(1963) 07 BOM CK 0012

Bombay High Court

Case No: Criminal R. Application No. 22 of 1963

Hiralal Gulabchand Shah		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: July 5, 1963

Acts Referred:

- Penal Code, 1860 (IPC) - Section 114, 166, 220, 384, 385

Citation: (1964) MhLj 35

Hon'ble Judges: S.M. Shah, J

Bench: Single Bench

Advocate: I.C. Dalal, for the Appellant; Mahtndra Gill, for accused Nos. 1 and 2 C.R. Dalvi, for accused Nos. 3 and 4 and C.C. Vaidya, Asst. Govt. Pleader for State, for the Respondent

Final Decision: Allowed

Judgement

S.M. Shah, J.
This application is filed by the complainant against the order of the learned Presidency Magistrate, 24th Court, Borivli, dismissing his complaint against the opponents u/s 203 of the Criminal Procedure Code.

2. The complainant had filed a complaint against the opponents charging them with offences under Sections 384, 385, 387, 220, 467 and 166 read with Section 114 of the Indian Penal Code. In this complaint it was alleged that opponents Nos. 1 and 2 (who will hereafter be referred to as accused Nos. 1 and 2) were brothers daing Kariana business at Carter Road, Borivli, in the name and style of Shashikant Suryakant Parekh and that the complainant himself did similar business and had business dealings with the shop of accused Nos. 1 and 2 through their Mehta by name Nemichand. The complainant alleged that Nemichand used to bring the goods bought by him from the shop of accused Nos. 1 and 2 with the bills prepared by those two accused and take his signature on the counterfoils in token of having received the goods. He further alleged that in all seven bills of different dates were

sent to him by accused Nos. 1 and 2 and that they were all paid off through Nemichand. The complainant further alleged that on April 20, 1902, accused Nos. 1 and 2 sent a Bhayya to him at about 10.00 p. m. with a message that he was required urgently at their place and that in response to that message he went to the shop of accused Nos. 1 and 2. When he reached the shop, besides accused Nos. 1 and 2, accused No. 4, who was then the Sub-Inspector at Borivli Police Station and another man named Virji were also present in the shop. The complainant asked accused No. 4 as to why he was sent for. Accused No. 4 stated that Nemichand had misappropriated the moneys of accused Nos. 1 and 2, that a sum of Rs. 30,000 was due from him (the complainant) to accused Nos. 1 and 2 and that he should pay that amount on pain of being put in the lock-up. The complainant told accused No. 4 that he had nothing to pay to accused Nos. 1 and 2 since he had paid for all the goods received by him from them and that all the bills in respect of those goods were signed by Nemichand in token of his having received the amounts thereof. Thereafter accused No. 4 took the complainant to the police station and from there he was taken to his own shop at about 2-30 a. m. for verifying the bills.

3. According to the complainant, all the bills except the last one which could not be traced at that time were seized by accused No. 4 and taken to the police station along with the complainant. The complainant further alleged that at about 5-30 a. m. on April 21, 1982, accused No. 3 who was the senior grade Sub-Inspector at Borivli Police Station came to the office and had a talk with accused No, 4 in English and that accused No. 3 thereafter threatened him to pay Rs. 30,000 to accused Nos. 1 and 2 or else be prepared to be put in jail. According to the complainant, accused Nos. 3 and 4 then left the Police Station saying that accused Nos. 1 and 2 should talk with the complainant. The complainant alleged in his complaint that accused Nos. 1 and 2 thereafter told him to pay at least half the amount i. e. Rs. 15,000 and further told him that if that amount was paid they would see that he was allowed to go from the Police Station. Finding himself in a difficult situation, the complainant, it was alleged in the complaint, agreed to procure a sum of Rs. 5,000 in cash and execute hundis in respect of the balance of Rs. 10,000. The complainant then stated that accused No 4 accompanied by accused Nos. 1 and 2 went to the house of the complainant and there the complainant arranged to collect Rs. 5,000 and on the collection being made, that amount was paid over to accused Nos. 1 and 2 at the police station in the presence of accused Nos. 3 and 4 at about 7-30 a. m. Three hundis, two of Rs. 2,500 each and one of Rs. 5,000 were thereafter executed and separately dated by the complainant. On these allegations, the complainant alleged that all the four accused obtained the money and valuable securities like hundis from him. The complainant further stated in his complaint that he asked accused Nos. 1 and 2 to pass a writing in respect of the amount paid and the hundis passed by him and such writing was given by them.

