

Vinod Kumar Shivhare and Others Vs. Tarachandra Gupta

Vinod Kumar Shivhare and Others Vs. Tarachandra Gupta

SooperKanoon Citation : sooperkanoon.com/503792

Court : Madhya Pradesh

Decided On : Jan-18-2001

Reported in : 2001CriLJ2970; 2001(2)MPHT168

Judge : Mr. N.K. Jain, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 202, 202(2) and 482;
Indian Penal Code, 1860 - Sections 395, 450, 465 and 465(2)

Appeal No. : Misc. Criminal Case Nos. 102 and 3365 of 1999

Appellant : Vinod Kumar Shivhare and Others

Respondent : Tarachandra Gupta

Advocate for Def. : Shri R.K. Sharma, Adv.

Advocate for Pet/Ap. : Shri Dharmendra Verma, Adv.; Shri B.D. Jain, Panel Lawyer

Disposition : Misc. criminal cases allowed

Judgement :

ORDER

N.K. Jain, J.

1. Both these petitions arise out of the order dated 30-5-1998 passed by Judicial Magistrate First Class, Gwalior in Criminal Case No. 332/1998, whereby the learned Magistrate has not only taken cognizance of the offences under Sections 395 and 450, Indian Penal Code, but also proceeded with the trial and directed for recording evidence before charge.

2. The offences under Sections 395 and 450 both are triable exclusively by the Court of Session. Obviously, the Magistrate could not proceed with the trial of the case and direct recording of evidence before charge. To this extent the order of the Magistrate is clearly without jurisdiction.

3. These petitions involve yet another point. The Magistrate before taking cognizance of the offences, recorded statements of the complainant and two witnesses, who were not cited as witnesses in the complaint. In the list of witnesses annexed with the complaint four witnesses besides complainant were named. However, neither of those witnesses was examined by the Magistrate before taking cognizance of the offence.

4. Proviso to sub-section (2) of Section 202 of the Code of Criminal Procedure mandates that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. This mandatory provision was also not complied with by the Magistrate before taking cognizance of the offences.

5. Learned counsel for the respondent/complainant submitted that non-compliance of the aforesaid provision will not vitiate the impugned order. Reliance has been placed on a Supreme Court decision in Rosy, AIR 2000 SC 637. In this case, the Apex Court held that when the accused have chosen not to raise objection on the premise of omission to examine witnesses before process was issued by the Magistrate, it must be taken that they had no grievance that such omission had occasioned failure of justice. Even if they had taken such objection after committal of the case to the Sessions Court there was no need to turn the switch board backwards as there is no scope for believing that such omission had occasioned failure of justice. This is because no evidence of any witness would be used in the

Trial Court unless such witness was examined in the Trial Court and the accused is afforded reasonable opportunity to cross-examine him. The stage had passed long ago for the accused or the prosecution to have raised objections that the committal order was vitiated due to non-examination of witnesses before the Magistrate issued process to the accused. Even if there was any such omission before process was issued the accused cannot raise it as an objection for the first time at the far end of a long drawn trial in the Sessions Court. Since one of the tests to ascertain whether such omission has occasioned failure of justice is incorporated in sub-section (2) of Section 465, i.e., whether objection had been taken at any earlier stage regarding such omission. If no such objection has been taken earlier normally the Court cannot permit that party to raise it at the last stage.

6. A careful reading of the aforesaid decision would show that in that case no objection was taken by the accused until the case ended into his conviction. Under those circumstances, the Apex Court held that non-compliance of the proviso to sub-section (2) of Section 202 would not vitiate the trial or the conviction unless the accused was able to show that any prejudice was caused to him. The Court further held that the defect was curable by taking recourse to Section 465 of the Code of Criminal Procedure. In the instant case, however, objection was taken at the earlier stage and it would be just and proper to remand the case back to the Magistrate for complying the aforesaid mandate of law. It is not possible at this stage to say that no prejudice is caused to the accused/applicant by the said non-compliance. It is quite possible that after examination of the witnesses cited in the complaint, the Court below may come to a conclusion that no case for proceeding against the accused persons is made out.

7. Accordingly, I allow both these petitions, quash the impugned order as also the proceedings taken thereafter and direct that the case shall now go back to the Magistrate to proceed further from the stage of Section 202 of the Code of Criminal Procedure and pass appropriate orders in conformity with law. It may, however, be clarified that the accused/applicant shall not be entitled to participate in the proceedings at that stage of enquiry.

8. Misc. Criminal Cases allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com