Chandra Deo Singh

Vs

Prokash Chandra Bose & Anr.

Criminal Appeal No. 155 of 1960

(Syed Jafar Imam, J. R. Mudholkar, K. Subha Rao, Raghuvar Dayal JJ)

27.01.1962

JUDGMENT

MUDHOLKAR, J. -

This is an appeal by certificate granted by the High Court of Calcutta under Art. 134(1)(c) of the Constitution of India. The facts which are relevant for the purpose of this appeal are briefly these :

> On December 25, 1957, one Panchanan Roy lodged a first information report at 11.00 p.m. at the police station, Bhangor, in the district of 24 Parganas alleging that respondent No. 1 (Prokash Chandra Bose) who is the proprietor of a fishery had killed a man named Nageswar Singh who was a darwan posted at the informant's master's fishery by shooting him with a gun. After the occurrence, the assailants's party was chased, but the principal culprit namely respondent No. 1 made good his escape in his own car. Two of his associates, Pannalal Saha and Sankar Ghosh, were arrested by the local people and produced in the police station. On the basis of the first information report, the police undertook investigation, but ultimately they submitted a final report as late as on September 17, 1958.

On November 3, 1958, one Mahendra Singh who claimed to be a distant relative of the deceased darwan, but which fact is denied by the widow of the deceased - filed a complaint before Mr. C. L. Choudhry, the Sub-Divisional Magistrate of 24 Parganas Alipore, against the final report of the police and asked for processes to be issued against certain other persons on the allegation that those persons had murdered Nageswar Singh. The complaint further contained a statement to the effect that the first information report lodged by Panchanan Roy with the police on December 25, 1957, was false and that he had done so at the instance of his Master Bidhu Bhusan Sarkar who was an enemy of respondent No. 1. After examining Mahendra Singh on oath and looking into the police papers, the learned Sub-Divisional Magistrate asked Mr. N. M. Chowdhry, Magistrate, First Class, to hold a judicial enquiry into the allegations made by Mahendra Singh and to submit a report to him by a certain date.

During the pendency of the enquiry into the complaint of Mahendra Singh, Chandra Deo Singh, the nephew of the deceased filed a complaint before Mr. Chowdhry on December 30, 1958 stating therein that respondent No. 1 had fired a shot at Nageswar Singh at point blank range and thereby murdered him. After examining him on oath, the Sub-Divisional Magistrate referred the matter again to Mr. N. M. Chaudhry Magistrate, First Class, for enquiry and report to him by a certain date. During this enquiry, respondent No. 1 was permitted by the learned Magistrate to appear through counsel. Seven witnesses were produced by the complainant Chandra Deo Singh and examined by

the learned Magistrate. In addition, Pannalal Saha and Sankar Ghose who, it might be remembered, are alleged to have been the associates of respondent No. 1, were examined as court witnesses and the suggestion is that the learned Magistrate did this at the instance of the counsel for respondent No. 1.

On February 9, 1959, Mr. N. M. Choudhry made a report to the Sub-Divisional Magistrate to the effect that a prima facie case has been made out against three persons, Upendra Neogi, Asim Mondal and Arun Mondal under s. 302/34 of the Indian Penal Code. On the same day, he made another report to the Sub-Divisional Magistrate saying that no prima facie case was made out against respondent No. 1. On the basis of the first report, the Sub-Divisional Magistrate directed summonses to be issued against the three persons named in that report and commenced committal proceedings against them.

The Sub-Divisional Magistrate on seeing the second report dismissed the complaint of Chandra Deo Singh without assigning any reason. Chandra Deo Singh preferred an application for revision before the Sessions Judge, Alipore, who, after issuing notice to respondent No. 1 and hearing his counsel, directed the Sub-Divisional Magistrate to make further enquiry against him. Thereupon respondent No. 1 preferred a revision application before the High Court, which came up for hearing before a single judge of that court. It would appear that the three persons against whom summonses were ordered to issue by the Sub-Divisional Magistrate also preferred a revision application before the High Court. Both the revision applications were heard together. The learned judge granted the application of respondent No. 1 as well as that of Upendra Neogy. We are informed by learned counsel for respondent No. 1 that eventually two of the three persons against whom summonses were ordered to be issued by the Sub-Divisional Magistrate were committed for trial before the Court of Sessions. But he was unable to say definitely whether they were actually tried and if so, what the result of the trial was.

