

Jitendra Kumar Agarwalla Vs. the State of Bihar and anr.

Jitendra Kumar Agarwalla Vs. the State of Bihar and anr.

SooperKanoon Citation : sooperkanoon.com/132414

Court : Patna

Decided On : Feb-29-2000

Judge : Anil Kumar Sinha, J.

Acts : Arms Act - Sections 27; Code of Criminal Procedure (CrPC) , 1974 - Sections 151, 154(4), 155(3), 156, 156(3), 173, 173(1), 190, 190(1), 192, 200, 202, 203 and 204; Indian Penal Code (IPC) - Sections 34, 114, 192, 302, 307 and 395

Appeal No. : Criminal Misc. Case No. 4039 of 1998 (R)

Appellant : Jitendra Kumar Agarwalla

Respondent : The State of Bihar and anr.

Advocate for Def. : K.K. Jhunjhunwala, A.P.P. and M.M. Pal, Adv. for No. 2

Advocate for Pet/Ap. : Kameshwar Prasad, Sr. Adv., Sunil Kumar Sinha, Rajesh Kumar and D.N. Bharati, Advs.

Disposition : Revision dismissed

Judgement :

Anil Kumar Sinha, J.

1. The present application has been filed against the order dated 13-12-1996 passed by the Chief Judicial Magistrate, Dhanbad, in C.P. Case No. 831 of 1992, whereby and whereunder he took cognizance against the petitioner under Sections 302/307/114 of the Indian Penal Code.

2. For better appreciation some of the relevant facts concerning this application may be stated in brief. On 16-2-1992 a case under Sections 302/307/114/34 of the Indian Penal Code readwith Section 27 of the Arms Act was registered at Dhanbad (Saraidhella) police station No. 117 of 1992 against the petitioner and three unknown persons on the basis of the statements of Sunit Kumar Roy Choudhary alias Sunit Roy Choudhary and after investigation the police submitted final form in the case on 22-6-1992, in which the accusations against the petitioner and one Indra Mohan Lal were found to be false. Before acceptance of final form a protest petition in the form of complaint was filed by the informant/complainant against the petitioner and Indra Mohan Lal alleging therein that the I.O. did not investigate the case in proper manner and never came to record the statements of the witnesses and the accused persons were seen moving with I.O. and high officials of the police Department and, therefore, the informant/complainant entertained a reasonable belief that the police has been gainedover by the accused persons and final report has been submitted by the police to save the accused persons and prayer was made that cognizance may be taken against the accused persons under Sections 302/307/114/34 of the Indian Penal Code read with Section 27 of the Arms Act.

3. The learned Chief Judicial Magistrate, Dhanbad, heard the informant/complainant and the accused persons as well as the A.P.P. on the final form submitted by the police as well as the protest cum complaint petition which was filed by the informant/complainant together and by his detailed order dated 19-12-1992 accepted the final form submitted by the police as there was no material in the case diary to proceed against the petitioner and one Lal Saheb, but in the same order while considering the protest-cum-complaint petition filed by the informant he held that the protest petition should be treated as complaint and directed the complainant to appear in his Court for his examination on S.A. and the examination of the witnesses and fixed the date on 6-1-1993 for the said purpose.

4. It may be pointed out that no revision was filed by either of the parties against the order dated 19-12-1992 passed by the learned Chief Judicial Magistrate, Dhanbad. Thereafter, the complainant was examined on S.A, and enquiry under Section 202 of the Code of Criminal Procedure proceeded on the protest petition filed by the informant/complainant on 4-11 -1992. After completing the enquiry, the learned Chief Judicial Magistrate, vide his detailed order dated 5-7-1993 dismissed the protest-cum-complaint petition under Section 203 of the code of Criminal Procedure, for which he assigned reasons in his order. Being aggrieved with the said order dated 5-7-1993 whereby the protest-cum-complaint filed by the informant/complainant was dismissed, the informant/complainant preferred a revision in the Court of Sessions Judge, Dhanbad, being Cri. Rev. No. 173 of 1993, which was Ultimately disposed of by Sri Ram nath Mahto, IVth Additional Sessions Judge, Dhanbad, by his order dated 20-5-1995, whereby he remanded back the case to Chief Judicial Magistrate, Dhanbad, directing him to make further enquiry into the complaint. Accordingly, the learned Chief Judicial Magistrate made further enquiry into the matter and by his reasoned order dated 13-12-1996 took cognizance against the petitioner and another accused under Sections 302/307/114 of the Indian Penal Code and transferred the case to the file of Sri S. C. Singh, Judicial Magistrate, Dhanbad for expediting the commitment proceedings.

