(1974) 03 BOM CK 0033

Bombay High Court (Nagpur Bench)

Case No: None

Sk. Razak		APPELLANT
	Vs	
Riyasathbi and Others		RESPONDENT

Date of Decision: March 23, 1974

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100
- Guardians and Wards Act, 1890 - Section 25

Citation: (1975) CriLJ 1131

Hon'ble Judges: Shimpi, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Shimpi, J.
The applicant husband hag filed this revision application praying that the order passed by the Judicial Magistrate First Class, 8th Court, Nagpur, in Criminal Case No. 6-A of 1973 confirmed in Criminal Revision No. 73 of 1973, be quashed and the application made by the non-applicant wife u/s 100 of the Criminal Procedure Code be remanded to the Court of the Magistrate for recording evidence and passing adequate orders as the Magistrate would deem fit after hearing the parties,

The facts in brief are as under:

That the applicant husband was married with the non-applicant sometime in 1964. During the subsistence of the marriage, son was born sometime in 1968. A contention was raised before me by the learned Advocate for the applicant that the son was born in 1967. He has produced one certificate of a school which shows that the mother had admitted the boy to the school and the birth date shown in that certificate is 15-4-1968. It is further seen that the position that the boy was born in April 1968 was not disputed in lower Courts, Therefore, that contention was not

allowed to be agitated. It is seen that after the birth of the child relations between the husband and the wife deteriorated. The wife i.e., the non-applicant left the house of the husband. There are divergent allegations on that point and it is not necessary to consider those allegations. On 10-4-1969 the applicant divorced his wife by a registered notice. It is further seen that a suit was filed by the wife to recover a dower amount and that amount has been recovered. It has also come in evidence that an application was made by the mother for obtaining maintenance of the child from the applicant-husband and the maintenance at the rate of Rs. 15/- was granted in favour of the child who was residing with the mother. The certificate produced shows that the boy was got admitted to the school on 4-6-1972. The applicant as well as the non-applicant reside at Nagpur in different Mohallas. The non-applicant i. e, the mother of the child was residing with her mother along with the child. Thus, it would be seen that since the birth the child, was residing with the mother. It has further come in evidence and wag accepted by the learned Advocate for the applicant that an application under the Guardians and Wards Act was preferred by the applicant after the maintenance decree to obtain the custody of son Rashid but the same was dismissed.

2. It is the allegation of the non-applicant mother that on 5-1-1973 at about 7 a. m. the applicant came with some of his friends, made a row, assaulted the mother-non-applicant and took away the child forcibly from her custody. She filed a report with the police but no action appears to have been taken while the version of the applicant-husband was that he was often going to see his child because he was in constructive custody of the child and on 5-1-1973 he had gone to see the child. The child expressed a desire that he would accompany him (the father) and, therefore, the applicant took him. There were the rival versions. ,

3. It is seen from the record that on 9-3-1973 an application u/s 100 of the Criminal Procedure Code was given by the mother-non-applicant against the applicant in the Court of the Judicial Magistrate First Class, 8th Court. Nagpur. The show cause notice was issued to the applicant who was a non-applicant in that application. Pursuant to the show cause notice he has given his say. It appears that the learned Magistrate, then presiding over the Court did not record the evidence but after hearing the parties, issued order of search warrant. Feeling aggrieved by that order the present applicant had filed a revision application in the Court of the Sessions Judge of Nagpur. However, the same was dismissed and thereafter the proceeding was again sent back to the Magistrate for passing orders as per the latter part of Section 100 of the Criminal Procedure Code. After the papers were received, after hearing the parties, the learned Magistrate passed an order in his discretion and directed the applicant who was the non-applicant to deliver the child to the mother as the child was below the age of 7 years. The learned Magistrate while passing this order had three circumstances before him. One was that the child Rashid was below 7 years. As such the mother though not a natural guardian under the Mohomedan Law was entitled to the custody according to Mohomedan Law. The second was that

the husband had taken the second wife, after divorcing the non-applicant wife. The second wife was residing with him. The learned Advocate for the applicant contended before me that there was a grand-mother i.e., the mother of the applicant residing with him and she was looking after the child. Whatever that may be the learned Magistrate came to the conclusion that between the natural mother and the step mother, the natural mother would properly bring up the child. The third circumstance which was before the Magistrate was that the maintenance decree was passed against the applicant husband to give Rs. 15/- per month to the child. In order to avoid the payment of that decree the father forcibly took away the child from the custody of the mother. Considering these three circumstances, the learned Magistrate passed the order that the custody be given to the natural mother. Feeling aggrieved, the applicant husband filed a revision application in the Sessions Court being No. 73 of 1973. That was heard by the Second Extra Additional Sessions Judge Mr. M. S. Pathak who dismissed the revision application. The learned Additional Sessions Judge has referred to the history of the litigation. He has also considered the provisions of the Mohomedan Law and had taken into consideration the two authorities which were cited by the learned Advocate for the applicant before him and which are also cited before me. He held that there was no provision u/s 100 of the Criminal Procedure Code to record evidence, it being a summary remedy and the order which has to be passed under the latter part of Section 100 is a discovery order. The learned Additional Sessions Judge felt that the discretion was properly exercised by the Magistrate. He, therefore, did not interfere with the order and rejected the application. Feeling aggrieved, the present revision application has been filed.

