

Harkesh and ors. Vs. State of Uttar Pradesh and anr.

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Court : Allahabad

Decided On : Aug-31-2001

Reported in : 2002CriLJ285

Judge : J.C. Gupta, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 2, 156(3), 161(3), 157, 170, 173(2), 190(1), 190(2), 200, 202, 202(1), 203 and 204; Indian Penal Code (IPC) - Sections 323, 324, 504 and 506

Appeal No. : Criminal Revn. No. 1210 of 2000

Appellant : Harkesh and ors.

Respondent : State of Uttar Pradesh and anr.

Advocate for Def. : G.K. Singh, Adv. and ;A.G.A.

Advocate for Pet/Ap. : L.V. Singh, Adv.

Disposition : Petition allowed

Judgement :

ORDER

J.C. Gupta, J.

1. The order dated 20-4-2000 passed by IIIrd Additional Chief Judicial Magistrate, Bijnor directing issue of process against the applicants is under challenge in this revision.

2. Facts relevant for the purpose of this revision in brief are that, on a complaint filed by Om Prakash, father of opposite party No. 2 and others regarding an incident of 29-3-1999 the police on the basis of an order made under Section 156(3) Cr. P.C. investigated the case and submitted final report, Ten days thereafter another complaint with the nomenclature 'Application under Section 156(3) Cr.P.C.' was filed by the opposite party No.2 alleging therein that on 12-4-1999 the applicants assaulted him and Ram Chandra and caused them injuries. The Magistrate concerned directed the police to register First Information Report' and investigate the same. Consequently, case was registered and police came into action. The investigating Officer recorded statements of witnesses and concluded that, case was false and concocted. With these conclusions he submitted 'final report' which was forwarded to the Court concerned by the Officer-in-charge of concerned police station. Feeling aggrieved, opposite party No.2 filed objections against acceptance of final report in the form of a 'Protest Petition' alleging therein that the investigating officer neither interrogated the witnesses nor recorded their statements and submitted final report in collusion with the accused persons. In support of the protest petition he also filed his own affidavit and affidavits of witnesses Ram Chandra, Banshi. Mohd. Ali, Abdul Aziz and Shamsher. The learned Magistrate then passed the impugned order observing that, perusal of case diary revealed that the investigating officer did not record the statements of witnesses Ram Chandra, Mohd. Ali and Shamsher on the ground that they did not; come forward before him despite requisition sent to them. He further observed that the complainant, in his statement has supported the allegations made in the First Information Report. It appears that the Magistrate on the basis of material placed before him which also included the complainant's affidavit and affidavits of witnesses, concluded that the final report was liable to be rejected. Accordingly final report dated 1-6-1999 was rejected and impugned summoning order was passed.

3. The Court has heard learned Counsel for the parties.

4. Learned Counsel for the applicants contended that where police submits final report, though it is open to the Magistrate to take cognizance under Section 190(1)(b) Cr.P.C. on the basis of investigation records but in that event he cannot take any external aid of any other piece of evidence or material which does not form part of police papers, if he decides to take into account any material or evidence other than police papers prepared during investigation, he is bound to comply with the requirement of Sections 200 and 202 of the Code. It was argued that since in the present case the learned Magistrate: has taken into consideration the affidavits of the complainant and other witnesses filed along with the protest petition, he was bound to follow procedure laid down for complaint cases. It was also contended that If the Magistrate felt that the investigating officer failed in his duty in collecting relevant material, he should have directed further investigation instead of issuing process against the applications on the basis of material brought on record in the form of affidavits.

5. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case we are concerned with Section 190(1) alone which is reproduced below.