5. It appears from the order dated 13-12-1996 passed by the learned Chief Judicial Magistrate, Dhanbad, that while taking cognizance against the petitioner and another accused the additional point which was with him was that the post-mortem report and the injury report were not on record when his predecessor dealt with the matter while dismissing the complaint by his order dated 5-7-1993, but the postmortem report and the injury report were brought on record, which disclosed that actually the murder of K. K. Roy Choudhary had taken place and the complainant had also sustained injury on his person and the complainant as also the witnesses had supported the complicity of the petitioner and accused Lal Saheb Singh in the alleged crime.

6. The learned counsel for the petitioner argued before me that the impugned order dated 13-12-1996 is manifestly illegal and cannot be sustained for the

reasons that once the Magistrate accepts final form and discharges the accused, he cannot act upon the protest-cum-complaint petition. The learned counsel relied upon a decision of this Court in the case of Uma Shankar Singh v. The State of Bihar 1981 BLJ 266 : 1981 Cri LJ NOC 118, Where it has been held by a Bench of this Court that :-

Where the Police submitted a final report in a case initiated on FIR and the informant had filed a protest petition, the Magistrate, if after considering the final report accepts it, has no jurisdiction to proceed with the protest petition and summon the accused.

His Lordship placed reliance on the case of Tula Ram v. Kishore Singh reported in AIR 1977 SC 2401 : 1978 Cri LJ 8 and the case of Bindeshari Prasad Singh v. Kali Singh AIR 1977 SC 2432 : 1978 Cri LJ 187. The ratios decided in the case of Tula Ram (Supra) were as follows (at p. 2406 of AIR) :

(1) That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is, to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

(2) Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives;-

(a) he can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnessses.

(b) the Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) the Magistrate can postpone the issue of process and direct any inquiry by any other person or an investigation by the police.

(3) In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

(4) Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above.

7. So far the case of Bindeshwari Prasad Singh 1978 Cri LJ 187 (SC) (supra) is concerned, it was held by the Apex Court that subordinate Criminal Courts have no inherent powers unlike Section 151 of the Code of Civil Procedure and, therefore, it was held in the facts and circumstances of that case that the learned Magistrate had absolutely no jurisdiction to recall his orders whereby he dismissed the complaint and the remedy of the respondent was to move the Sessions Judge or the High Court and in that context, it was observed that after passing the order dated 23-11-1968, the sub-Divisional Magistrate became functus officio and had no power to review or recall his order on any ground whatsoever, with all respects, I must say that the principles enunciated by the Apex Court in the case of Bindeshwari Pd. Singh has got no application in the facts and circumstances of the instant case because the facts of the present case are entirely different.

8. The learned counsel for the petitioner also relied upon a decision of this Court, reported in 1981 Cri LJ 795 Bhuneshwar Prasad Sinha v. The State of Bihar where His Lordship held that:

Whether the final report by police holding the case against accused persons to be untrue, was accepted by the Magistrate earlier than the complaint petition was filed against the accused, the Magistrate would not be justified in taking cognizance on the basis of the complaint petition in respect of the same facts

constituting the offence which were mentioned in the final form when a judicial order was passed by accepting the final form.

His Lordship placed reliance on the decision reported in AIR 1968 SC 117 : 1968 Cri LJ97.

9-10. With all respects, I must say that the aforesaid decision in the case of Bhuneshwar Prasad Sinha v. State of Bihar 1981 Cri LJ 795 (Patna) is also not applicable in the facts and circumstances of the instant case, because, His Lordship has clearly held that the Magistrate would not be justified in taking cognizance on the basis of the complaint in respect of the same facts constituting the offence which were mentioned in the final form. As such, in order that the decision is made applicable in the instant case, it is necessary that the complaint petition must be filed on the same facts which were mentioned in the final form. Meaning thereby that if the facts in the final form are different than the facts stated in the complaint petition, the Magistrate is not debarred from taking action on the complaint petition for the simple reasons that the complaint petition disclosed some more facts and different facts which were not the subject matter of investigation by the police.

11. It necessarily follows that if the facts as contained in the final form or in the case diary are exactly same and similar in the subsequent complaint petition filed by the complainant and if the Magistrate has accepted the final form, he cannot proceed to act upon the complaint petition on the same and similar fact when a judicial order has been passed accepting the final form.

12. It would be pertinent to point out here that in the protest-cum-complaint petition it was clearly alleged that the police never come to examine the witnesses of the occurrence and the I.O. of the case colluded with petitioner and another accused Lal Saheb Singh and they were seen moving together. In other words, there was allegation that the police has been gained over by the accused persons and final form has been submitted to save the accused persons. The complainant stated various overt acts committed by the accused persons showing the involvement of the petitioner and Lal Saheb Singh at the time of the alleged occurrence and prayed to the Court to take cognizance on the basis of the complaint petition filed

by him.