4. The complainant further alleged that in spite of this payment and execution of the hundis accused Nos. 3 and 4 did not allow him to leave the police station and go

home and demanded Rs. 2,000 by way of bribe. The complainant told them that he had no more money to pay since he had already paid a sum of Rs. 5,000 to accused Nos. 1 and 2. According to the complainant, the two police officers, accused Nos. 3 and 4, thereupon threatened him and went away. At about 5-30 p. m. accused Nos. 1 and 2 came back to the police station along with accused Nos. 3 and 4 and the former told the complainant that they would pay Rs. 1,500 to accused Nos. 3 and 4 out of the sum of Rs. 5,000 received by them if the complainant agreed to execute hundis for that amount in their favour. The complainant stated that there was" no alternative left to him in the situation in which he found himself and, therefore, he agreed to that proposal whereupon accused Nos, 1 and 2 paid Rs. 1,500 to accused Nos. 3 and 4 and two hundis, one for Rs. 500 and the other for Rs. 1,000 were executed by him in the name of Bhimji Jivraj. According to the complainant, he asked for a receipt for this sum of Rs. 1,500, but accused Nos. 1 and 2 refused to pass any such receipt. It was only after all these things were done that he was released from the police custody and he went home. He, however, fell ill but soon after his recovery from that illness, on making enquiries he learnt that no complaint was at all filed by accused Nos. 1 and 2 with regard to any misappropriation of their money and that all the accused had joined hands with a view to extorting money and getting valuable securities from him. On these allegations, he filed a complaint against all the four accused charging them with offences as stated hereinabove, in the Court of the Presidency Magistrate at Borivli on April 26, 1962. Along with this complaint an application was also filed by the complainant praying that a search warrant be issued as against accused Nos. 1 and 2 for seizure of certain documents, papers and account books from their shop.

5. The learned Magistrate did not pass any order either on the complaint or on the application on the day they were presented to him, but on the next day he issued notice to the accused to show cause as to why process should not be issued against them in respect of the charges made against them in the complaint. The hearing of this notice was taken up on September 27, 1962, when the learned Magistrate thought fit to examine the complainant on oath in exercise of his power u/s 202 of the Criminal Procedure Code, but curiously enough, after examining him on oath on the subject-matter of his complaint, he allowed the advocate for accused Nos. 1 and 2 as well as the advocate for accused Nos. 3 and 4 to cross-examine the complainant and the cross-examination covered as many as four typed pages. The learned Magistrate thereafter did not think fit to examine any other witnesses. The further hearing of the notice was thereafter adjourned to October 19, 1962. On that day the learned Magistrate heard the arguments advanced by the respective advocates of the parties but since the arguments could not be over on that day, they were further heard on October 24, 1962. After considering the evidence and the documents produced in course of the enquiry both by the complainant and the accused, the learned Magistrate thought that the complainant had failed to make out a prima facie case against the accused and that there was no truth in the complaint filed by

him. The learned Magistrate accordingly dismissed the complaint u/s 203 of the Criminal Procedure Code. It is against this order of the learned Magistrate that the complainant has filed the present revision application in this Court.

6. In support of this application, it was strenuously urged by Mr. Dalai, the learned advocate for the complainant, that although the procedure followed by the Magistrates in Greater Bombay of issuing notices to persons charged with any offence before issuing process under the provisions of the Code of Criminal Procedure was not illegal as held by our High Court in In Re: Virbhan Bhagaji, , the learned Magistrate could not possibly allow the accused a right to cross-examine the complainant as was done in the present case. According to him, the scope of enquiry by a Magistrate to whom a complaint is presented with a view to ascertaining the truth or falsity of such complaint is limited to examining the complainant and such of his witnesses as he thinks fit, hearing the explanation of the accused as regards the charges made against him, allowing him to tender such documents as he pleases in support of his explanation, considering the evidence of the complainant and his witnesses and the explanation of the accused and the documents produced by him, and then deciding whether or not he would issue process and further proceed with the hearing of the complaint. At one stage Mr. Dalai contended that the practice prevailing in the Magistrates'' Courts in Greater Bombay of issuing notices to accused persons was condemned by this Court. He was, however, not able to cite a single decision which condemned that practice. On the contrary, what we find is that this Court in the decision referred to above, did not hold that practice to be illegal so as to vitiate the proceedings before the Magistrate.'' In the light of this decision, therefore, it must be held that there is nothing wrong in the Presidency Magistrates in Greater Bombay issuing notices to accused persons to show cause why process should not be issued against them in respect of the complaints presented to them, though this practice is not strictly authorised by the provisions of Section 202 of the Criminal Procedure Code.

