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Court : Patna

Decided On : Aug-12-2004

Judge : Mridula Mishra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161 and 209

Appeal No. : Cri. Misc. Nos. 13771, 21802 and 22245 of 2003

Appellant : Ajay Kumar Singh and ors.

Respondent : State of Bihar and anr.

Judgement :

Mridula Mishra, J.

1. All the aforesaid three applications arise out of the order passed in Silao (Rajgir) P.S. Case No. 316 of 1996.

2. Cr. Misc. No. 13771 of 2003 and Cr. Misc. No. 22245 of 2003 have been filed for quashing the order dated 16.4.2003, passed by the Judicial Magistrate, 1st Class, Bihar Sharif by which it has been directed that the statement of four witnesses recorded under Section 164 of the Criminal Procedure Code (hereinafter referred to as the Cr PC) should be reconstructed on the basis of photostat copy of the statement recorded under Section 164, Cr PC and produced by the informant. Cr. Misc. No. 21802 of 2003 has been preferred for quashing the

order dated 3.6.2003, passed by the Judicial Magistrate, 1st Class, Biharsharif, whereby the case of the petitioner have been committed to the Court of Sessions Judge, Nalanda at Biharsharif without complying the mandatory provisions contained in Section 207, Cr PC.

3. Petitioners are named accused in the FIR, for offences under Sections 452, 323, 324, 307, 302 and 34 of the Indian Penal Code and 27 of the Arms Act. Cognizance has been taken under Sections 302, 307, 324 and 34 of the Indian Penal Code and 27 of the Arms Act. Thereafter an order was passed on 15.12.1999 by which the case was committed to the Court of Sessions. This order was challenged by filing Cr. Misc. No. 2696 of 2000 on the ground that without complying the mandatory provisions in Section 207, Cr PC and without supplying the police papers to the accused persons, the case has been committed to the Court of Sessions. The order dated 15.12.1999 was quashed and the case was remitted back with the direction to serve police papers to the petitioners as required under Section 207, Cr PC and only thereafter the case be committed to the Court of Sessions.

4. Counsel for the petitioner submits that in compliance of the direction of this Court the Court made endeavor to supply necessary documents to the accused as required under Section 207, Cr PC. The statement of four witnesses recorded under Section 207, Cr PC. The statement of four witnesses recorded under Section 164, Cr PC were since not available on the record the Investigating Officer was asked to supply the same. The Investigating Officer also informed his inability to supply the statement of witnesses recorded under Section 164, Cr PC as the statement of the witnesses under Section 164, Cr PC was not recorded at the instance of the Investigating Officer, but it was recorded at the instance of the informant. The Judge Incharge, Administration, Civil Court, Nalanda directed the Judicial Magistrate to re-construct lost documents. The informant thereafter filed a petition annexing copies of the statement of four witnesses recorded under Section 164, Cr PC for re-construction of the record. By order dated 16.4.2003 the Judicial Magistrate allowed the application of the informant. This order has been challenged by the petitioners on the ground that serious prejudice and in justice has been caused to the petitioners as the order has been passed without

assigning/giving an opportunity to the petitioners. The photostat copy of the statement recorded under Section 164 Cr. PC has been filed by the informant. This photostat of the statement recorded under Section 164, Cr PC. Certified copy of the statement recorded under Section 164 is not available with the informant.

5. From the petition is it evident that the photo copy is the photo copy of the statement recorded under Section 164, Cr PC. The genuineness of such document is disputed by them even then the Court below has passed the order for reconstruction of the record on the basis of such suspicious document alleged to be the photo copy of the statement recorded under Section 164, Cr PC.

6. Counsel appearing for opposite party has admitted that the photostat copy of which has been supplied by the informant is the photocopy of the photocopy of the statement recorded under Section 164, Cr PC. Very fairly he has concerned that if the accused persons are going to be prejudiced by such reconstruction of the documents, in that case Section 164, Cr PC statement may be treated as part of the police record. There should not be reconstruction of this documents. No part should be allowed to look into this document in course of trial. Counsel for the petitioner has also consented for it.

7. Accordingly the order dated 16.4.2003 is quashed. The statement recorded under Section 164, Cr PC will not be reconstructed. The statement under Section 164, Cr PC will not form the part of the police record. The trial will proceed without there being any statement of four witnesses recorded under Section 164, Cr PC as the part of the police-papers. These two applications are disposed off with these observations.

