

# **BOMBAY HIGH COURT**

Emperor

Vs

J.A. Finan

(S Patkar, C.J. Murphy ,J.)

01.07.1931

## **JUDGMENT**

### **Patkar, Ag. C.J.**

1. The petitioner applies for revision of the order passed by the Presidency Magistrate, Third Court, discharging the notice and dismissing the complaint brought by the petitioner against the opponent Sergeant Finan charging him with the offences under Sections 383 and 342 of the Indian Penal Code.

2. It appears that, on October 26, 1930, the petitioner went to the Esplanade Maiden to witness the national flag salutation ceremony, and resisted the endeavors of the police-officers who tried to snatch the national flag in her hand, whereupon the petitioner along with thirteen others was made to sit in a police motor van, and it is alleged was made to get down at a lonely place between Ghatkopar and Bhandup in spite of her repeated protests either to take her to jail or back to Bombay.

3. She filed a complaint before the learned Magistrate without mentioning the name of the Sergeant, The learned Magistrate issued a notice, and the Police Commissioner on December 10,1930, furnished the name of the accused as Sergeant Finan. On December 12, the Commissioner sent a letter stating that the accused had acted under his orders. On January 15, 1931, when the case was called on, the accused appeared in person and did not dispute the correctness of the statements made by the complainant. When questioned by the Magistrate whether he had anything to say, he replied that under the Commissioner's order he took the women to Ghatkoper Road.

4. The learned Magistrate held an enquiry under Section 202 of the Criminal Procedure Code and in view of the evidence of the complainant and the admission of the accused proceeded to consider ' the question whether the prosecution under Sections 363 and 342 would lie against the accused. The learned Magistrate held that as the accused was led to believe in good faith under a

misconception of fact that he was bound by law to carry out the order, he was entitled to the protection afforded by Sections 76 and 79 of the Indian Penal Code. He, therefore, discharged the notice and dismissed the complaint.

5. It is urged on behalf of the applicant that the procedure adopted by the learned Magistrate is erroneous inasmuch as he did not record any reasons under Section 202 of the Criminal Procedure Code, that the practice prevailing in the Magistrates' Courts in Bombay of issuing a notice to the accused before issuing a process against him under Section 202 of the Criminal Procedure Code was illegal, and that the accused having admitted the truth of the complaint, the onus of proving good faith was on the accused and the Magistrate ought not to have dismissed the complaint but ought to have decided the case on taking evidence.

6. The learned Magistrate had jurisdiction under Section 202, if he thought fit, for reasons to be recorded in writing, to postpone the issue of process for compelling the attendance of the person complained against, and to enquire into the case himself for the purpose of ascertaining the truth or falsehood of the complaint. The omission to record reasons would amount merely to an irregularity if the procedure adopted by the Magistrate was legal and proper under the circumstances of the case.

7. The practice of issuing a notice to the accused before issuing a process against him under Section 202 of the Criminal Procedure Code was held to be improper and was discontinued by the Madras High Court by the full bench decision in *Appa Rao Mudaliar v. Janahi Animal*<sup>1</sup> In *Bhim Lal Sah v. Emperor*<sup>2</sup> it was held that the accused should not be made a party to a proceeding under Section 202, nor allowed to cross-examine the prosecution witnesses, or to adduce evidence for the defense. In *In re Virbhan Bhagaji* it was held, following the decision in the case of *In re Tukaram* (1904) 6 Bom. L.R. 91, that the practice which prevails in the Magistrates' Courts in Bombay of issuing a notice to the accused before issuing a process against him under Section 202 of the Criminal Procedure Code is not illegal. Fawcett J. observed that there was a clear distinction between considering whether such a procedure is illegal and whether such a procedure is desirable, and though he felt the force of the objections to having a sort of preliminary trial of a case, he did not think that there was anything absolutely illegal in the issue of a notice to an accused person, but was of opinion that it was a matter more for any directions that the High Court as a body may think fit to issue than for a Division Bench of the High Court to deal with.

8. Assuming that the procedure of issuing a notice to an accused person before issuing a process under Section 202 is permissible in order to avoid false and frivolous complaints, the nature of the inquiry is limited by Section 202 of the Criminal Procedure Code. The inquiry can be made by the Magistrate under Section 202 for the purpose of ascertaining the truth or falsehood of the

complaint. The inquiry or investigation under Section 202 is not intended to supersede a regular trial. The inquiry 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 complainant's charge so as to justify the issue of a process and the commencement of the proceedings against the accused, and is not intended to cover an inquiry by the Magistrate as to whether the unproved allegation of the accused exonerates him. In the present case, the accused did not dispute the correctness of the statement made by the complainant, and when questioned replied that under the Commissioner's order he took the women to the Ghatkopar Road, and in effect pleaded that his action was justified as having been done in good faith and that he was protected by Sections 76 and 79 of the Indian Penal Code.

