

Vinay Choudhary Vs. State

Vinay Choudhary Vs. State

SooperKanoon Citation : sooperkanoon.com/689250

Court : Delhi

Decided On : Feb-23-1989

Reported in : ILR1989Delhi659

Judge : P.K. Bahri, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 190

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 75 of 1989

Appellant : Vinay Choudhary

Respondent : State

Advocate for Pet/Ap. : P.P. Grover and; K.K. Bakshi, Advs

Judgement :

P.K. Bahri, J.

(1) The petitioner who has been challaned for an offence under Sections 302, 307 & 436, Indian Penal Code (for short Indian Penal Code ') and Section 27 of the Arms Art. has come up and filed this petition seeking bail.

(2) The petitioner is stated to have killed a young college, girl who had allegedly refused to marry the petitioner by shooting her from very close quarter on her temple. On merits, even the learned counsel for the petitioner has nothing to say

as far as the bail petitioner is concerned. However, counsel for the petitioner has vehemently argued that the investigation had not been completed by the police within 90 days and incomplete challan had been filed on December 4, 1988 and thus, under Section 167(2) of the Code of Criminal Procedure (for short 'Cr. P.C ') the petitioner has become entitled to bail.

(3) I have gone through the record of the case and find wsi on December 4, 1988, which was a Sunday, the challan was put in before the Duty Magistrate and it was recorded by the Duty Magistrate in his order that he accepted the challan and he directed the Ahlmad to check the same and put it before the concerned Metropolitan Magistrate on the following day. He also noticed that the accused had been already remanded in judicial custody till December 12 1988.

(4) The first contention raised by the learned counsel for petitioner is that no cognizance has been taken by the Magistrate while passing the order by which he accepted the challan and thus, it should be held that within 90 days of the detention or the petitioner the cognizance having been not taken by the Magistrate the petitioner has become entitled to bail. He has cited

(1) Ajit Kumar v. State of West Bengal. : AIR 1963 SC765 , wherein it has been observed that the word 'cognizance' has no esoteric or mystic significance in criminal law or procedure, and it merely means become aware of and when used with reference to Court or Judge, to take notice of judicially. It was observed that taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate, as such. applies his mind to the suspected commission of an offence. Then. reference is made to

(2) Devarapalli Lakshminarayana Reddy & others v. Narayana Reddy & others, : 1976 CriLJ1361 , in which it. was held that. the expression 'taking cognizance of an offence' by the Magistrate has not been defined in the Criminal Procedure Code . and the ways in which such cognizance can be taken are set out in clauses (a), (b) and (e) of Section 390(1) and the question whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of the preliminary action. It was held that broadly speaking, when on

receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 20G and the succeeding Sections in Chapter Xv of the Code of Criminal Procedure 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). Then it was laid down that if instead of proceeding under Chapter IX he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. I do not think that these two judgments help the contention of the petitioner in any manner.' After all a challan could be filed before the Metropolitan Magistrate having the jurisdiction. It is also not disputed before me that the Duty Magistrate, before whom the A challan was filed, was having the jurisdiction all over Delhi. Hence, the Duty Magistrate having accepted the challan would mean that the Magistrate had applied his mind to the challan and taken cognizance and gave the directions for putting the challan before the regular concerned Metropolitan Magistrate on the following day. As already laid down by the Supreme Court, there are no special or specified orders to be made by the Magistrate while taking cognizance of a particular matter. It will depend on the facts of each case to see whether the Magistrate had applied his judicial mind or not for taking cognizance of the offence.

(3) In *Babulal Yadav & others v. State of Bihar*, 1980 Cri. L. L 170, the question which arose for decision was whether the accused could be remained to judicial custody or not before the challan had been filed and before the Magistrate had taken cognizance. It was held that after the receipt of the charge-sheet and before taking cognizance the Magistrate has power to remand the accused and the accused cannot be released on bail under Section 439 Criminal Procedure Code only on the averment that his remand is not proper. At any rate, keeping in view the fact that the Magistrate had clearly mentioned in his order that he accepted the challan would mean that he was applying his judicial mind to the charge sheet and thus, had taken cognizance. Hence, the petitioner had not become entitled to bail on this ground.

