

Pawan Kumar Jaiswal Vs. State of Bihar

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Court : Patna

Decided On : Apr-28-1999

Judge : R.N. Sahay and S.K. Katriar, JJ.

Appeal No. : Crl. WJC No. 240 of 1999

Appellant : Pawan Kumar Jaiswal

Respondent : State of Bihar

Advocate for Pet/Ap. : Mr. Prasoon Sinha

Disposition : Petition Allowed

Judgement :

1. This is a writ petition for release of the petitioner from judicial custody in G.R. Case No. 1/99, arising out of Bairgania P.S. Case No. 1/99, currently pending in the Court of the Chief Judicial Magistrate, Sitamarhi, on the ground that his continued detention with effect from 31.3.99 is in the teeth of the provisions of Section 309(2) of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code').

2. Mr. Prasoon Sinha, learned Counsel for the petitioner, submitted that the present petitioner is a named accused in Bairgania P.S. Case No. 1/99, wherein allegations have been levelled against the petitioner and others under Sections 364, 323 and 307, read with Section 34 of the, I.P.C., as well as Section 27 of the

Arms Act. The same was started on the basis of the information of one Rina Devi, recorded on 1.1.99 with the Bairgania Police Station. In view of the issue arising in the writ petition, there is no need to go into the allegations set out in the FIR, a copy of which is marked Annexure-1 to the writ petition.

3. The police investigated into the allegations and submitted its charge-sheet on 31.3.99, along with the case diary, as is manifest from order dated 31.3.99 of the Court of the learned Chief Judicial Magistrate, Sitamarhi. The relevant extract of the order-sheet is marked Annexure-2 to the writ petition. The petitioner has also been charge-sheeted. It is manifest from a plain reading of the order-sheet (Annexure-2), particularly the order dated 12.4.99, that the petitioner herein was already in custody from before and his bail application was rejected by order dated 7.4.99, passed by the learned Sessions Judge, Sitamarhi, in B.P. No. 368 of 1999. It is further manifest from the order dated 1.4.99 (Annexure-2), that the petitioner herein was produced before him on that date, the matter was adjourned to 15.4.99 in order to hear the matter on the question of cognizance, and the petitioner was by the same order remanded to custody till the next date. Curiously enough, the learned Chief Judicial Magistrate passed just the same order on 15.4.99, adjourning the matter to 28.4.99 for hearing on the question of taking cognizance, and once again remanding the petitioner herein to custody.

4. On these facts, the learned Counsel for the petitioner submitted that once the charge-sheet was submitted against the petitioner, he could not have been remanded to custody without taking cognizance. He has relied on a Division Bench judgment of this Court reported in 1998, Vol. 1, PLJR 782 (H.C.) S.K. Lal v. Lain Prasad. He has also relied on an unreported judgment of Division Bench of this Court, passed in Cr. WJC No. 164 of 1999 on 24.3.99 Magni Mahto @ Rajesh Mahto v. State of Bihar, a copy of which is marked Annexure-3 to the writ petition.

5. It is manifest from a plain reading of both the judgments that the basic facts of both the cases are same or similar to those of the present-case. In the said two judgments, as in the present case, the petitioners were already in custody, charge-sheet was submitted, cognizance was not taken by the concerned Courts which was postponed from date to date, and the accused persons were in the meanwhile

remanded to custody.

6. Learned Government Advocate appearing for the respondent-State submitted that for the purpose of applicability of Section 309(2) of the Code, there is a difference between the cases triable by the Magistrate and those triable by the Court of Session. According to him, there is no question of inquiry in the former cases, but there is an element of inquiry in the latter kind of cases. He placed reliance on a Full Bench judgment of this Court reported in 1984 PLJR 701 *Rabindra Rai v. State of Bihar*. The submission of the learned Government Advocate does not commend itself to us for the reason that the same has been fully discussed and explained in *S.K. Lal's case* (supra). It has been clearly held that the facts of *Rabindra Rai's case* (supra) were entirely different. That was obviously a case (i.e. *Rabindra Rai's case*), where the Magistrate after receiving the charge-sheet had taken cognizance, had remanded the petitioner there in who was already in custody, and then enquiry under Section 209 of the Code was pending before him. Paragraph 22 of the judgment in *S.K. Lal's case* illumines the position and is set out hereinbelow :

This change of view, however, will not make any difference to the result of the instant case. Whether the proceeding contemplated under Sections 208 and 209 of the Code is an inquiry or not, the moment a Magistrate receives a police report under Section 170 read with Section 190 of the Code, and proceeds to perform his judicial functions under Sections 207 and 209 of the Code, he must be deemed to have taken cognizance of the offence on the basis of the police report. The case with which we are concerned, is not a sessions case, but a case triable as a warrant case. In such a case also, the moment a police report is received, the Special Judge must take cognizance of the offence and then proceed to consider the matters relevant to Sections 238 to 240 of the Code. If he does not take cognizance, even if the next stage of the proceeding be an inquiry, he cannot, in the absence of taking cognizance, remand an accused under Sub-section (2) of Section 309 of the Code. The second question formulated by the Special Judge assumes as a fact that cognizance has not been taken by the Court. If such be the position, the Court cannot remand an accused in custody under Section 309(2) of the Code without taking cognizance of the offence on the basis of police report

submitted after completion of investigation.

7. On the contrary, in the present case, the significant question which arises for consideration is whether or not it is permissible for the learned Magistrate by a warrant to remand the accused already in custody in cases where charge-sheet has been submitted but cognizance has not been taken. The facts of the present case are, therefore, fundamentally different from those in Rabindra Rai's case. We, therefore, reject the submission of the learned Govt. Advocate.

8. The respondents have not filed any counter-affidavit in the matter.

9. In considered opinion, the contention of the petitioner is well-founded and must prevail. The present case is squarely covered by both the judgments, wherein it has been held in no uncertain terms that in the circumstances indicated above, remand of the accused would be illegal and in the teeth of the provisions of Section 309(2) of the Code.

10. In the result, this writ petition is allowed. We hold that remand of the petitioner to jail custody with effect from 1.4.1999 is illegal and in the teeth of provisions of Section 309(2) of the Code. We, therefore, direct the Chief Judicial Magistrate, Sitamarhi, to release the petitioner, namely, Pawan Kumar Jaiswal, on bail, if he is willing to furnish the bail bond to his satisfaction, and also if not needed in any other case. The writ petition is accordingly allowed.

11. We feel unhappy over the mode and manner in which the Chief Judicial Magistrate, Sitamarhi, has conducted the proceedings. We see no justification for adjourning the matter for hearing on the point of cognizance on 1.4.99 and thereafter. On account of lack of attention to his essential duties and functions, he has brought about a situation where this Court is forced to allow this writ petition and order for release of the petitioner on bail. This is particularly significant in view of the fact, as is manifest from the order dated 12.4.99 of the Chief Judicial Magistrate, that the bail application of the petitioner was rejected by the learned Sessions Judge, Sitamarhi, by his order dated 7.4.99. In such circumstances, we call upon the concerned Chief Judicial Magistrate, Sitamarhi, to explain the circumstances in which he passed the orders on 1.4.99 and 15.4.99, annexing

copies of the materials on record. Let a copy of this judgment be sent to the concerned Chief Judicial Magistrate.

12. Put up on 21.6.99 in Chambers, if not sitting together, along with the report of the Chief Judicial Magistrate, Sitamarhi.

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