence under Section 244(1) is over, the next stage that arises is of Section 245(1), which requires a Magistrate to consider

as to whether or not any case against the accused has been made out, which if unrebutted, would warrant his conviction. If the Magistrate comes

to the conclusion that no case against the accused has been made out which if unrebutted would not warrant his conviction, the Magistrate, for the

reasons to be recorded, has to mandatorily discharge the accused. However, if unrebutted evidence, in the opinion of the Magistrate, is sufficient

to warrant conviction of the accused, the Magistrate has no other alternative than to frame a charge against the accused, as contemplated under

Section 246 of Code of Criminal Procedure. This procedure has been explained in details by the Hon''ble Apex Court in the case of Ajoy Kumar

Ghose Vs. State of Jharkhand and Another, , on which extensive reliance has been placed by learned counsel for the applicant.

10. In view of the mandate of Section 245(1) and also what has been held by the Hon''ble Apex Court in the case of Ajoy Kumar, supra, now it

has to be examined if unrebutted evidence of respondent no. 1 in this case would warrant his conviction or not. It will also have to be borne in

mind while doing so that probative value of the material on record cannot be gone into at the stage of framing of charge, as held in the cases of (i)

Mohd. Akbar Dar and Others Vs. State of Jammu and Kashmir and Others, and (ii) Krishnanath Gopal Matodkar v. State reported in 2009(3)

Mh.L.J. 821.

11. Learned counsel for respondent no. 1 has placed reliance on the case of Onkar Nath Mishra and Others Vs. State (NCT of Delhi) and

Another, wherein the Hon''ble Apex Court has held that the Court has to form a presumptive opinion as to existence of factual ingredients

constituting the offence alleged and even strong suspicion founded on material leading to form a presumptive opinion as to the existence of the

factual ingredients constituting the offence alleged against the applicant is sufficient for framing of the charge. This principle of law would also have

to be borne in mind while dealing with the legality or correctness of the orders impugned herein and in particular would make it clear that when it is

read in the context of Section 245(1) Cr.P.C., it would necessitate existence of some material which, if unrebutted, would lead to a strong

suspicion that there is a possibility of conviction of the accused so as to frame the charge against the accused.

12. The evidence before charge led by respondent no. 1 comprises three witnesses, namely P.W.1 Omprakash, P.W.2 Pratapsingh and P.W.3

Dara Singh, and also the disputed Form submitted by the applicant. If we consider this evidence as it is, still, we would find that the evidence is not

sufficient even to lead to a suspicion that there is a possibility of securing conviction of the appellant for the offences alleged against him.

13. The entire case of respondent no. 1 revolves around the fact that Kisan Gavhane is a fictitious name and such person by name Kisan Gavhane

never existed. However, evidence adduced by respondent no. 1 would show that none of the witnesses of respondent no. 1 including he himself

has stated that the person Kisan Gavhane never existed. The evidence only shows that according to them said Kisan never resided in Ward No.

15, and that his address as resident of Ward No. 15, Malkapur, certified to be correct by the applicant in the disputed Form amounted to false

certification and, therefore, would amount to commission of offences punishable under Section 177 (offence of knowingly giving false information

by a person bound to furnish correct information), Section 465 (forgery by submitting a false document) and Section 419 (cheating by

impersonation). If none of the witnesses in the evidence before charge does not assert that person by name Kisan Sampat Gavhane never existed,

I do not think that the only statement that this person was never residing in Ward No. 15 would give rise to a suspicion of his non-existence and,

therefore, would reasonably create a possibility of conviction of the applicant for the offences alleged against him.