13. The learned counsel appearing for the opposite party No. 2 submitted before me that there is no illegality or impropriety in the impugned order passed by the learned Magistrate, inasmuch, as the Magistrate was fully competent to hold enquiry and issue process against the accused persons even after accepting the final form submitted by the police. In support of her contention Mrs. Pal, counsel appearing for the opposite party No. 2 relied upon a decision reported in the case of Chandra Shekhar Chaudhary v. Raj Kishore Jha 1982 BLJ 627, in which their Lordships have dealt with the matter in detailed by referring various decisions of the Apex Court and finally held that:-

(1) When the complaint is sent to the police under Section 156(3) and in the meantime a protest petition is filed or in course of police investigation a protest petition is filed and is kept pending, the Magistrate after disposing of the case on receipt of the police report, is fully competent to deal with the complaint. It is not at all necessary to keep the matter pending on receipt of the police report and pass the order on the protest petition on receipt of the police report together for the reasons mentioned above; (2) if a protest petition in the nature of complaint is filed after the final form is accepted then it must be some fresh materials or it must be shown that the previous order was passed on incomplete record or a misunderstanding on the nature of the complaint or it was manifestly absurd, unjust or foolish or were new facts which could not, with reasonable diligence, be brought on the record of the previous proceeding as held in the case of Pramatha Nath Talukdar v. Saroj Ranjan AIR 1962 SC 876 : 1962(1) Cri LJ 770.

In paragraph 5 of the judgment their Lordships have observed that:-

What will be the procedure if the police submits final form and there is a protest petition filed by the informant during the pendency of the investigation which is kept pending and has ordered to be considered after the final form is received, that is the point to be decided in this case.

13A. In other words, can the Magistrate, after accepting the final report and discharging the accused persons, has the power to deal with the protest petition,

hold enquiry, examine witnesses and then issue process against the accused persons or even direct an enquiry by any other person or investigation by the police. The answer must be in the affirmative. The concept, which in my opinion, creates all the confusion that when the complaint is filed and is sent to the police for investigation under Section 156 of the Code or a protest petition is filed during the pendency of the police investigation and is kept pending because the Magistrate refused to act on the petition and, therefore, that petition disappears is totally incorrect. In my considered opinion it does not amount to total effacement of the complaint and the Magistrate will be perfectly justified to act under Section 202, 203 and 204 of the Code. I am completely supported by the decision of the Supreme Court in the case of H.S. Bains v. The State (Union Territory of Chandigarh AIR 1980 SC 1883 : 1980 Cri LJ 1308 where on receipt of the complaint the Magistrate sent it to the police under Section 156 Sub-Clause (3) and on receipt of the final report differed from the same and took cognizance. In H. S. Bains case (supra) it was held as follows :

The mere fact that he had earlier ordered an investigation under Section 154 Sub-clause (4) and received a report under Section 173 will not have the effect of total effacement of the complaint and, therefore, the Magistrate will not be barred from proceeding under Sections 200, 202 and 204. Thus, a Magistrate who on receipt of a complaint orders an investigation under Section 155(3) and receives a police report under Section 173(1), thereafter can do one of three things :

- (1) He may decide that there is no sufficient ground for proceeding further and drop action;
- (2) He may take cognizance of the offence under Section 190(l)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;
- (3) He may take cognizance of the offence under Section 190(l)(a) on the basis of the Original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an enquiry under Section 202 if he thinks fit, thereafter, he may dismiss the complaint or issue process, as the case may be.

14. The point that whether the Magistrate becomes functus officio after he accepts the report submitted by the police under Section 173, Cr. P.C. has been answered by the Apex Court in the case of Smt. Nagawwa v. Veeranna Shivalingappa Konjaligi AIR 1976 SC 1947 : 1976 Cri LJ 1533 which was primarily the case relating to the ambit and scope of Section 202 and 204 Cr. P.C. In the case before their Lordships the police had submitted charge sheet against some persons on which cognizance had been taken by the Magistrate and thereafter the Magistrate acted on the complaint-cum-protest petition against those persons who were not sent up for trial by the police and the order of the Magistrate was found to be justified by the Apex Court which in its own turn will meet the point raised by the learned counsel for the petitioner that the Magistrate could not have acted on the protest-cum-complaint petition if he had accepted the final report submitted by the police. Similar view was expressed in the case of Chandra Shekhar Chaudhary v. Raj Kishore Jha 1982 BLJ 627. Therefore, in my considered view the Magistrate does not become functus officio if he accepts the final form and it is not correct to say that he could not have acted on the complaint petition to make enquiry under Section 202, Cr. P.C. when the protest-cum-complaint petition unfolded new facts which were not the subject matter of the enquiry by the police or were not present in the case diary and the protest petition was filed on the ground that the order passed by the Magistrate on the basis of the final form was manifestly unjust and the real facts were not investigated or brought in the case diary by the police. It is also not correct to say that if the Magistrate accepts the final form and discharges the accused his order can only be interfered with by the superior Courts and the Magistrate has got no jurisdiction to act upon the protest-cum-complaint petition.

