

**Hare Ram Singh and ors. Vs. State of Bihar and anr.**

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**Court :** Patna

**Decided On :** Oct-27-2005

**Judge :** Chandramauli Kr. Prasad, J.

**Acts :** Indian Penal Code (IPC) - Sections 34 and 302; Code of Criminal Procedure (CrPC) , 1974 - Sections 164, 164(1), 184 and 311

**Appeal No. :** Cr. Misc. No. 12317 of 2003

**Appellant :** Hare Ram Singh and ors.

**Respondent :** State of Bihar and anr.

**Advocate for Def. :** Ran Vijay Singh and Maya Nand Jha, Addl, P.P.

**Advocate for Pet/Ap. :** Shyameshwar Dayal, Adv.

**Disposition :** Application allowed

**Judgement :**

**Chandramauli Kr. Prasad, J.**

1. This application has been filed for quashing the order dated 12-12-2002 passed by the Chief Judicial Magistrate, Begusarai in Teghra P. S. Case No. 103 of 2001 whereby he differed with the conclusion of the Investigating Officer and took cognizance of the offence under Section 302/34 of the Indian Penal Code against

the petitioners.

2. Short facts giving rise to the present application are that on the basis of the report given by Opposite Party No. 2 Sumit Kumar Singh Teghra P. S. Case No, 103 of 2002 was registered under Section 302/34 of the Indian Penal Code, hereinafter referred to as 'IPC'. The first information report was lodged against unknown. The police, after investigation, submitted charge-sheet against one accused, namely, Sita Ram Bind alias Sita Ram Mahto. The informant filed protest petition alleging the complicity of the petitioners in the crime.

3. It is relevant here to state that during the course of investigation statement of five persons namely Ram Bilas Singh, Ram Udai Singh, Hari Nandan Sharma, Sagar Singh and Yogendra Singh were recorded under Section 164 of the Code of Criminal Procedure. However, statements of these persons were not recorded at the instance of the Investigating Officer. The informant filed a petition on 13-11-2002 praying to take cognizance of the offence against the petitioners also inter alia, on the ground that the Investigating Officer did not include the statements of the persons recorded under Section 164 of the Code of Criminal Procedure, for short referred to as 'the Code'. According to the informant, from the statements of the witnesses recorded under Section 164 of the Code' it is clear that the petitioners have committed the offence under Section 302/34 of the IPC. The learned Magistrate on perusal of the statements of the witnesses examined under Section 164 of the Code as also the material in the police case diary differed with the conclusion of the Investigating Officer and being prima facie, satisfied that the statements recorded under Section 164 of the Code and the material collected during the course of investigation show the petitioners' complicity in the crime took cognizance of the offence under Section 302/34 of the IPC.

4. Mr. Shyameshwar Dayal, appearing on behalf of the petitioners very fairly submits that the Magistrate while considering the final form is not bound by the opinion of the Investigating Officer and can differ with its conclusion and take cognizance of the offence against such persons who have not been sent up for trial. However, he contends that for that purpose, the learned Magistrate is to examine the materials collected during the course of investigation and he cannot

consider the statements of the witnesses recorded under Section 184 of the Code, who had not been examined at the instance of the Investigating Officer. He points out that in the present case, the learned Magistrate while differing with the conclusion of the Investigating Officer, had taken into consideration the statement of such witnesses recorded under Section 164 of the Code, who have not been examined at the instance of the Investigating Officer. In support of the submission, he has placed reliance on a judgment of the Supreme Court in the case of *Jogendra Nahak v. The State of Orissa*. : 1999 CriLJ3976 and my attention has been drawn to the following paragraphs of the said judgment :.22. -- If a Magistrate has power to record statement of any person under Section 164 of the Code, even without the Investigating Officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the Investigating Officer would be disinclined to record statements of willing witnesses and, therefore, such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightway approach a Magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the Court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the Investigating Officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the Court with a request to record their statements under Section 164 of the Code.

23.-- On the other hand, if door is opened to such persons to get in and if the Magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate Courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the Magistrate under Section 164 of the Code. It is not part of the investigation to open

up such a vista nor can such step be deemed necessary for the administration of justice.

24.-- Thus, on a consideration of various aspects, we are disinclined to Interpret Section 164(1) of the Code as empowering a Magistrate to record the statement of a person unsponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it.

(Underlining mine)

5. Dr. Maya Nand Jha, Additional Public Prosecutor appearing on behalf of the State and the Counsel representing opposite party No. 2, however, contend that the investigating agency had gone in collusion with the accused persons and in that circumstances, witnesses got themselves examined under Section 164 of the Code and as such, the learned Magistrate did not err in considering their statements while differing with conclusion of the Investigating Officer and taking cognizance of the offence. In any view of the matter, they contend that the learned Magistrate, while passing the impugned order, had not only considered the statements recorded under Section 164 of the Code but also materials collected during the course of investigation and form part of the final form.

6. Having appreciated the rival submission, I find substance in the submission of Mr. Dayal and the authority relied on clearly supports his submission. Undisputedly, the learned Magistrate, while differing with the conclusion of the Investigating Officer had taken into account the statements of such witnesses who were examined under Section 164 of the Code and were not sponsored by the investigating agency.

7. In view of the decision of the Supreme Court in the case of Jogendra Nahak (1999 Cri LJ 3976) (supra), there is no escape from the conclusion that the Magistrate is not entitled to record the statement of such persons who is not sponsored by the investigating agency but knocks at his door with a request to record his statement under Section 164 of the Code. Further such statements

cannot be permitted to remain on the record. Undisputedly, the learned Magistrate, while differing with the conclusion of the Investigating Officer has referred to and placed reliance on the statements of the witnesses examined under Section 164 of the Code. It is well settled that any decision arrived at on consideration of material not brought on record in accordance with law vitiates the order. The impugned order of the learned Magistrate, thus, suffers from an apparent error.

8. It is relevant here to state that the learned Magistrate, while passing the impugned order, had also considered the materials collected during the course of investigation. As the learned Magistrate had passed the order considering the irrelevant materials, same vitiates his order. He shall now proceed to pass order taking into account the materials collected during the course of investigation and such materials admissible In law ignoring the statements recorded under Section 164 of the Code.

9. In the result, this application is allowed. The impugned order dated 12-12-2002 is quashed with the direction aforesaid.

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