

# **Surendra Kumar Tiwari vs State Of U.P. And Another on 10 August, 2018**

**Equivalent citations: AIRONLINE 2018 ALL 3450**

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Court No. - 15

Case :- CRIMINAL REVISION No. - 2379 of 2018

Revisionist :- Surendra Kumar Tiwari

Opposite Party :- State Of U.P. And Another

Counsel for Revisionist :- Shashank Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Kumar Singh-I,J.

1. Heard the arguments of learned counsel for the revisionist Shri Shashank Tripathi and learned A.G.A. Sri Prashant Kumar and perused the record.
2. The present criminal revision has been filed with a prayer to call for record and set aside the impugned judgment and order dated 16.4.2018 passed by Learned Special Judge, (POCSO)/ Additional Session Judge, Court No. 14, District Kanpur Nagar in Complaint Case No. 20 of 2015 (Km. Nandni Yadav Vs. Surendra Tiwari), under Sections 323, 354Ka, 504, 506 IPC & Section 3/4 of POCSO Act, P.S. Rail Bazar, District Kanpur Naga as well as entire proceedings of the present case.
3. The contention of the learned counsel for the revisionist is that the learned trial court has

committed error in rejecting the application of the revisionist under sections 227 Cr.P.C. dated 29/06/2016 wherein apart from the factual disputes, the legal objection raised, was that in view of the provision under sections 204 (2) of Cr.P.C. no summons or warrant can be issued to the accused unless list of prosecution witnesses is annexed therewith and further reliance is placed upon Dinesh Kumar Raizada vs Satya Narain and Another, reported in MANU/UP/1714/2014, 2014 (7) ADJ 506. Further in Para 16 of the said application it was also mentioned that summoning order dated 08/09/2015 was wholly illegal and not tenable in the eye of law, hence the entire proceeding of the case was liable to be turned down and that till the disposal of the said application, the proceedings were required to be suspended.

4. Perusal of the impugned order would indicate that the learned lower court has recorded therein that the complaint was presented on 30/07/2015, which was registered as complaint case under sections 323, 354-A, 504, 506 IPC and POCSO Act and after recording of statement of witnesses of the complainant side under sections 200 and 202 Cr.P.C., the revisionist - accused Surendra Tiwari was summoned under sections 323, 354 A, 504, 506 IPC and Section 3/4 POCSO Act to face trial vide order dated 08/09/2015 and simultaneously an order was also passed for the complainant to take steps. Being aggrieved by this order the present application under sections 227 Cr. P.C. has been moved stating therein that the present complaint has been moved as a counterblast to earlier application of the revisionist - accused and on the basis of those averments, mainly time had been sought in the present case. Further it is mentioned in the impugned order that earlier a first information report dated 28/09/2015, crime No. 259/2015 under sections 147, 148, 323, 386, 396, 504, 506 and 166 IPC, PS Rail Bazar, Kanpur Nagar was got registered by the accused against the father of the opposite party No. 2, therefore as a counterblast the present complaint case was initiated and that the O P No. 2 did not come with clean hand because no mention was made by her in respect of the above criminal case. Further it is mentioned that the complainant had not annexed any receipt of the registered post whereby complaint was said to have been sent by her to the police. Lastly, it was mentioned that the trial court has not complied with the mandatory provisions of sections 204 (2) Cr.P.C. which mandates that summons/warrant could be issued against the accused only when the complainant had filed a list of witnesses and that the accused was being falsely implicated due to enmity just to harass him and that complainant did not have any evidence to support the allegations made against the accused and therefore further proceedings should be stayed. He also mentioned in the impugned order that reliance was placed upon Dinesh Kumar Rizada's case (supra). Further court mentioned that a photocopy of the alleged FIR along with medico-legal report which was undated, were also filed. The learned trial court has observed that no such stay of proceedings was possible to be granted unless an order was obtained from higher forum such as High Court, because once summoning order has been passed and the trial begins, no stay could be granted. As regards the Dinesh Kumar Rizada's case (supra) it is mentioned that on the basis of the law laid down therein, the summoning order could not be set aside and that the revisionist was at liberty to file a revision against the said order, because there was no provision under criminal law to recall an order passed by a criminal court and accordingly the said application was rejected being not maintainable and case was fixed for evidence of the prosecution/complainant on 25/4/2018.

5. It may be mentioned here that the learned trial court has rightly held that in Dinesh Kumar Rizada's case (supra) it was held that the violation of the provision under sections 204 (2) Cr.P.C. did not mean that accused would not be summoned before the list of witnesses was filed, but it was clarified by this court that according to sections 204 (2) Cr.P.C. the summons/warrant to the accused shall be issued only when the list of prosecution witnesses has been filed and accordingly allowing the revision the impugned order passed by the Additional Sessions Judge, Kanpur Nagar in criminal revision was set aside and the Magistrate was directed to proceed according to law.