15. In the case of Chandra Shekhar Chaudhary v. Raj Kishore Jha 1982 BLJ 627 their Lordships have differed with the views expressed by the learned single Judge in the case of Bindeshwari Singh v. State Cr. Misc. No. 262 of 1979, decided on 23-5-1980, where it was held that:-

Having discharged the petitioners the learned Magistrate was wrong in proceeding to summon them on the basis of the protest petition. Since protest petition was already on the record when the final form was received, he should have refrained from passing any order on the final form if he missed to proceed with the complaint

or he should have considered the final form and could have either discharged the accused or summon them straightway for trial. He could not have done both as he has done in this case. On this view the impugned order is entirely without jurisdiction and is fit to be quashed.

While differing with the aforesaid view expressed by the learned single Judge their Lordships observed in the decision referred to above 1982 BLJ 627, which may usefully be requoted hereunder :-

I am unable to subscribe to this view which is in direct conflict with the decision of the Supreme Court which has been discussed earlier. If that position is accepted then the Magistrate has to consider the final report also at the time of disposing the protest petition and in that event the Court is bound to refer to some of the materials referred to in the case diary which will certainly have some bearing in the mind of the Court while disposing of the protest petition. This will be an extraneous matter as held by these Courts in the case of Ram Kumar Pandey v. The State of Bihar 1979 BBCJ 293. Again if the final report is considered after this disposal of the protest petition then it can be very well argued that the Magistrate had already expressed his mind and, therefore, the acceptance of the final form was a mere formality and without the application of the judicial mind. In my considered opinion, therefore, the two proceedings are separate and have to be dealt with separately and in that view of the matter, that case has not been correctly decided. Thus, I am satisfied that the Magistrate was quite competent to deal with the protest petition which was filed on 23rd February, 1980 and was kept pending. The other submission of the learned counsel for the petitioners that Section 395 of the Indian Penal Code was also mentioned in the protest petition and, therefore, the Magistrate could not have transferred it under Section 192 and should have dealt with himself. This submission is also devoid of any substance and must be rejected. Simply by mentioning Section 395 of the Indian Penal Code where the allegations were similar to the original petition of complaint the jurisdiction of the Magistrate cannot be ousted. It is well settled that it is the substance of the allegations which has to be seen in order to ascertain what offences have been made out and, therefore, the Sections mentioned will not at all be relevant. Of course, in course of trial if it is found that a graver offence is committed it will

always be open to the Court concerned to commit the accused persons to stand their trial before the Court of session.

16. In the same judgment their Lordships held that :-

On careful consideration of the points, which have been raised in this application, and after hearing the learned counsel for the parties and after carefully going through the decisions cited at the Bar it must be held, (1) when the complaint is sent to the police under Section 156(3) and in the meantime a protest petition is filed or in course of police investigation a protest petition is filed and is kept pending, the Magistrate after disposing of the case on receipt of the police report, is fully competent to deal with the complaint. It is not at all necessary to keep the matter pending on receipt of the police report and pass the order on the protest petition and the police report together for the reasons mentioned above, (2) If a protest petition in the nature of complaint is filed after the final form is accepted then it must be some fresh materials or it must be shown that the previous order was passed on incomplete record or a misunderstanding on the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, be brought on the record of the previous proceeding.

17. Having regard to the peculiar facts and circumstances of the present case, I am of the view that the decision given in the case of Chandra Shekhar Chaudhary v. Raj Kishore Jha 1982 BIJ 627 is fully applicable in the instant case and, accordingly, I hold that even after accepting the final form by the impugned order, the learned Magistrate was fully competent to take cognizance on the protest-cum-complaint petition filed by the informant/complainant and he was also justified to hold enquiry under Section 202 of the Code of Criminal Procedure and the acceptance of final form was no bar to him for taking action on the protest-cum-complaint petition, because the complaint-cum-protest petition disclosed additional facts which were not present in the police report submitted by the police under Section 173 of the Code of Criminal Procedure. Therefore, I am of the view that there is no illegality or impropriety in the order dated 13-12-1996, passed by the learned Magistrate in C.P. Case No. 831 of 199 whereby he issued .notices to the

accused persons for their appearance for facing the trial on the basis of the enquiry held by him under 5. 202 of the Code of Criminal Procedure.

18. In the result, therefore, I find no merit in this revision application, which stands dismissed.

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