8. Cr. Misc. No. 21802 of 2003 has been filed for quashing the order dated 3.6.2003. The order has been challenged on the ground that without complying the mandatory provisions under Sections 207 and 209, Cr PC the order of commitment has been passed. The order of commitment has been passed in absence of petitioner No. 2 which is illegal and violative of Section 209, Cr PC. The statement of witnesses recorded under Section 161, Cr PC have not been supplied which is mandatory under Section 207, Cr PC.

9. Under the provision of Section 207, Cr PC before passing an order of commitment the Magistrate has to supply the accused police report, the FIR recorded under Section 154, Cr PC. The statement recorded under sub-section 3 of Section 161, the confessional statement, if any, recorded under Section 164, Cr PC and any other documents or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.

10. From the perusal of the impugned order it transpires that the police papers were supplied to the petitioners and thereafter the order of commitment has been passed.

11. Counsel for the petitioners submits that the police papers which were supplied to them are not the papers as mentioned under Section 207 sub-section (3), Cr PC. The papers did not contain the statement recorded under sub-section (3) of Section 161, Cr PC. It is the case diary which is being supplied to them and it has been decided in many legal pronouncement that the accused is not entitled to look into the case diary and it can be perused by the Court or by the Investigating Officer.

12. Counsel for the petitioners had placed reliance on some decisions which, are 1991 (4) SCC 341. 1995 (4) SCC 181 and 1999 Cr LJ 2051. The submission of the counsel for the petitioner is that according to Police Manual Rule 170 (d), it is statutory responsibility of prosecution to supply the statement recorded under Section 161, Cr PC to the accused under Section 207, Cr PC. Under Rule 279 (d) of the Bihar Police Manual, it has been mentioned that the copies of the statement recorded under Section 161, Cr PC and other relevant documents or extract thereof on which the prosecution proposes to rely shall be furnished to the accused before commencement of enquiry or trial. Rule 170 of the Police Manual clearly indicates that the statement of witnesses shall not be recorded in case diary but on separate sheet of papers which shall be attached to the case diary. Section 172, Cr PC lays down that every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a

statement of the circumstances ascertained through his investigation.

13. Sub-section (2) of Section 172, Cr PC is to the effect that any criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. The aid which the Court can receive from the entry from such diary is confined to utilizing the information given therein as foundation for question to be put to the witnesses particularly the police witnesses and the Court may think it necessary (sic) use the entry to contradict the police officer who made them. Case diaries are only for the use of the Court. The document which is to be supplied to the accused is statement recorded under Section 161, Cr PC which according to Police Manual should be recorded on loose sheets of paper and in diary. Since case diary have been supplied it is not proper compliance of provisions under Section 207, Cr PC.

14. The decisions which have been relied by the petitioners simply say that the time of commitment under Section 207, Cr PC the police papers containing the statement of the witnesses as well as other documents should be supplied to the accused.

15. The submission made by the petitioners' counsel that the documents which are being supplied to him they are not the statement of the witnesses under Section 161, Cr PC but they are the case diary which cannot be looked into by him is without any substance. It does not seem to be correct. Rule 170 of the Police Manual enumerates that statements of the witnesses recorded on loose sheet of papers shall be attached to the case diary and reference of it should be made therein. The statement recorded under Section 161, Cr PC is the part of the case diary. The police papers supplied to the petitioners is valid compliance of provisions under Section 207, Cr PC. Another point raised by the petitioner is that the commitment of the case has been made in absence of the petitioner No. 2, as such provision under Section 209, Cr PC has not been complied. Section 209 of the Code read 'when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall

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(a) commit after complying with the provisions Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made.

16. From reading of Section 209 it follows that in absence of an accused no commitment order can be passed. Since the order of commitment has been passed in absence of petitioner No. 2, in that case so far impugned order is concerned with respect to petitioner No. 2 is quashed.

17. The Court below will fix a date for passing an order of commitment in respect of petitioner No. 2, on the date petitioner No. 2 will remain present in Court. If the petitioner No. 2 will not be present in Court on that every date, no further adjournment should be granted and his bail bond should be cancelled.

18. Accordingly all the three applications are disposed of. Since the case is of the year 1996, the Court below will take all recourse for speedy disposal of the case.

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