

Kamlesh Pathak and ors. Vs. State of Madhya Pradesh and anr.

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Court : Madhya Pradesh

Decided On : Dec-03-2004

Reported in : II(2005)DMC348; 2005(3)MPHT426; 2005(2)MPLJ588

Judge : Subhash Samvatsar, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 156, 156(3), 190, 192, 200, 202, 202(2), 204 and 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 302, 307, 323, 324, 406, 420, 448 and 498A

Appeal No. : Misc. Criminal Case No. 2798 of 2004

Appellant : Kamlesh Pathak and ors.

Respondent : State of Madhya Pradesh and anr.

Advocate for Def. : V.S. Chaturvedi, Govt. Adv. for Respondent No. 1 and ;Pradeep Katare, Adv. for Respondent No. 2

Advocate for Pet/Ap. : V.K. Saxena, Sr. Adv. and ;Prasun Maheshwari, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Subhash Samvatsar, J.

1. This petition is filed by the accused under Section 482, Cr. P.C. for quashing the First Information Report in Criminal Case No. 302/03 lodged by respondent Pawan Sharma against the present petitioners and subsequent proceedings in pursuance thereof.

2. The brief facts of the case are that Kamlesh Pathak has some family dispute with his wife, Smt. Meera Pathak, who has lodged the complaint against the present petitioner No. 1, Kamlesh Pathak for committing offence under Section 498A, I.P.C. and also filed proceedings under Section 125, Cr.P.C. for maintenance. She was residing with her brother, respondent No. 2, Pawan Sharma. It is alleged by the petitioner that he along with his Lawyer, Mr. Nandan Dixit went to the house of respondent No. 2, Pawan Sharma for reconciliation of the dispute, it is alleged by the petitioner that at time respondent No. 2 and his colleagues fired gun shot against the present petitioner and his Counsel in which his Counsel, Mr. Nandan Dixit died. The present petitioner was also injured in the incident. Pawan Sharma and other persons ran away from the spot, and police chased them and thereafter there was exchange of firing between respondent No. 2 and police party in which some police personnel were injured.

3. After the said incident Pawan Sharma wrote a letter to Chief Judicial Magistrate alleging that present petitioners along with his colleagues had fired gun shot which were struck in the house and wall of the complainant. The complainant escaped in the said incident. Thus, according to Pawan Sharma present petitioner has committed offence under Section 307, I.P.C. It is alleged by the petitioner that police conducted inquiry on the basis of said letter and found that the offence is not made out. Thereafter Pawan Sharma filed a private complaint in which the Magistrate issued a direction on 8.9.2003 for making an investigation under Section 156(3), Cr.P.C. This order is under challenge in the present petition.

4. The main contention raised by Mr. V.K. Saxena, Sr. Advocate appearing for the petitioner is that as the complaint is lodged by respondent No. 2, Pawan Sharma, for committing an offence under Section 307, I.P.C. which is triable by the Sessions Court, the Magistrate has no power to direct the police authorities to make investigation under Section 156(3), Cr.P.C. For this purpose Counsel for the

petitioner has invited attention of this Court to proviso (a) to Sub-clause (2) of Section 202, Cr.P.C., which reads as under:

'202. Postponement of issue of process.--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In any inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

5. Proviso to Sub-section (1) where it appears to the Magistrate that the offence complained of is triable exclusively by the Sessions Court then the direction under Section 156(3), Cr.P.C. should not be passed and it is incumbent on the Magistrate himself to take cognizance of the offence after recording statements of witnesses under Section 200, Cr.P.C. For this purpose Counsel for the petitioner has relied upon the judgment of Orissa High Court in the case of Laxmidhar Das and Ors. v. State of Orissa and Anr., 2004 (3) Crimes 299, in which the Orissa High Court has held that the Magistrate has no jurisdiction to direct investigation under Section 156(3), Cr.P.C. for an offence under Section 302, I.P.C. which is triable by Sessions Court.

