

Deep Narayan Yadav and ors. Vs. State of Bihar and anr.

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Court : Patna

Decided On : Mar-03-2000

Judge : Indu Prabha Singh, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 173, 190(1), 239, 319, 397 and 401; Indian Penal Code (IPC) - Sections 379 and 420

Appeal No. : Cri. Revn. No. 507 of 1996

Appellant : Deep Narayan Yadav and ors.

Respondent : State of Bihar and anr.

Advocate for Def. : A.P.P.

Advocate for Pet/Ap. : Shashi Dhar Jha and M. Prasad Yadav, Advs.

Disposition : Application allowed

Judgement :

Indu Prabha Singh, J.

1. This application in revision under Sections 397 and 401 of the Code of Criminal Procedure (in short 'the Code') is directed against that part of the order dated 5-8-1996 passed by Shri N. Pandey, Judicial Magistrate, Birpur at Supaul in G.R. Case No. 463/92 by which he had directed to issue summonses against the

present petitioners.

2. From the facts of this case it would appear that the Station Superintendent of Raghopur Railway Station submitted a written complaint on 9-10-1992 at Raghopur police station alleging therein that on 15-9-1992 he found two bags containing Rs. 55,005/- and 41,774/- missing at the relevant time. One Jayant Kumar Srivastava was in-charge of this cash. However, he is said to have handed over the charge of these two bags to petitioner, Deep Narayan Yadav, who worked till 8 a.m. on 15-9-1992. When the informant took charge of the cash from Shri Yadav he could detect that some cash was missing. As a matter of fact the informant had slept at the railway quarter of one Rameshwar Yadav, fitter in the Railways. Petitioners and his son Ajay Kumar, Deep Narayan Yadav, was also residing therein. While the informant had slept on its Varandah he has kept his bag containing the key of safe inside the house. In the morning he found this key kept at the another place in the bag and subsequently he could detect the missing of two bags containing the cash mentioned above. The FIR was registered and after completing Of the investigation the police submitted the charge sheet which is Annexure-2 to this petition. This charge sheet will show that the S.I. of police of Raghopur police found that a case was made out only against the Assistant Station Master, Jayant Kumar Srivastava under Sections 379 and 420 of the Indian Penal Code. So far as accused Laxmi Prasad Yadav and Deep Narayan Yadav (petitioner Nos. 1 and 2) were concerned the Investigating Officer found the allegations against them as false. With the aforesaid conclusion he submitted the charge-sheet. The learned Additional Chief Judicial Magistrate on the perusal of the charge-sheet and the case diary by his order dated 22-3-1995; took cognizance of the offence under Sections 379 and 420 of the Indian Penal Code only against accused Jayant Kumar Srivastava, However, on the perusal of the case diary he did not find any case made out against petitioner Nos. 1 and 2. Accordingly, he discharged them for want of proper evidence and did not take cognizance for the offences against them.

3. At the time of framing of the charge the parties were heard by Shri N. Pandey, Judicial Magistrate to whose Court the case was transferred for disposal. Before the learned trial Court accused Jayant Kumar Srivastava filed a petition that since

no case is made out against him as per the case diary no charge-sheet should be framed against him. In the meantime, this accused had also filed a Criminal Revision No. 91/95 before this Court for quashing the order taking cognizance of the offence against him. In the said criminal revision this Court directed that the question of discharge of this accused will be considered at the time of framing of the charge by the trial Court. Under this circumstance this accused filed a petition for discharge before Shri N. Pandey, Judicial Magistrate, named above; The learned Magistrate has by his order dated 5-8-1996, after a detailed discussions of the materials available in the case diary, found that there was no evidence against accused Jayant Kumar Srivastava in the case diary on the basis of which any charge could be framed against him. However, in this very order he has observed that on the perusal of the entire case diary he could find that a prima facie case against the present petitioners was made out. He, accordingly, discharged accused Jayant Kumar Srivastava but he directed to issue summonses to the present petitioners (petitioner No. 3, is the son of petitioner No. 1) for standing their trial in the case. It is against this order that the present petitioners have filed this revision application.