Aggrieved by the order of the learned single judge, the appellant Chandra Deo Singh made an application under Art. 134 of the Constitution for the grant of a certificate of fitness for appeal to this court which as already stated, was granted by the High Court. The certificate was sought by the appellant on four grounds. The first ground was that respondent No. 1 had no locus standi to appear and contest a criminal case before the issue of process. The second ground was that the test propounded by the learned single judge for determining the question whether any process should be issued by the court was erroneous. The third ground was that a Magistrate making an enquiry under s. 202 of the Code of Criminal Procedure had no jurisdiction "to weigh the evidence in golden scales" as was done in the present case. The fourth and last ground was that the learned Sub-Divisional Magistrate acted in contravention of the provisions of s. 203 Cr.P.C. in dismissing the complaint without recording any reason for doing so. The High Court granted the certificate on all the grounds except the first. It has been held by this court that the High Court cannot limit its certificate in this manner and, therefore, we propose to examine all the four grounds taken by the appellant.

Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to

the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of s. 202, Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under s. 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were examined as court witnesses were so examined at the instance of respondent No. 1 but from the fact that they were persons who were alleged to have been the associates of respondent No. 1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No. 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection, the observations of this court in Vadilal Panchal v. Dattatraya Dulaji Ghadigsonkar [[1961] 1 S.C.R. 1, 9.], may usefully be quoted :

> "The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

Coming to the second group, we have no hesitation in holding that the test propounded by the learned single judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is "sufficient ground for proceeding" and not whether there is sufficient ground for the conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the bar in which the question of the scope of the enquiry under s. 202 has been considered. Amongst those decisions are : Parmanand

Brahmachari v. Emperor [A.I.R. (1930) Pat. 30]; Radha Kishun Sao v. S. K. Misra [A.I.R. (1949) Pat. 36.]; Ramkisto Sahu v. The State of Bihar [A.I.R. (1952) Pat. 125.]; Emperor v. J. A. Finan [A.I.R. (1931) Bom. 524.] and Baidya Nath Singh v. Muspratt [(1886) I.L.R. 14 Cal. 141.]. In all these cases, it has been held that the object of the provisions of s. 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under s. 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-s. (1) of s. 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.

This brings us to the third ground. Section 203 of the Code of Criminal Procedure which empowers a Magistrate to dismiss a complainant reads thus :

> "The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or inquiry, if any, under s. 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

The power to dismiss a complaint rests only with a Magistrate who has taken cognisance of it. If before issue of process, he had sent down the complaint to a Magistrate subordinate to him for making the enquiry, he has the power to dismiss the complaint, if in his judgment, there is no sufficient ground for proceeding. One of the conditions, however, requisite for doing so is the consideration of the statements on oath if any made by the complainant and the witnesses and of the result of the investigation of the enquiry which he had ordered to be made under s. 202, Cr.P.C. In the case before us, an investigation by a police officer was not ordered by the learned Sub-Divisional Magistrate, but an enquiry by a Magistrate, First Class. He had, therefore, to consider the result of this enquiry. It was not open to him to consider in this connection the statements recorded during investigation by the police on the basis of the first information report lodged by Panchanan Roy or on the basis of any evidence adduced before him during the enquiry arising out of the complaint made by Mahendra Singh. All these were matters extraneous to the proceedings before him. Of course, as we have already stated, the learned Magistrate has not given any reasons for dismissing the complaint and, therefore, we do not know what exactly weighed with him when he dismissed the complaint, but the learned single judge of the High Court who has dealt with the case elaborately has not kept the evidence adduced in the two complaints separate but appears to have been influenced in deciding one case on the basis of what was stated by the witnesses in the other case. The High Court has relied upon the evidence of Pannalal Saha and Sankar Ghose who ought never to have been examined by the enquiring Magistrate. The High Court has further relied upon the investigation made by the police in the complaint of Panchanan Roy. All this will be clear from the following passage in its judgment :