4. Shri Ziaudddin, the learned Advocate for the applicant husband contended before me that the learned Magistrate committed a breach of Section 100 of the Criminal Procedure Code while issuing the search warrant. He submitted that in order to attract the Provisions of Section 100. Criminal P. C. the Magistrate should have been satisfied that there was a confinement and that confinement of the child amounted to an offence. Shri Ziauddin submitted that the applicant husband submitted before the Court that the child was in his custody and the child was going to a school. Therefore, there was no confinement. He further submitted that he had given applications after applications but no evidence was recorded. He further submitted that the learned Magistrate has not properly taken into consideration the provisions of the Mohomedan law. He drew my attention to the principles of Mohomedan Law and especially to Section 352 which states that the mother is only entitled to the custody of her male child until it has completed the age of 7 years but the natural guardian of the child is the father. He submitted relying on the commentary in Baburam Varma''s Mohomedan Law, 4th Edition 1968 page 304 that though the physical custody may be of the mother, the father remains in constructive and legal custody of the child. He, therefore, submitted that when the father was the legal guardian, the father did not commit any offence in taking away the child and there

was no confinement. He submitted that, relying upon the observation in Banarsi Lal Vs. Neelam and Others, and Hasmat Ali Vs. Smt. Suraya Begum, , to which I shall refer a little later, the Magistrate has not passed a proper order. He led me through the definition of Section 341 of the Indian Penal Code to canvass that there cannot be a wrongful confinement in this case. He, therefore, urged that the finding arrived at by the Magistrate granting the search warrant and passing the subsequent order is perverse and illegal and should be set aside.

5. In order to appreciate the submissions of Shri Ziauddin, it is necessary to consider the provisions of Section 100, Criminal Procedure Code. It reads as under:

100. If any Presidency Magistrate, Magistrate of the first class or Sub-Divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Reading Section 100, Criminal Procedure Code it will be seen that it is divided into three parts; The first is that the Magistrate of the First Class if he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant. After the issuance of the search warrant he is to direct the police officer in whose name the search warrant is given to search for the person so confined. The third is, after the search is over and the person is found then in connection with that person who is immediately brought before the Magistrate, the Magistrate may make such order as in the circumstances of the case seems proper.

6. In the instant case, the facts show that an application was given by the non-applicant mother u/s 100 of the Criminal Procedure Code. A show cause notice was issued to the present applicant who was non-applicant in that proceeding. After hearing him, the Magistrate issued a search warrant. That Magistrate after satisfying himself about the ingredients of the section issued a search warrant. The present, applicant who was dissatisfied with that order, therefore, filed a revision application. That revision application came to be dismissed and thereafter the record was sent to the trial Court for implementing the order of a search warrant and for passing the order as per the later part of Section 100, Criminal Procedure Code. The applicant allowed the order to become final. He did not challenge it in the High Court. As such, in my opinion, it is not open to the applicant to re-open that point.

7. Shri Ziauddin, the learned Advocate for the applicant submitted that even if that order was passed that question can be considered by the revisional Court when the applicant has come before this Court : Assuming that Shri Ziauddin is entitled to

advance his submissions on that point, I shall examine that case and find out whether the Magistrate had reason to believe that the child wag confined and whether the circumstances were such that the confinement amounted to an offence. I have already given the history before the application was filed u/s 100, of the Criminal Procedure Code. It is not necessary to repeat it. The history would go to show the relations of the parties were not cordial but hostile prior to the happening of 5-1-1973. It will be seen that the applicant had divorced his wife in the year 1969. The applicant now says that he is the legal guardian of the child. As a guardian it was for him to look after the welfare of the child. But from the year 1969, he did not provide any maintenance to the child. The mother filed an application, obtained an order that the father i.e., the present applicant should pay a maintenance at the rate of Rs. 15/-. These are the established facts prior to the incident of 5-1-1973. It is further seen that on 5-1-1973 when the child was residing with the mother and when the child was going to the school as is evident from the certificate produced by Shri Ziauddin as per the order of my learned brother Masodkar, J., who while admitting the petition had asked the applicant to produce the certificate of the school. That certificate would show that the mother had put the child in school sometimes in June, 1972 and while that child was going to the school on 5-1-1973 the father has taken away the child. Apart from the rival allegations which are not necessary for me to consider, the fact remains that the child who was residing with the mother and who was below 7 years of age has been taken by the father as per his say for looking after him and for his welfare. It is not that the child was not sent to the school by the mother. It is not that the child was not maintained by the mother. There appears to be no earthly reason for the father to take away the child. The only reason that is apparent is to defect the maintenance order passed against him and nothing else.