7. The next question, however, is as to what powers a Magistrate can exercise u/s 202 of the Code of Criminal Procedure even after issuing a notice to the accused to show cause why process should not be issued against him. Does the section authorise the Magistrate to allow the accused to test the veracity of the evidence given by the complainant and such of his witnesses as the Magistrate thinks fit to examine, by permitting him to cross-examine them? Does the section entitle the complainant even contrary to the wishes of the Magistrate to insist upon examining his witnesses whilst the Magistrate is making an inquiry u/s 202 -- Can the accused insist upon a right to cross-examine the complainant and his witnesses whom the Magistrate has examined in course of such inquiry as a matter of right?

8. The relevant provisions of Section 202 of the Code of Criminal Procedure are as follows:

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him u/s 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:.....

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

9. It was contended by the learned advocate for accused Nos. 1 and 2 that under the provisions of this section a Magistrate could, for the purpose of satisfying himself as to the truth or falsity of the complaint presented to him, "do anything under the sun", that is to say, he had a right to allow the accused to test the veracity of the evidence of the complainant and the witnesses examined by the Magistrate in course of the inquiry and also pronounce judgment not only that the complaint was false or true but also that the accused was guilty or innocent. I am afraid, this is far too sweeping a statement made by the learned advocate, which is not at all borne out by any of the terms of Section 202. It must be stated that a Magistrate is a '' creation of the statute and his powers in dealing with cases coming up before him for disposal are defined by the several sections of the Criminal Procedure Code. If, under a particular section, a Magistrate is holding an inquiry before deciding as to whether he should or should not issue a process to the accused, the scope of such inquiry must be held to be circumscribed by the provisions of the section itself. It may be that the provisions of such section may be capable of being liberally construed in the interest of justice, but that does not mean that, by putting such liberal construction, what is intended merely to be an inquiry before process is issued, should be converted into a full-fledged trial. It must further be noted that in an inquiry u/s 202 the initiative is with the Magistrate alone to examine or not to examine the complainant or any of his witnesses. He has got the discretion to be satisfied merely on the statements made in the complaint and issue process forthwith. He has also the discretion to refer the complaint to the Police for inquiry, if he so thinks fit, or to make an inquiry himself as to the falsity or otherwise of the complaint presented to him by examining the complainant and such of his witnesses as he thinks fit.

10. Strictly speaking, Section 202 of the Code of Criminal Procedure does not contemplate the presence of the accused at such inquiry at all. Since, however, a practice has grown up in this city and is continued for several decades of issuing notice to the accused to show cause why process should not be issued against him, Section 202 may be construed liberally in the sense that, apart from the examination of the complainant and such of his witnesses as he may think fit to examine, the

Magistrate may allow the accused to tender an explanation as to the charges made against him and to produce such documents as he might please in support of his explanation, and it would be for the Magistrate then to decide the question of the issue of process one way or the other. The section does not permit the complainant to insist upon the examination of his witnesses as a matter of right for does it entitle the accused to cross-examine the complainant or his witnesses who may have been examined by the Magistrate in course of the inquiry as a matter of right. These rights of the complainant and the accused respectively only arise after the commencement of the trial under the provisions of the Criminal Procedure Code. In other word,s it is only when the Magistrate chooses to issue process to the accused and holds the trial that the complainant can insist upon examining any number of witnesses he chooses as a matter of right and the Magistrate will then have no jurisdiction to debar him from so doing, and the accused on his part will have a right to cross-examine each of the complainant''s witnesses and the complainant himself and the Magistrate would have no power to debar him from exercising that right. In my opinion, therefore, a Magistrate holding an inquiry u/s 202 of the Code of Criminal Procedure cannot possibly allow either the accused or his advocate to cross-examine the complainant or any of his witnesses who may have been examined by him in his discretion for the purpose of ascertaining the truth or otherwise of the complaint. It, may be open to the Magistrate to take the assistance of the accused or his, advocate in himself putting the questions to the complainant and his witnesses, who may be examined by him. But that would certainly be quite a different, thing from the cross-examination by the accused or his advocate which would cover a much larger field than the one available to the Magistrate whose inquiry would be limited only to ascertaining the truth or falsity of the complaint and does not extend to determination of the guilt of the accused'' person. Since in the present case, the learned Magistrate failed to confine, himself to, the limits of his power as defined by Section 202 of the Code of Criminal Procedure and allowed the advocate of the accused to cross-examine the complainant, which he was, not entitled to do at the stage of inquiry, his order dismissing the complaint must necessarily be set aside.