6. Further reliance is placed by the learned counsel for the revisionist on Ram Narain vs Vishamber Nath, 1959 lawSuit (P & H) 222, wherein the facts of the case are a great deal different from the facts of the present case, however the court has recorded its opinion that clauses (1-A) and (1-B) of Section 204 Cr.P.C. of Cr. P.C. 1898 (equivalent sections of Section 204 (2) and (3) of Cr. P.C., 1973) were meant for protection of the accused person and that their disregard was likely to be injurious to the accused, but at the same time it may be argued, that merely non-filing of a list of witnesses before the summons are issued and not attaching a copy of the complaint with the summons, are not matters, which by themselves, are calculated to seriously prejudice the accused, if a copy of the complaint is supplied to him as soon as he appears in court and if the required list of witnesses is also actually filed in court when the accused appears. It is further held that it would be permissible to argue that the language used in Section 204 (1-B) Cr.P.C. is neither negative not prohibitive nor exclusive. Furthermore, so far as filing a list of witnesses is concerned, being only time provision, it may be argued to have been intended to be merely directory, as filing of the list just after the issue of process may not cause any serious injury or wrong. Further it is held that Section does not say that if no list is filed before the accused is summoned, then none can be filed later. It was further held that there does not seem to be any legal bar even to the filing of supplementary list of witnesses, though the reliability and trustworthiness of the supplementary list of witnesses may be open to consideration. Further it is held that the question is undoubtedly not free from difficulty but after considering the matter from all aspects, it could be said that provision of clause (1-B) of Section 204, Cr.P.C., is merely directory in the sense that failure to attach a copy of the complaint with the summons does not by itself completely invalidate or nullify the issue of process. The court's decision to issue process cannot be deemed to have been necessarily and automatically invalidated by the omission of the ministerial officers to attach a copy of the complaint with the summons. Supply of such a copy to the accused on or before his appearance, may cure the defect under sections 537 Cr.P.C.. Therefore the case law relied upon by the learned counsel for the revisionist himself is not supporting his argument that for want of attaching list of witnesses with summons sent to the accused would invalidate the summoning order.

7. The other law relied upon by the learned counsel for the revisionist is Keshava Murthy vs Veeraiah, 1987 lawSuit (Karnataka) 97, in which the respondent had lodged a written complaint against the petitioners before the Magistrate alleging that each of the petitioners had committed an offence punishable under section 500 of IPC. On the basis of statement of the complainant and documentary evidence the petitioners-accused were summoned under Section 500 IPC and were directed to appear before court to answer the charge. The contention of the learned counsel for the petitioners - accused was that provisions under Section 204 (2) of the Code were not followed, which were mandatory and therefore the proceedings against them were liable to be quashed. The court

held that the breach of law could be corrected without prejudice to the case of the petitioners - 1 and 2 and on the facts and circumstances of the case the court found that it would be in the fitness of things to send back the matter to the Metropolitan Magistrate concerned to summon the petitioners by issuing summons to them in accordance with the provisions under Section 204 Cr.P.C. ensuring that the respondent furnished list of witnesses, if any. It may be observed here that even in this case the proceedings were not quashed, rather a direction was issued that fresh summons be issued by the concerned court along with the list of witnesses, which amounts to nothing but providing copy of list of witnesses to the accused. Therefore even in this case the proceedings were not quashed by the court for non-observance of the provisions of Section 204 (2) Cr.P.C.

8. This matter was considered at great length in the case of Smt. Pramila Mahesh Shah vs Employees State Insurance and another, 2002 Cr.L.J. 2454, in which Bombay High Court (Nagpur Bench) came across a similar matter wherein question arose as to whether provisions of Section 204 (2) and 204 (3) Cr. P.C. were mandatory and after considering a large number of case laws cited from the side of the applicant: Chaturbhuj vs Naharkhan, 1958 Cri.L.J. 50; State of Bombay vs Janardhan and others, 1960 Cri.L.J. 1569; Ram Narain vs Bishamber Nath, AIR 1961 Punjab 171; Subol Mondal vs The State, 1974 Cri.L.J 176; Patel Dhanji Mavji Vs Gadhvi Govind Jiva and Anr., 1974 Cri.L.J. 241 Guj), Bhiku Yeshwant Dhanghal Vs Baban Maruti Barate, 2001 Cri.L.J. 295 (Bom.) and from the side of learned and APP reliance is placed upon Mowu vs The Superintendent, Special Jail, Nowgong, Assam, (1971) 3 SCC 936; Kanhu Ram Vs Durga Ram, 1980 Cri.L.J. 518 (Him. Pradesh); Madhavan Nambiar Vs Govindan, 1982 Cri.L.J. 683 (Ker.); & Bhalchandra G. Naik vs Suresh Melvani, 1999 Cr.L.J. 1908, the court held in paragraph 23 , 28 & 29, which are as follows: -

"23. In Shashi Nair vs RC Mehta (1982 (1) Bom CR 358), this court, after considering almost all judgements available on the subject and which have been quoted above, reiterated the position of law laid down by this court in Madhaorao Pandurang vs Yeshwant (1969 Mah LJ (NOC) 21) with reference to Section 204 (2) of Criminal Procedure Code 1973. It is pertinent to note that in Madhaorao Pandurang vs Yeshwant (supra) and Shashi Nair vs R C Mehta (supra), it has been laid down that the jurisdiction of Magistrate under Section 204 (1) to issue summons or warrant in the first instance, as the case may be, if he is satisfied that there was sufficient ground for proceeding cannot be taken away by the failure on the part of the complainant to file a list of prosecution witnesses.