9. The letter written by the Commissioner on December 12, that it was under his orders that the accused acted in connection with the incident, is not proved by legal evidence in the case. Under Section 105 of the Indian Evidence Act when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. It was, therefore, incumbent on the Magistrate to investigate the complaint and to find out whether the allegation of the accused that he was protected by Sections 76 and 79 of the Indian Penal Code was made out by legal evidence before him. In *Emperor v. Dhondu* it was held that a complaint charging defamation cannot be dismissed by the Magistrate under Section 203 of the Criminal Procedure Code, without taking any evidence, on the ground that the accused is protected by Section 499, exception 8, of the Indian Penal Code, since Section 105 of the Indian Evidence Act places the burden of proving the exception on the accused. The limits of the inquiry under Section 202 have been circumscribed and the scope of the inquiry is restricted only to the ascertainment of the truth or falsehood of the complaint, that is, for ascertaining whether the material facts alleged by the prosecution are true or false, and the provisions of Section 202 are not intended to supersede the regular trial of the case by allowing the accused to make out his defense merely by alleging it without legal proof in support of his allegation.

10. It is urged on behalf of the Crown that the accused is protected under Sections 76 and 79 of the Indian Penal Code, and reliance has been placed on the decision in the *case of Pramatha Nath Barat v. P.C. Lahiri*<sup>3</sup> where a Deputy Commissioner of Police sent a head constable, placed under suspension, to the lock-up, without malice and in conformity with a circular order of the Commissioner of Police, and it was held that he was justified in assuming that the said circular order had received the sanction of the Government of Bengal and that as he, by reason of a mistake of fact and not of law, in good faith, believed himself to be bound by law to obey the

instructions of the Commissioner of Police, and to be justified by law in sending the head constable to such custody, he was protected by Sections 76 and 79 of the Indian Penal Code. In that case the accused was acquitted by the Magistrate on a full investigation of the case, and the complaint was not dismissed under Section 203 of the Criminal Procedure Code in a summary way as in the present case.

11. It is urged on behalf of the Crown that the order of the Commissioner of Police was justified under Section 27 of the City of Bombay Police Act (Bom. IV of 1802). The learned Magistrate held that the order was not justified by Section 27 of the City of Bombay Police Act. It is urged on behalf of the Crown that even if the order was not justified under Section 27 of the City of Bombay Police Act, the accused who was in service as a sergeant for eighteen months was bound to obey the order of the Commissioner, and by reason of a mistake of fact considered himself bound to obey that order and was, therefore, protected under Sections 76 and 79 of the Indian Penal Code. The precise order passed by the Commissioner is not before us and has not been proved before the Magistrate by legal evidence in the case.

12. The Magistrate, in our opinion, should investigate this complaint, take legal evidence, and decide whether the order passed by the Commissioner was legal, and whether, if it was not a legal order, the accused, by reason of a mistake of fact, felt himself bound to obey that order, and was entitled to the protection afforded by Sections 76 and 79 of the Indian Penal Code. If he comes to the conclusion that the accused is so protected, it will be open to him to acquit the accused. If, on the other hand, he comes to a contrary conclusion he will deal with the accused according to law.

13. I do not think that it is necessary to investigate the complaint under Section 353, Indian Penal Code, as the petitioner had gone to the Maidan voluntarily on an errand of her own, and the accused had no intention to interfere with the rights of the lawful guardian of the petitioner, if any. The complaint under Section 342, Indian Penal Code, will have to be investigated.

14. I would, therefore, set aside the order dismissing the complaint under Section 203 of the Criminal Procedure Code and direct the Magistrate to investigate the complaint under Section 342, Indian Penal Code, and deal with the case according to law.

**Murphy, J.**

15. The complainant was arrested for attending a flag salutation ceremony, which had been forbidden by the Commissioner of Police, and she alleged that on her arrest she and some other women were put into a van and taken some miles along the Thana Road, where they were left to find their own way home. A complaint was filed for wrongful restraint and kidnapping from

lawful guardianship. It is clear on the facts that they are not covered by the conditions which kidnapping from lawful guardianship require, and there only remains the offence of wrongful restraint,

16. The complaint was originally made against an unknown sergeant, but the name of the accused was supplied by the police authorities in the course of the trial, On receipt of the name, the Magistrate elected to hold an inquiry under Section 202, Criminal Procedure Code, and issued a notice on the accused, instead of process. The accused appeared and pleaded the orders of his superior officer and a mistake of fact under Sections 76 and 79 of the Indian Penal Code, and he was discharged by the learned Magistrate on the ground that his action was covered by the exceptions.

17. Now, it is a clear condition of the holding of an inquiry by a Magistrate, that he shall do so if in doubt as to the truth or falsehood of the complaint, as appears from the end of Sub-section (1) before the first proviso. The section is intended to protect the public from the harassment of reckless accusations; but once the truth of the facts alleged is admitted, the inquiry under Section 202 must clearly be at an end, and the proceedings then be transformed into a trial.

18. This is what has happened here, The facts alleged were admitted, and an exception was pleaded. It was then the duty of the Magistrate to proceed with the case as at a trial, and decide the plea of the exception on the merits, the burden being on the accused to show that he acted under a bona fide mistake of fact, thinking that the Commissioner of Police's order was one of deportation, a power which the Commissioner of Police has, under the City of Bombay Police Act, in certain circumstances, and after deciding on the validity or otherwise of the plea, to acquit the accused, or to convict him as the facts might require. But the learned Magistrate discharged the accused when the facts were admitted on the bare plea of the exception, and here I think that he was in error.

19. I agree, therefore, with the order proposed by the learned Chief Justice.

Cases Referred.

1(1926) I.L.R. 49 Mad. 918, F.B

2(1912) I.L.R. 40 Cal. 444

3(1920) I.L.R. 47 Cal. 818