190. Cognizance of offences by Magistrates :-- (1) Subject to the provisions of this Chapter, any Magistrate of the first, class, and any Magistrate of the second class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence --

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts:

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

6. There are four methods of taking cognizance of offences by the Courts competent to try the same. The Court called upon to take cognizance of the offence must apply its mind to the facts placed before it either upon, a police report or upon a complaint or In some other manner the Court came to know about it and

in the case of Court of Session upon commitment of the case by the Magistrate, (vide A.R. Antulay v. R.S. Nayak (1984)2 SCC 500 : AIR 1984 SC 718

7. When a Magistrate receives a complaint, which may be either oral or in writing as defined under Clause (d) of Section 2 of the Code, he has two courses open before him. He may take cognizance under Section 190(l)(a) by applying his mind to the facts of the case and thereafter proceed in the manner provided in Sections 200 and 202 Cr.P.C. By virtue of Section 200 he is required to examine the complainant and the witnesses present, if any. If the Magistrate finds that there is sufficient ground for proceeding, he may issue process under Section 204. But if the Magistrate does not feel satisfied, he may either dismiss the complaint under Section 203 Cr. P.C. or postpone the issue of process and take recourse to Section 202 which provides that he may inquire into the case himself or may direct an investigation to be made by a police officer or such other person as he thinks fit, for the purpose of deciding whether or not there are sufficient grounds to proceed. If he finds grounds to be sufficient he may issue process or otherwise he may dismiss the complaint under Section 203 Cr.P.C. after briefly recording his reasons for so doing.

8. The other course open to the Magistrate is that instead of taking cognizance he may send the complaint for police investigation under Section 156(3), Cr. P.C. If this course is adopted, the police will have to investigate the matter as per the procedure laid down in Section 157 onwards. If upon investigation it appears to the Officer-in-charge of the police station that there is no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, he may submit a report to the Magistrate for dropping the proceedings. Such a report is commonly known as 'Final Report'.

9. Section 170 Cr.P.C. lays down that if, upon an investigation, it appears to the officer in-charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, shall take

security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed. The report of completion of investigation shall be forwarded to the Magistrate in the prescribed form as provided under Section 173(2) Cr.P.C.

10. Upon receiving final report the following four courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require:

(I) He may agree with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

(II) He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr. P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

11. This position of law is now well settled by various pronouncements of the Apex Court, such as (1) *Abhinandan Jha v. Dinesh Misra* AIR 1968 SC 117 (2) *H.S. Bains v. State* AIR 1980 SC 1883 (3) *Tularam v. Kishore Singh* AIR 1977 SC 2401 and (4) *M/s India Carat Pvt. Ltd. v. State of Karnataka* AIR 1989 SC 885 (890).

12. In *Abhinandan Jha v. Dinesh Misra* AIR 1968 SC 117 (Supra) the question arose whether a Magistrate to whom report under Section 173(2) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge sheet, on his disagreeing with the report submitted

by the police. The Apex Court held that the Magistrate has no jurisdiction to direct the police to submit a charge sheet but it is open to the Magistrate to agree or disagree with the police report. If he agrees with the report that there is no case made out for issuing process to the accused, he may accept report and close the proceedings. But if he comes to the conclusion that further investigation is necessary, he may make an order to that effect under Section 156(3) and if ultimately the Magistrate is of the opinion that the facts set out in the police report, constitute an offence. He can take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. However in the said decision a typing error occurred inasmuch as the reference to Section 190(1)(c) was a mistake for Section 190(1)(b) which was later on pointed out in H.S. Bains case AIR 1980 SC 1883 (supra).

(Emphasis supplied)

13. In the case of H.S. Bains (supra) it was held that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate under Section 173(2) Cr. P.C. The Magistrate may prefer to ignore the conclusion of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police. It would, thus, be a cognizance under Section 190(1)(b) of the Code. The Apex Court repelled the contention that if the Magistrate was not satisfied with the police report only two courses were open to him viz. either to order a further investigation of the case by the police or to take cognizance of the case himself as if upon a complaint and record the statements of the complainant and his witnesses under Section 200 of the Code and then issue process if he was satisfied that the case should be proceeded with.