11. The view that I am taking of the provisions of Section 202 of the Code of Criminal Procedure finds support in a recent decision of the Calcutta High Court in Anil Kumar Saha Vs. Pranada Chakrabarty and Others, . Mr. Justice K. C. Das Gupta (as he then was) examined the scheme of the provisions of the Code of Criminal Procedure with regard to the inquiry held by a Magistrate before issuing process to, the accused and observed that the utmost that a Magistrate could do in course of such inquiry would be to take the assistance from the accused or his advocate in putting some questions to the complainant or his witnesses whom he may choose to examine for the purpose of finding out the truth or falsity of the complaint. The learned Judge, however, does nowhere observe in the judgment that instead of the Magistrate taking assistance from the advocate of the accused in this manner, it

would be permissible to him to allow the accused''s advocate to cross-examine the complainant and his witnesses. Mr. Vaidya, the learned Assistant Government Pleader, contended than for all practical purposes it would not make the slightest difference if the Magistrate put questions to the complainant and his witnesses at the suggestion of the advocate of the accused or the advocate of the accused himself directly put those questions to them. Though the contention may prima facie appear to be plausible, it appears to me that there is a good deal of substantial difference in the two modes. Where the Magistrate puts questions on the suggestion of the advocate of the accused, he has the power to reject the suggested questions if they go beyond the charge made in the complaint, but when the advocate is allowed to cross-examine the complainant and his witnesses such cross-examination would include questions affecting their character and credibility and many other matters which would not strictly be relevant at the stage of inquiry into the falsity or otherwise of the complaint. In my opinion, the true intention of the section is that it is the Magistrate who is the master of the situation until he decides the question as to whether he should issue the process or not, and he cannot allow himself to be a tool either of the advocate for the accused or the complainant so as to be guided in his discretion and judgment by what answers the complainant and his witnesses might give during their cross-examination by the accused''s advocate.

12. I wonder whether this is not the first case in Greater Bombay in which in a notice for inquiry u/s 202 of the Code of Criminal Procedure the complainant has been allowed to be cross examined by the advocate of the accused. Within my limited experience as a Judge of this Court, I have not come across such a case at all. At any rate, the practice of allowing the accused or his advocate the privilege of cross-examining the complainant or his witnesses is directly in contravention of the provisions of Section 202 and must, therefore, be forthwith put an end to. Magistrates in their zeal to dispose of cases expeditiously have no justification in disregarding the peremptory provisions of the statute. Their effort in that behalf will be better appreciated if they do it in strict conformity with the relevant provisions of the law.

13. It was then urged by Mr. Vaidya, the learned Assistant Government Pleader, that the procedure adopted by the learned Magistrate might only amount to an irregularity and since no prejudice was caused to the complainant the order need not be set aside in view of the provisions of Section 537 of the Criminal Procedure Code. It is difficult to accept this contention. Section 537 is not an omnibus section which can cure any sort of defect in the proceedings of a criminal case. It cannot possibly cure the exercise of powers not vested in the Magistrate while disposing of cases. It cannot cure doing something which is repugnant to the aim and object of a particular provision of law. These kinds of defects cannot possibly be cured by the provisions of Section 537. In the present case, it is not as if there was some slight error in the procedure followed by the learned Magistrate. In what was done by the learned Magistrate, a fundamental principle was involved. In the inquiry that he

made, he mixed up his own rights u/s 202 with the rights of the accused which would be available to him only at the trial. In other words, he allowed the accused the right to cross-examine the complainant which right the accused could only have after the commencement of the trial. This is not a small error which can be cured u/s 537. Mr. Vaidya said that there was no prejudice caused to the complainant. In my opinion, considerable prejudice is caused to the complainant by the manner in which the learned Magistrate held the inquiry. After his cross-examination was over, the learned Magistrate did not think it fit to examine any of his witnesses, and the curious position was that the complainant did not have any right to examine any of his witnesses. Mr. Vaidya said that at least the complainant should have made an application that he wanted to examine some of his witnesses and that there was no reason to presume that the learned Magistrate would not have considered that application favourably, but while making this statement, Mr. Vaidya forgot that the discretion was entirely with the learned Magistrate whether to allow the application or not, and if he did not allow it, surely, the complainant would be deprived of the benefit of the evidence of his witnesses. The Magistrate, however, would have no such discretion and refuse the complainant''s request to examine his witnesses once the trial begins. Accordingly, there was considerable prejudice caused to the complainant and, therefore, even if Section 537 were applicable for the purpose of curing the defect in the procedure followed by the learned Magistrate, since it has caused serious prejudice to the complainant, that section cannot be availed of.

14. In the result, the application succeeds, the order of dismissal of the complaint passed by the learned Magistrate is set aside and the rule is made absolute. The learned Magistrate to proceed with the complaint afresh.