8. It was then suggested by Shri Ziauddin that the father had sent the child in the school and for that purpose a certificate is filed of Head Mistress, Urdu/K. G. primary School, Mohmmadalt Sarai, Nagpur, that Kashid the child was a student of their school in Class K. G. Junior. When that child was admitted. Whether the child was still going to the school is not to be seen from this certificate. Before the learned Magistrate, Shri Ziauddin complains that no evidence was recorded. Otherwise, these facts could have been brought on record. Nothing prevented the applicant to produce a certificate of the school to show that the child was sent to the school. Under the circumstances, the Magistrate felt that there was a confinement of the child which amounted to an offence. This is the subjective satisfaction of the Magistrate which cannot be lightly interfered with at the revisional stage unless a very strong ground is made out before the Court. Once that position is accepted, then the matter becomes more clear that the Magistrate had no option but to pass an order of search warrant. The learned Advocate Shri Ziauddin as I have already stated drew my attention to the observations reported in Banarsi Lal Vs. Neelam and Others, He relies on Placitum (C) which runs as under:

Section 100 Criminal P. C., is of course a provision of emergency, but this by itself does not mean that the Magistrate acting under this section is to issue warrants of search automatically without applying his judicial mind to the allegations contained in the application and to the other material which may be available to him. The expression "reason to believe," which is the real core of this section, implies a belief in judicial mind arrived at after considering all the available material with a sense of responsibility and effort of mind, without ignoring, so far as, possible, the other side of the controversy. This is a judicial duty and its performance rules out of superficial and arbitrary approach. The Magistrate must have reasonable grounds to believe that the confinement in question is such that it amounts to an offence.

From the facts of that (reported) case, it will be seen that, at the instance of the father, a search warrant was issued in respect of a child which was residing with the mother and the child was 5 years old. The learned Chief Justice Shri I. B. Das, as he then was, had considered the provisions of Section 6 of the Hindu Minority and Guardianship Act and its proviso. The proviso relates to the custody of the minor who has not completed the age of 5 years and the custody in such cases is ordinarily to be with the mother. The learned Judge made the observations reproduced above in the light of those facts that the learned Magistrate should have applied his mind to the provisions of the Hindu Minority and Guardianship Act which clearly lays down that the custody of a child below the age of 5 years should ordinarily remain with the mother. In spite of these clear provisions, the learned Magistrate of Delhi had issued a search warrant and in that light these observations are made. The observation and the facts of that case are not applicable to the facts of the present case.

9. Shri Ziauddin also drew my attention to a case reported in Hasmat Ali Vs. Smt. Suraya Begum, He relies upon placitum (C) which reads as under:

Under the law the mother is entitled to the hizanat or custody of her male child until he has completed seven years and her female child until she attains puberty. The right continues though she is divorced unless she marries a second husband in which case the custody belongs to the father. In case the minor is removed from her custody she can exercise her right by filing a suit and not by way of a proceeding u/s 25 of the Guardians and Wards Act.

What was contended by Shri Ziauddin was that by analogy the non-applicant mother'' was not entitled to take resort to the provisions of Section 100. Criminal Procedure Code but her only remedy was to file a suit. I am unable to draw any such inference or conclusion from the facts stated in this case. I am inclined to hold that the facts of that case are not applicable to the present case.

10. I have already shown that Section 100, Criminal Procedure Code is divided into three parts. I have considered the first part. The search warrant wag issued. The search warrant was directed to a Police Sub-Inspector who ultimately produced the

child before the Court, After the child is produced, the learned Magistrate is to exercise his discretion and pass order as he deemed fit regarding the custody of the child. I have already shown in the earlier part of my judgment that the learned Magistrate passed the discretionary order by considering the three facts which were present in his mind. I need not repeat those facts. In that view of the matter the Magistrate cannot be said to have exercised his discretion in an arbitrary, capricious or an erroneous manner. I do not find that there is any manifest erroneous finding given by the magistrate. Under such circumstances, the revision application is rejected. Rule discharged.

11. Shri Ziauddin submitted that the child should be sent to the Kinder Garten School where he was studying. It is for the mother to take proper action to bring about the child and to send the child to any school near her house.