28. Thus, a survey of law on the subject goes to show that provisions of Section 204 (3) are directory in nature. A copy of the complaint should accompany the summons or warrant, as the case may be, and the Magistrate should ensure the compliance of these provisions though it is directory in nature. Nevertheless, the non-compliance of Section 204 (3) does not vitiate the issue of process and the copy of the complainant can be furnished to the accused before the proceedings actually start. In the case under consideration, the copy of the complaint admittedly was furnished to the applicant at the stage of bail and before the proceedings had actually started. Therefore, there is no merit in this ground raised by the petitioner.

29. Coming to Section 204 (2) of Criminal Procedure Code, I must say that non-compliance of this provision does not affect the jurisdiction of the Magistrate either to issue process or to try the case. This view has been taken by the Apex court in Noorkhan vs State of Rajasthan (1964 (1) Cri. L.J. 167); Madhaorao Pandurang vs Yeshwant (supra); Abdullah Bhat vs Gulam Mohd.Wani (1972 Cri. L.J. 277) (J and K) (FB); and Shashi Nair vs R C Mehta (supra). The procedural laws are hand made of justice and the question of prejudice is of paramount consideration in respect of breach of procedural provisions. Therefore, even if it was to be held that the provisions of Section 204 (2) are mandatory, that, by itself, would not vitiate the issue of process or the jurisdiction of the court and where the matter is at the initial stage, directions can be given to furnish the copy of list of witnesses, if any, before the proceedings actually commenced. The stage of the proceedings is relevant to determine the prejudice, if any, caused to the accused. In the case under consideration, the substantive proceedings had not yet started. Therefore, in the circumstances, directions to the complainant to supply copy of witnesses, if any, within a period of four weeks from the receipt of the copy of the order of the trial court would be considered as sufficient compliance of Section 204 (2) of Criminal Procedure Code, 1973."

9. This court finds itself fully in agreement with the view taken by the Bombay High Court in the above-mentioned Pramila Mahesh Shah's case in respect of the provision of Section 204 (2) and (3), that these are the provisions which are directory in nature and that the court would have to see whether breach of these provisions would cause any prejudice, which is required to be adjudged on the basis of the stage of proceedings in a particular case. At the initial stage if it is found that the accused has been summoned without providing him a copy of complaint and list of witnesses being relied upon by the complainant, the same can be directed to be provided to him within a reasonable time by the complainant as soon as the accused appears before court and that merely because the list of witnesses and a copy of complaint have not been provided as mentioned in the above provisions would by itself not vitiate the proceedings depending upon the stage of the proceedings. In the case at hand the record reveals that the revisionist - accused was summoned to face trial under afore- mentioned sections on the basis of evidence recorded under sections 200 and 202 Cr. P.C. .The order sheet dated 28/1/2016 reveals that accused was arrested on NBW and on bail application being moved by him he was allowed to be released on bail. In order sheet dated 7/5/2016 it is recorded that the file was received by the trial court by transfer with the date fixed for statement under Section 244 Cr. P.C. to be recorded, but the transferee court has mentioned that provisions of Section 244 Cr. P.C. were not applicable in this case as it was required to be tried under Section 228 Cr. P.C., simultaneously time was allowed to both the sides to place their viewpoint in this regard and thereafter on 9/6/2016 the impugned application 32 Kha appears to have been moved by the revisionist - accused under sections 227 Cr. P.C. which has been disposed of by the impugned order whereby the same has been rejected. The entire order-sheet does not reveal that the charge has been framed against accused so far, hence it appears that the stage as of now is that accused appeared before the trial court and has got himself bailed out and it being Sessions trial, it has to proceed under Chapter XVIII of Cr. P.C. which contains section 225 to Section 237, which provides under Section 227 the provision of discharge which is as follows: "if, upon

consideration of the record of the case and documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing." The discharge sought on the ground of non-compliance of Section 204 (2) Cr. P.C. seems untenable in the light of above position of law. However it would be in the fitness of things to direct the trial court to provide the list of witnesses within a period of four weeks from the date of passing of this order, as it is initial stage of the case, and no prejudice would be caused to the accused if he is provided a copy of the list of witnesses at this stage to enable him to contest the case on merits. Whatever other contents are there in the said application, relate to the factual aspect of the case, which cannot be seen in these proceedings.

10. This revision is disposed of accordingly with the direction to the trial court to provide a list of witnesses to the revisionist - accused within a period of four weeks from the date of passing of this order. The revisionist - accused shall place a certified copy of this order before the court concerned within two weeks from the date of order positively. Thereafter, the trial court shall decide the case in accordance with law. Since this revision is being disposed of finally without providing opportunity of hearing to the opposite party No. 2, the opposite party No. 2 shall be at liberty to approach this court in case it feels prejudiced by this order. This revision has been disposed of finally because it involved only legal aspect.

Order Date :- 10.8.2018 A.P. Pandey