6. Another judgment relied upon by the learned Counsel for the petitioner is in the case of P.R. Venugopal v. S.M. Krishna and Anr., I (2004) CCR 409=2004 Cri. L.J. NOC 32. In that case the Karnataka High Court has laid down that before passing direction under Section 156(3), Cr.P.C. it is incumbent upon the Court to first apply its mind to find out whether there is sufficient material for issuing such direction. The learned Counsel for the petitioner has also relied upon a decision of the Apex Court in the case of Tularam and Ors. v. Kishore Singh, : 1978 CriLJ8 , in which the Apex Court has dealt with the powers of the Magistrate directing investigation under Section 156, Cr.P.C. In that case the Apex Court has laid down that a Magistrate can order investigation under Sections 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 inquiry as contemplated by Section 202 of the Code. 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 straightaway 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 witnesses; (b) the Magistrate can postpone the issue of process and direct an inquiry by himself and (c) the Magistrate can postpone the issue of process and direct an inquiry by any other person or an investigation by the police. Thus, the Magistrate has power to issue directions under Section 156(3), Cr.P.C. before taking cognizance of the offence.

7. From the perusal of the said judgment it appears that in that case the Apex Court was not considering the powers of Magistrate in cases where the offence is triable by the Sessions Court. Counsel for the petitioner relying on proviso to Section 202(2), Cr.P.C. has urged that as in the present case offence under Section 307, I.P.C. is triable exclusively by Sessions Court, the impugned order issuing direction under Section 156(3), Cr.P.C. is without jurisdiction and cannot be sustained in the eyes of law.

8. This prayer is opposed by the Counsel for the respondent. He submits that the Magistrate has powers to issue directions under Section 156(3), Cr.P.C. at the time of taking cognizance of the offence. For this purpose Counsel for the petitioner relied upon the judgment of the Apex Court the case of Gopal Das Sindhi and Ors. v. State of Assam and Anr., AIR 1961 SC 986. After perusing said judgment it appears that in that case the complaint was filed against the accused for committing offence under Sections 147, 323, 342 and 448, I.P.C. All these offences are triable by Judicial Magistrate, First Class and, therefore, while deciding that case the Apex Court had no occasion to deal with proviso of Section 202 and, therefore, this case is quite distinguishable. Hence, the aforesaid judgment does not help the petitioner.

9. The next case relied upon by the Counsel for the petitioner is the judgment of the Apex Court in the case of Madhu Bala v. Suresh Kumar and Ors., III (1997) CCR 36 (SC)=1998 SCC (Cri.) 111. In that case also the Apex Court has held that when a complaint is lodged, the Magistrate has powers to direct investigation under Section 156(3), Cr.P.C. at the time of taking cognizance of the offence. In that case the complaint was lodged for committing offence under Sections 498A and 406, I.P.. Both these offences are triable by Judicial Magistrate, First Class. Hence, this judgment also does not help the petitioner for disposal of this petition.

10. Another judgment relied upon by the Counsel for the petitioner is in the case of Satyavarai v. State and Anr., 2002 (3) Crimes 654, in which the Delhi High Court has laid down that the procedure of taking cognizance of an offence on a complaint by Magistrate starts from the date when he starts recording of evidence of complainant. This proposition in fact does not help for disposal of the present petition. The question involved in this case is quite different.

11. Counsel for the respondent heavily relied upon the judgment of the Apex Court in the case of Suresh Chand Jain v. State of Madhya Pradesh and Anr., I (2001) CCR 54 (SC) : 2001 (1) Crimes 171 (SC), in which it is held that in a private complaint the Magistrate has power to direct police for investigation under Section 156(3), Cr.P.C. before taking cognizance of the offence. The Magistrate can also order police to register the First Information Report and conduct investigation and

in such case the Magistrate is not bound to examine the complainant. After perusing the said judgment I find that in that case the complaint was about commission of offence under Section 420, I.P.C. which is an offence triable by Judicial Magistrate First Class, which is not the situation in the present case. In that case also the Apex Court was not considering the powers to Magistrate in respect of directions under Section 156(3), Cr.P.C. which is an offence triable by Sessions Court. Hence, the said judgment is distinguishable.

12. Thus, after perusing the aforesaid case laws and the language of proviso to Section 202 it clearly appears that the Magistrate has no power to issue direction under Section 156(3), Cr.P.C. in cases where offence is triable by exclusively by Sessions Court and if directions are issued that would be without jurisdiction. In case a complaint is made to the Magistrate of an offence which is exclusively triable by Sessions Court it is incumbent on him to call upon the complainant to produce witnesses on which he relies and after recording their statements the Magistrate may decide whether cognizance of offence is to be taken or not. In the present case the Court has not followed the Said procedure and has directed investigation by police under Section 156(3), Cr.P.C.

13. In the result, I allow this petition and set aside the impugned order and direct the Magistrate concerned to record statements of complainant and his witnesses himself and then decide whether cognizance of the offence is to be taken or not. With this direction this petition stands allowed.