

State Vs. Mehtab Khan

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Court : Mumbai

Decided On : Mar-20-1991

Reported in : (1991)93BOMLR130

Judge : G.D. Patil and ;V.A. Mohta, JJ.

Appeal No. : Criminal Reference No. 3 of 1991 in Sessions Case No. 240 of 1986

Appellant : State

Respondent : Mehtab Khan

Judgement :

V.A. Mohta, J.

1. This is a reference under Section 395(2) of the Code of Criminal Procedure by the Additional Sessions Judge, Nagpur for a decision on the following question of law:

Whether it is open for the Sessions Court to quash the order of the commitment and send the proceeding back for strict compliance of the provisions of Section 202(2) of Cr.P.C. to the Chief Judicial Magistrate when it finds that without complying the provisions of the said section a case instituted otherwise than on police report is committed to the Court of Sessions?

2. A private complaint disclosing commission of offences exclusively triable by the Court of Sessions came to be filed in the Court of Chief Judicial Magistrate, Nagpur on March 25, 1985. It had a list of 11 witnesses. One out of the four complainants was examined on November 27, 1985, two witnesses were examined on December 19, 1985 and one on January 16, 1986. The complainants did not close their case, but the learned. CJM chose to issue process against the accused on February, 7, 1986 and committed them to the Court of Sessions, vide order dated October 4, 1986. In the Court of Sessions the accused filed an application (Ex. 25) under Section 203 Cr.P.C. for dismissal of the complaint on the ground that mandatory requirement of examining all the witnesses was not followed by the CJM and hence the committal order was void. The accused also prayed for discharge under Section 227 Cr.P.C. on that very ground. The complainants filed an application (Ex. 41) for making a reference to the High Court. The learned Additional Sessions Judge while disposing of both those applications by a common order held that (i) Section 203 Cr.P.C. does not apply to Sessions Trial; (ii) the evidence on record did not warrant discharge; and (iii) the committal order was illegal in the absence of examination of all the witnesses of the complainants as required by proviso to Sub-section (2) of Section 202 Cr.P.C.

3. Against the above basic factual backdrop, for finding an answer to the question referred it is necessary to examine the object behind introduction of Section 202(2) Cr.P.C. 41st Report of the Law Commission while recommending introduction of this provision states: (Paras. 16.11 and 18.29).

We recommend that the Magistrate who takes cognizance of such evidence on complaint must himself make an inquiry into the complaint, and call upon the complainant to produce his witnesses and examine them on oath. Further, in such cases the Magistrate should not direct an investigation by police officer or other person. For this purpose, we propose two amendments of Section 202 in the form of another proviso to Sub-section (1) and a proviso to Sub-section (2).

We propose that in such cases it would be sufficient if the Magistrate taking cognizance of the offence on complaint holds an inquiry under Section 202 and examines the complainant and all his witnesses on oath, but not in the presence of

the accused. If on the basis of such sworn statements he finds that there is 'sufficient ground for proceeding' he should issue process to the accused as provided in Section 204. He should then grant to the accused copies of statements of all persons examined by the Magistrate and other material on which the prosecution relies in order that the accused may get adequate information about the charge against him and prepare for his defence.

The combined effect of these two provisions would be to place a person accused of grave offence by a private complaint in somewhat better position than one charged with a similar offence on the basis of a police investigation. In the former case, preliminary inquiry by a Magistrate into the truth of the complaint is made mandatory and takes place of an investigation by the police. The accused gets copies of the statements of all prosecution witnesses recorded by the Magistrate in the former case and the statements recorded by the police under Section 161(3) in the latter case. With these safeguards which appear to us to be sufficient, we consider that the committal proceedings could be dispensed with for complaint cases also.

4. It does not appear that the only object behind Section 202(2) Cr.P.C. is to protect the interest of the accused. It has in its view also the interest of the complainant. The purpose of the inquiry is not merely for the subjective satisfaction of the Magistrate in the matter of existence or otherwise of the sufficient ground to proceed. On the basis of the material produced the order is passed and the matter is transmitted to the Court of Sessions which is not bound by the opinion formed by the Magistrate on the basis of that material. Sessions trial begins with opening of a case by the Prosecutor by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. Section 226 Cr.P.C. Upon consideration of the material before him and hearing parties if the Sessions Judge feels that there is no sufficient ground for proceeding against the accused, he can indeed he is duty bound to discharge the accused. Section 227 Cr.P.C. If the accused is committed to the Court of Sessions only upon the basis of part of the material and without full material which the complainant wanted to put forth, the complainant is exposed to the risk of the accused being discharged for no fault of the complainant. The order

of discharge under Section 227 is not confined only to the total absence of factual material. Presence of legal flaw is also a sufficient ground for discharge. In this connection useful reference may be made to the case of T.V. Sarma v. R. Meeriah : AIR 1980 AP219 . Thus invalidity of the order of committal can also be one of the grounds for discharge.

5. In cases like this where complainant had not given up the witnesses, was willing to examine all his witnesses and the Magistrate chose to issue process even after considering the evidence of some of the witnesses, the order of discharge would result into grave prejudice to the complainant and he would be made to suffer for no fault of his. In other words he would be made to suffer for the fault of the Court.

6. One of the foremost duties of Courts is to see that no litigant is allowed to suffer for the act of the Court. Keeping that duty and interest of real justice in view, the only just course to adopt is to set aside the order of committal and to remand the matter to the Magistrate for passing appropriate order after examining all the witnesses as mandated by law. Such a power of remand is indeed incidental to the power of discharge under Section 227 Cr.P.C. Is there any legal bar for such remand in the Code of Criminal Procedure, is the next question? We do not think so. In this context revisional powers of the Sessions Court under Sections 397, 398 and 399 read with Section 401 Cr.P.C.-which can be exercised even suo motu will have to be kept in view. Under that jurisdiction passing 'of remand order is plainly permissible.

7. Not to recognise such power of remand in the Court of Sessions is to subject the litigants to avoidable misery of facing another round of litigation just for the sake of procedure. That under Section 482 Cr.P.C such an order of remand can be passed by the High Court is very obvious.

8. All these considerations lead us to hold that in appropriate cases it is open for the Sessions Court to quash the order of commitment and send the proceedings back to the Magistrate for strict compliance of Section 202 Sub-section (2) Cr.P.C. We, therefore, answer the question in the affirmative.

9. The matter is already delayed. There is no point in following the convention of merely answering the reference and sending the matter back to the Sessions Court. In our view, proper course to follow is to quash the committal order passed by the CJM and to send back the matter to him for passing appropriate orders after recording the evidence of all the witnesses of the complainant as required by Section 202 Sub-section (2) Cr.P.C.

10. Needless to mention that the CJM, Nagpur will give to this matter priority in view of its chequered career.

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