(5) It has been then argued that an incomplete-, challan was filed on the ninetieth day of the detention of the petition while on December 7, 1988, the prosecution had filed the original rukka, copy of the F.I.R., site-plan, two M.L.Cs., one daily diary report, inquest papers, death summary and post-mortem report and thus, the investigation could be deemed to be completed only when said documents were filed and period of 90 days had already expired. So, it is argued that investigation was not complete till the filing of the said documents and, therefore, the petitioner be given benefit of Section 167(2) of the Criminal Procedure Code . In (4) Tara Chand v. The State, : [1951]2SCR729 , the Supreme Court had an occasion to consider as to whether a particular report given under Section 173 Criminal Procedure Code . (1898) is complete or not? It was held that all that Section 173 requires is that as soon as the police investigation under Chapter 14 is complete, the police should forward to the Magistrate a report in the prescribed form setting forth the name of the parties, the nature of the information and the name- of the A persons who appear to be acquainted with the circumstances of the case and where, therefore, the first report made by the police to a Magistrate, though called incomplete challan, contains all these particulars and a second report called a supplementary challan is filed subsequently, giving the names of certain witnesses who are merely formal witnesses, the first report is, in fact, a complete report and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed. At the time the first report in the cited case was filed, the Imperial Serologist and the sketch map of the occurrence had not been prepared. Along with the supplementary challan, a list of some more witnesses was filed who were merely formal witnesses. Still it was held by the Supreme Court that the first report was a complete challan. The learned counsel for the petitioner has tried to distinguish this judgment by contending that the new Criminal Procedure Code . has made a different provisions in Section 173 and thus, the judgment of the Supreme Court which was based on the previous provisions of the old Criminal Procedure Code . would not apply. There is not much marked difference between the provisions of Section 173 of the old Criminal Procedure Code . and also of the new Criminal Procedure Code . In Section 173(2), it has been mentioned that the police report shall comprise of the names of the parties, the nature of the information. names of the persons who appear to be

acquainted with the circumstances of the case and whether any offence appears to have been committed and if so, by whom and whether the accused has been arrested and has been released on his bond or surety and whether he has been forwarded in custody under Section 170. Even as per the previous Criminal Procedure Code, these material facts were bound to be incorporated in the police report. Only in Section 173(5) it has been made incumbent on the police officer to forward Along with police report all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already supplied to the Magistrate during investigation and also the statements recorded under Section 161 Criminal Procedure Code, of all the persons whom the prosecution proposes to examine as witnesses So, it has been argued by the learned counsel for the petitioner that as the post-mortem report particularly and the inquest papers and the list of additional witnesses have been filed Along with an application later on should mean that the provisions of Section 173(5) have not been complied with and thus, the first police report filed in the present case was incomplete. He has argued that in absence of the post-mortem report the police could not have come to the conclusion as to what offence the petitioner has committed. He has argued that it is only from the postmortem report it can be opined that the death of the girl took place on account of said bullet injury allegedly caused by the petitioner. It is no doubt true that the post-mortem report is an important document to bring home the offence to the accused but the question which arises for consideration is whether the particulars mentioned in Section 173(2) filled in the police report are sufficient or not in order to make the challan complete. The dead body had been already sent for post-mortem examination and the post-mortem report shows that the post-mortem was performed and the report was prepared on November 7, 1988. There is only lapse of the police in not collecting the post-mortem report expeditiously from the doctor concerned. The M.L.Cs, the inquest papers, the original rukkal and the death summary were also obviously handed over to the doctor who performed the post-mortem and those were collected by the police and filed in court on December 7, 1988, after the expiry of 90 days. I may refer to a Full Bench judgment of the Punjab & Haryana High Court on this aspect of the case. In (5) State of Haryana v. Mehal Singh & another : 45(1978)CLT343, it was held in this case that the investigation of an offence cannot be considered to be

inconclusive merely for the reason that the investigating officer, when he submitted the report in terms of sub-section (2) of Section 173 to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under Section 161 of the Cr. P.O., although these were available with him when he submitted the police report to the Magistrate. It was held that in such a case the accused would not become entitled to bail under proviso to Section 167(2). It was held that the police report would be deemed to be complete if all such facts as are mentioned in sub-section (2) of Section 173 have been recorded in the report. The provisions of Section 173(5) were also considered and it was held fiat the same do not change the content or the consent of the police report as envisaged in the unamended Criminal Procedure Code . in Section 173(1).