> "The version of these two witnesses (Pannalal Saha and Sankar Ghose) is supported

> by the fact that the police when they went to the locality found a dead bird and a pair of shoes and a pair of black half pants in wet condition. This find of the dead bird and the pair of shoes etc. has not explained on the version given by Panchanan Roy, Upendra Mondal and Tarapado Naru. Mr. Ajit Kumar Dutt stated that the inquiring Magistrate was not right in examining Pannalal Saha and Shankar Ghose at the suggestion of an advocate for the accused Chabbi Bose and that the latter should not have been allowed at the inquiry. When however there had already been a full investigation into the case by the officers under the supervision of the Superintendent of Police, it was desirable and proper for the inquiring magistrate to make a careful inquiry and not merely an one sided inquiry by examining such witnesses as might be produced by an interested party. Moreover, in this case, the learned magistrate was inquiring into both the complaints simultaneously and necessarily he could look at the evidence as a whole. In fact, two separate cases ought not to have been started at all, even though there were two separate complaints giving two different versions. These complaints were more or less Naraji petitions against the final report submitted by the police. There was only one incident in the course of which Nageswar Singh has lost his life. Therefore on the basis of the two Naraji petitions it would have been proper to hold one inquiry rather than two separate though simultaneous inquiries."

What the Magistrate could not do, the High Court was incompetent to do, and, therefore, its order reversing that of the Sessions Judge cannot be sustained.

Reliance is however, placed by Mr. Sethi on the decision of this court in Vadilal's case [(1961) 1 S.C.R. 1, 9.], at p. 10 of the report. What was considered there by this court was whether as a matter of law, it was not open to a Magistrate to accept the plea of the right of private defence at a state when all that he had to determine was whether process is to issue or not. The learned Judges held that it is competent to a Magistrate to consider such a plea and observed :

> "If the Magistrate has not misdirected himself as to the scope of an enquiry under s. 202 and has applied his mind judicially to the materials before him, we think that it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses, - all these are questions which must be answered with reference to the facts of each case. No universal rule can be laid in respect of such questions."

On the basis of these observations it was urged that this court has held that a Magistrate has the power to weight the evidence adduced at the enquiry. As we read the decision, it does not lay down an inflexible rule but seems to hold that while considering the evidence tendered at the enquiry it is open to the Magistrate to consider whether the accused could have acted in self-defence. Fortunately, no such question arises for consideration in this case but we may point out that since the object of an enquiry under s. 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under s. 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under s. 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this. By "evidence of other witnesses" the learned judges had apparently in mind the statements of persons examined by the police during investigation under s. 202. It is permissible under s. 203 of the Code

to consider such evidence along with the statements of the complainant recorded by the Magistrate and decide whether to issue process or dismiss the complaint. The investigation in that case was made by the police under s. 202, Cr.P.C. at the instance of the Presidency Magistrate. Apparently, the statement of the various witnesses questioned by the police were self-contradictory. That being the case, it was open to the Presidency Magistrate to consider which of them to accept and which to reject. The enquiring Magistrate has not stated nor has the High Court found in the case before us that the evidence adduced on behalf of the complainant and his own evidence were self-contradictory and, therefore, it could not be said that there was anything intrinsically false in the allegations made in the complaint. Learned counsel for the appellant referred us to the decision of this court in Ramgopal Ganpatrai Ruia v. The State of Bombay [[1958] S.C.R. 618, 638.]. In that case, after quoting a passage from Halsbury's Laws of England, Vol. 10, 3rd Edn. in art. 666 at p. 365 where the law regarding commitment for trial has been stated, this court has observed :