4. From time to time the question, whether the cognizance of any offence can also be taken against the persons against whom the charge-sheet was not submitted had come up for consideration before the Hon'ble Supreme Court. In this connection a reference may be made to the case of Abhinandan Jha v. Dinesh Mishra AIR 1968 SC 117 : (1968 Cri LJ 97). In this case the Hon'ble Supreme Court has held that if on the basis of the facts stated in the final report the Magistrate finds that an offence is made out, he can take cognizance of the same and may issue process against those persons, against whom the police had not submitted the charge-sheet. This question had come up for consideration before a Special Bench of this Court in the case of Kuli Singh v. The State of Bihar AIR 1978 Patna 298 : (1978 Cri LJ 1575). In this case it was held that upon receiving a report under Section 173 of the Code a Magistrate has full jurisdiction to differ with the conclusions of the police and to direct the accused, not named in the police report, or not sent up for trial, be also put on trial. It was further held that the Magistrate has full power under Section 190(1)(b) of the Code to differ with the police report be it charge-sheet or final report so called. This matter had earlier

come up for consideration before the Hon'ble Supreme Court in the case of Raghubans Dubey v. State of Bihar AIR 1967 SC 1167 : (1967 Cri LJ 1081). In this decision the Hon'ble Supreme Court has held that once a cognizance has been taken by the Magistrate he takes cognizance of the offence and not of the offenders and once he takes cognizance of the offence, it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of additional accused is part of the proceeding initiated by his taking of the cognizance of the offence.

5. On the strength of these authoritative pronouncements of the Hon'ble Supreme Court and Patna High Court it has been contended before me that the Magistrate was fully authorised by law to pass the impugned order for the issuance of summonses to the present petitioners. It has also been pointed out that once cognizance of the offence is taken it is not taken against any particular offender or offenders but against all persons who are involved in the commission of the offence. As against it the learned counsel appearing on behalf of the petitioners has submitted that broadly speaking there is no dispute in this proposition of law that the cognizance is taken of the offence and not of the offenders as has been held in the case of Raghubans Dubey (supra). He has, however, pointed out that in the present case the learned sub Divisional Judicial Magistrate while taking cognizance of the offence as per his order dated 22-3-1995 has clearly held that as per the case diary no offence against the petitioners Laxmi Prasad Yadav and Deep Narayan Yadav has been made out and, therefore, they were discharged. No doubt by this order the learned Sub divisional Judicial Magistrate took cognizance of the offence but only against accused, Jayant Kumar Srivastava since on the perusal of the case diary he could find that the allegation against the present petitioners was found to be false even by the police. So, the net result would be that as per this order taking cognizance of the offence the cognizance was taken only against accused Jayant Kumar Srivastava and not against petitioner Nos. 1 and 2 as is evident from the order dated 22-3-1995. It has further been pointed out by the learned counsel on behalf of the petitioners that in a situation like this the order taking cognizance of the offence will not mean that the cognizance was also taken against the present petitioners. He has pointed out that

this order taking cognizance of the offence is not a routine or blanket order of cognizance in which the cognizance is taken against the accused named in the FIR. The learned Magistrate taking cognizance of the offence has stated in his order that he has perused the case diary as also the charge sheet and since he found no case made out against the present petitioners Nos. (1) and (2) he is not taking cognizance against them. He accordingly, discharged them as will appear from this order dated 22-3-1995.