14. In the case of M/s India Carat Pvt. Ltd. v. State of Karnataka AIR 1989 SC 885 (supra) it was held by the Apex Court in paragraph 16 of the report 'The position is, therefore, now well settled that upon receipt of, a police report under Section

173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused, the Magistrate can ignore the conclusions arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

15. Similarly in the case of Tula Ram AIR 1977 SC 2401 (supra) it was held that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of the case under Section 190(1)(b) and issue process or in the alternative he could take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he was of opinion that the case should be proceeded with.

16. In a recent decision in Suresh Chand Jain v. State of Madhya Pradesh and Anr. (2001) 2 JT (SC) 81 : AIR 2001 SC 571 the Apex Court pointed out that the investigation envisaged in Section 202 is different from the investigation contemplated under Section 156(3) of the Code as the former is ordered after taking cognizance of the offence whereas the later at a pre-cognizance stage. The investigation referred to Section 202(1) is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other

person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

17. The moot question that stares at our face in the present case is whether the Magistrate deciding to take cognizance under Section 190(1)(b) on the receipt of final report could take aid of external material or evidence in addition to the materials or facts collected during investigation or he could act upon only on the investigation records?

18. The observations made in the decision in M/s. India Carat Pvt. Ltd., which have been reproduced above in this order, leave no room for doubt that the Magistrate is not bound with the conclusions arrived at by the investigating agency and it is open for him to apply his mind independently to the facts emerging from the investigation and take cognizance of the case if he deems fit, in exercise of his powers under Section 190(1)(b). The Magistrate in such a situation is not bound to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance under Section 190(1)(a), though alternatively it is open to him to act under Section 200 or Section 202 also.

19. The position is thus clear that when Magistrate receives police report under Section 173(2), he is entitled to take cognizance of an offence even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during investigation and other material collected during investigation and form his own opinion independently without being bound by the conclusions arrived at by the investigating agency and take cognizance under Section 190(1)(b) of the Code and direct the issue of process to the accused. However the Magistrate cannot make use of any material or evidence other than the investigation records while acting under Section 190(1)(b) of the Code. If he chooses to make use of any materials other than the investigation records, he will have to follow the procedure laid down in relation to complaint cases, on the basis of original complaint or application moved under Section 156(3) Cr.P.C. which

otherwise tantamount to complaint or the Protest petition filed against acceptance of final report treating the same as complaint. This proposition would be in consonance with the provision of Section 207 which inter-alia provides for supply of copy of statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses and any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of Section 173.

20. In the present case the learned Magistrate while taking cognizance under Section 190(1)(b) of the Code has taken into consideration the affidavits of complainant and other witnesses filed along with Protest Petition which was not permissible in law. He could take cognizance on the basis of the Protest Petition or the original complaint but. in that event he was bound to follow procedure laid down for complaint cases. The distinction between two types of cognizance is apparent inasmuch as cognizance under Section 190(1)(b) is taken only on the basis of papers forwarded by police under Section 173(2) Cr.P.C. but when the Magistrate makes up his mind to take into consideration other material or evidence it would be a case of taking cognizance under Section 190(1)(a) of the Code and for that matter procedure prescribed for complaint cases under Sections 200 and 202 Cr.P.C. has to be followed. If the Magistrate was of the opinion that the investigating officer had failed to record statements of material witnesses, it was open for the learned Magistrate to have sent back the case to police for a further investigation.

21. For the above reasons, the impugned order of the learned Magistrate cannot be sustained.

22. The revision is accordingly allowed. The order of the learned Magistrate dated 20-4-2000 passed in Case No.411 /2000 arising out of Crime No.242/90 under Sections 323/324/504/506 I.P.C. and 3(1)(X) of S.C./S.T. Act is set aside and the learned Magistrate is directed to pass appropriate orders afresh on the Protest Petition filed by opposite party No.2 against the final report submitted by police in accordance with law and in the light of observations made above in the body of this order.