> "In each case; therefore, the magistrate holding the preliminary inquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit, and unless he is so satisfied, he is not to commit. Applying the aforesaid test to the present case, can it be said that there is no evidence to make out a prima facie case, or that the voluminous evidence adduced in this case is so incredible that no reasonable body of persons could rely upon it ? As already indicated, in this, case, there is a large volume of documentary evidence - the latter being wholly books and registers and other documents kept or is used by the Mills themselves, which may lend themselves to the inference that the accused are guilty or to the contrary conclusion. The High Court has taken pains to point out that this is one of those cases where much can be said on both sides. It will be for the jury to decide which of the two conflicting versions will find acceptance at their hands. This was pre-eminently a case which should have been committed to the Court of Sessions for trial, and it is a little surprising that the learned Presidency Magistrate allowed himself to be convicted to the contrary."

Thus, where there is a prima facie case, even though much can be said on both sides, a committing Magistrate is bound to commit an accused for trial. All the greater reason, therefore, that where there is prima facie evidence, even though an accused may have a defence like that in the present case that the offence is committed by some other person, or persons the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused. Incidentally, we may point out that the offence with which respondent No. 1 has been charged with is one triable by jury. The High Court, by dealing with the evidence in the way in which it has done, has in effect sanctioned the usurpation by the Magistrate of the functions of a jury which the Magistrate was wholly incompetent to do.

In view of what we have stated above, it is not necessary to say very much about the last ground. Section 203 of the Code of Criminal Procedure provides that where the Magistrate dismisses a complaint because in his judgment there is no sufficient ground for proceeding with the trial, he shall record his reasons for doing so. Here, as already stated, the Magistrate perused the report of the enquiring Magistrate and then proceeded to dismiss the complaint. It is stated on behalf of respondent No. 1 that this is at best an error in his order and, therefore, it is curable under s. 537(a) of the Code of Criminal Procedure. In support of this view, reliance is placed upon the decision of this court in Willie (William) Slaney v. The State of Madhya Pradesh [[1955] 2 S.C.R. 1140.]. Here, the error is of a kind which goes to the root of the matter. It is possible to say that giving of reasons is a pre-requisite for making an order of dismissal of a complaint and absence of the reasons would

make the order a nullity. Even assuming, however, that the rule laid down in Slaney's case [[1955] 2 S.C.R. 1140.], applies to such a case, prejudice is writ large on the face of the 'order'. The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a revisional court. Being kept in ignorance of the reasons clearly prejudices his right to move the revisional court and where he takes a matter to the revisional court renders his task before that court difficult, particularly in view of the limited scope of the provisions of s. 438 and 439, Code of Criminal Procedure. For all these reasons, we hold that the High Court was in error in setting aside the order of the Sessions Court and direct that further enquiry be made into the complaint of the appellant against respondent No. 1.

Mr. Sethi, however, contends that since there is only one offence i.e., the murder of Nageswar Singh, there can be only one trial and since other persons are being tried for that offence, there could be no further enquiry. As there was no material on record we could not know what happened to the enquiry against Asim Mondal and Arun Mondal after the dismissal of their application for revision by the High Court. We, therefore, called for a report from the Sub-Divisional Magistrate, 24 Parganas. That report has been received. It would appear from that report that on March 22, 1961, the High Court directed that the commitment proceedings against these two persons be stayed pending the disposal of the present appeal by this court. We cannot appreciate the argument that an enquiry against a different person with reference to the same offence cannot be undertaken. It will be open to the court before which commitment proceedings against Asim Mondal and Arun Mondal are pending to consider whether they should be stayed pending the result of the enquiry with reference to the respondent before us, but there can be no legal impediment to the enquiry against the respondent.

Appeal allowed.

Further enquiry directed.

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