14. Learned counsel for respondent no. 1 has strongly submitted that offences relating to knowingly giving of false information and dishonestly

submitting false documents punishable under Sections 177, 465 and 419 have been, prima facie, not made out in this case. For showing prima

facie existence of factual ingredients constituting these offences, it is necessary for the one who alleges commission of these offence to show that

false information was given, that it was known to be false to the person who gave the information or the person who gave the information had

reason to believe that it was false, that the person giving information was bound under the law to give the information and that some wrongful gain

or wrongful loss was occasioned thereby. So far as the aspect of the person being bound under law to give information is concerned, there cannot

be any dispute about the fact that the applicant, being Sub Divisional Officer of Malkapur, and being certifying authority, was bound under law to

give correct information. But, as regards the other ingredients relating to applicant having knowledge of the information to be false or having reason

to believe the information that he was certifying to be correct was false and causing of wrongful gain or loss, I must say, the evidence before charge

adduced by respondent no. 1 is very much wanting. Nowhere respondent no. 1 or any of his his two other witnesses has stated that the applicant

knew that the information that he was certifying to be correct was false or that he had reason to believe that the said information was false. Some

assertion on their part in this regard was necessary. But, it has not appeared on record. Some circumstances in order to enable the Court to make

an inference about possessing of knowledge by the applicant about the information to be false, at least, ought to have been brought on record by

the witnesses of respondent no. 1. Those circumstances have also not been brought on record. Then, the question would arise, as to on what basis

could it be said that the other essential factual ingredients of the offences under Sections 177, 419 and 465 of Indian Penal Code have been prima

facie made out. However, no basis for making the said inference could be seen by me in the evidence adduced by respondent no. 1 nor learned

counsel for respondent no. 1 could satisfy me from the evidence of respondent no. 1 about existence of such basis. The witnesses of respondent

no. 1 could have stated before the trial Court that the fact of non-existence or non-residence of Kisan Sampat Gavhane in Ward No. 15 was

brought to the notice of the applicant either before issuance of the disputed certificate, or immediately thereafter, or within a reasonable time after

issuance of the disputed certificate by the applicant and yet the applicant did not make necessary corrections. Had there been available on record

any such evidence, it could perhaps have been said that the appellant acted, prima facie, with fraudulent intentions.

15. It is interesting to note here that the applicant has certified about the correctness of address and also undergoing of Kisan Sampat Gavhane

operation of vasectomy on the basis of affidavit submitted to him by Kisan. When a person submits an affidavit, as seen from the language of the

disputed Form, the authority which certifies the contents of the affidavit to be correct, would normally rely upon the statements made on oath by

the deponent himself and this is what appears to have happened in this case. The disputed certificate appears below the so-called affidavit of the

deponent by name Kisan and it only states that the information contained (in the above affidavit), to the knowledge of the applicant, is correct. The

knowledge of the applicant in such a case would be based upon the record before him and the record would be in the nature of affidavit of the

concerned person. Therefore, as stated earlier, it was necessary for respondent no. 1 to have produced in evidence some circumstances disclosing

that in spite of bringing to the knowledge of the applicant the fact of non-existence or non-residence of Kisan, the applicant did not make any

amends and claimed amount of Rs. 20/-. Had such circumstances been brought in the evidence of respondent no. 1 then only it could have been

possible that the unrebutted evidence of respondent no. 1 was prima facie sufficient to warrant conviction of the applicant. Such not being the case,

I am of the view that the impugned orders are against the well settled principles of law and need to be quashed and set aside. I also find that any

continuation of proceedings against the applicant in this case would only result in abuse of process of law.

16. In the result, I find that the application deserves to be allowed and is allowed accordingly. Impugned orders are hereby quashed and set aside.

The proceedings of criminal complaint being Criminal Case No. 36 of 1988 are hereby quashed and set aside.

17. At this stage, learned counsel for respondent no. 1 has prayed for stay of this order in order to challenge the same before the Hon''ble Apex

Court. This prayer is strongly opposed by learned counsel for the applicant. Considering the nature of the dispute between the parties, I am of the

view that some time can be given to respondent no. 1 for resorting to appropriate remedy in accordance with law. Therefore, it is directed that this

order shall not take effect for a period of four weeks from the date of this order.