6. Now the question that would arise for consideration would be whether under the facts and circumstances of this case the impugned order could have been passed by the learned Magistrate to whom the case was transferred for disposal. It appears from the record that before the learned Magistrate there was only one accused namely Jayant Kumar Srivastava. The present petitioners were not before the learned Magistrate since no charge sheet was submitted against them and no cognizance was taken. When the stage came for the framing of the charge this accused filed a petition for discharge under Section 239 of the Code. This section authorises the Magistrate to consider whether the charge against the accused is groundless or not. If after perusing the police report and the documents sent with it under Section 173 of the Code and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving prosecution and the accused an opportunity of being heard the Magistrate finds that the charge against the accused is groundless he shall discharge the accused and record his reasons for so doing. It is under the provision of this section that the petition by the sole accused Jayant Kumar Srivastava was filed before the learned Magistrate. The question to be considered by the learned Magistrate was whether or not the charge is to be framed against this accused on the basis of the police report and the documents sent with it. He was also to decide whether the allegations against accused Jayant Kumar Srivastava were groundless as alleged by him in his petition for discharge and if so he could discharge this accused and record his reasons for so doing. This section nowhere authorises the trial Court at this stage to record a finding that not the accused but some other persons were concerned with the commission of the alleged offence and to summon them as has been done in this case. No doubt under the provision of Section 319 of the Code such an order could be passed but only after it would appear before the trial Court that

on the basis of the evidence adduced before him any other person not being the accused has committed an offence for which such person could be tried together with the accused. In such a situation the Court may proceed against such person for the offence which he appears to have committed. In the present case that stage has not as yet reached and as such Section 319 of the Code cannot be applied at this stage of the case.

7. It may be stated here that there is a clear line of distinction between the stage when this petition for discharge by Jayant Kumar Srivastava was filed and the stage at which the cognizance of the offence was taken by the learned Sub-Divisional Judicial Magistrate, The decisions noted above relate to the stage at the time of taking of the cognizance and not. to the stage when the charge is to be framed before the trial Court specially when the Magistrate taking cognizance of the offence has passed the specific order discharging some of the accused and not taking cognizance against them. If the cognizance would have been taken simpliciter the position would have been different. This is not so in the present case where in the order taking cognizance of the offence the learned Magistrate has specifically mentioned that he is not taking cognizance of the offence against the present petitioners who were discharged by him. No doubt, as noticed above, in the different decisions as mentioned above that the Magistrate taking cognizance of the offence is not bound by the opinion of the police or the charge sheet submitted by them. Even if the charge sheet is not submitted against a particular person the Magistrate taking cognizance of the offence is fully authorised to proceed against him as has been held in the case of Raghubans Dubey (supra). In the present, however, the situation is entirely different. Here the Magistrate on the perusal of the case diary and police papers has specifically ordered that no case was made out against the present petitioners at the time when he took cognizance of the offence. In a situation like this the decisions noted above would hardly be of any help to the prosecution. In this connection a reference may be made to the case of A.S. Poplai v. The State of Bihar 1989 PLJR 83. In the said case five persons were named as accused In the complaint petition. The Magistrate, however, took cognizance of the offence only against four out of five accused persons so named. It was held that this would show that he had applied his judicial mind and had exercised his discretion In not proceeding

against one of the accused. It was further held that when the cognizance is taken simpliciter, it is taken of the offences and not of the offenders. But if Magistrate decides not to proceed against one offender it will mean that he has not taken cognizance of the offence against him. In this decision the learned single Judge (B. Prasad, J.) had examined the law on the subject and had decided the same on the lines indicated above. This decision fully applies to the facts of the present case. From this also it would appear that the impugned order passed by the learned Magistrate cannot be sustained.

8. I have perused the impugned order. The learned Magistrate has passed a very detailed order referring to various paragraphs of the case diary on the strength of which he had ordered for the issuance of summonses to the present petitioners. The impugned order could not have been passed in terms of Section 239 of the Code which only deals with the framing of the charge or the discharge of the accused who has been sent up for trial to him. This section nowhere authorises the trial Court to order for the issue of summons to a person who has already been discharged by the Magistrate taking cognizance of the offence. The learned Magistrate has misdirected himself completely on this point and has failed to grasp the scope of Section 239 of the Code according to which he could not have passed the impugned order.

9. From the detailed discussions made above it becomes clear that impugned order cannot be allowed to stand. This application, is, therefore, allowed and the impugned order dated 5-8-1996 passed by Shri N. Pandey, Judicial Magistrate, Birpur, Supaul is quashed.