(6) The learned counsel for the petitioner has. however, argued that there are two judgments of this Court taking a different view and this Court should prefer the judgment of this Court than the judgment given by a Full Bench of Punjab and Haryana High Court. He has made reference to (6) Hari Chand v. State 1977 Cri. L.J. 156. it was held in this case that the police report as defined in Section 2(r) can only be filed as soon as the investigation is completed and if it is not complete no such report can be filed. It was also held that the filing of the incomplete challan cannot circumvent the provisions of Section 173(2). It was also held that Section 173(8) could come into operation only after a complete challan had been filed. However, nothing said in this Judgment is contrary to what has been held by the Full Bench of the Punjab and Haryana High Court. He has then referred to (7) Taj Singh v. State (Delhi Admn.) : 33(1987)DLT3A . The only question which arose for decision before a Division Bench of this Court was whether the police report could be considered incomplete or not for want of receipt of the report of the expert of Central Forensic Science Laboratory. It was held that the investigation would be deemed to be complete when a challan is filed under Section 173(2) giving all the necessary particulars contemplated by the said provision and report of the expert of the Cfsi was not said to be such material which needed to be mentioned in the challan. It is pertinent to mention that Section 173(5) Criminal Procedure Code . was also taken note of and it was held that the rigour of the contention raised by the petitioner on the basis of sub-section (5) of Section 173 Cr. P. C. stands

substantially impaired in the face of sub-section (7) of Section 173. It was held that convenience of the investigating Officer referred to in sub-section (7) of Section 173 pertaining to the furnishing of all or any of the documents to The accused whittles down the mandatory nature of sub-section (5) of Section 173. So, in the said case the challan was held to be complete. I do not understand how anything said in this Judgment helps the contention of the learned counsel for the petitioner, rather this judgment has followed the Full Bench of the Punjab and Haryana High Court in support of the ratio that the challan would be complete if all the particulars mentioned in Section 173(2) are incorporated in the said challan

(7) The learned counsel for the petitioner has also cited (8) T. V. Sharma v. Smt. Turgakamala Devi & others, , wherein it has been held that if investigation is not complete, filing of preliminary charge-sheet would not deprive the right of the petitioner to be released on bail under proviso to Section 167(2). There is no dispute about this principle of law. Unless the challan is complete as required by section 173(2) Criminal Procedure Code . the investigation cannot be considered to be completed. In the present case, the investigation was complete when the challan was filed as all necessary particulars mentioned in Section 173(2) were incorporated in the challan. Mere fact that the post-mortem report and other documents, which were in existence even before the challan was filed, had not been collected and filed Along with the challan would not make the challan incomplete. Something could be said in support of the case of the petitioner if the post-mortem report had been prepared after the filing of the challan in the court but such is not the case.

(8) The learned counsel for the petitioner also made reference to (9) Bandi Kotayya v. State & others : AIR 1966 AP377 . I have gone through this judgment and find that it is of no help to the case of the petitioner. The learned counsel for the petitioner has vehemently argued that in absence of the postmortem report the Investigating Officer could not have possibly concerted the petitioner with the charge of murder. The learned counsel for the-petitioner forgets that there is ocular direct evidence available which is mentioned in the report which links the accused with the offence of giving bullet injury to the deceased. The post-mortem report could only furnish the cause of death in support of the ocular evidence. So,

from the evidence already collected and referred to in the challan, the Investigating Officer could reasonably form the opinion of the commission of offence of murder by the petitioner when he filed the challan. As already mentioned by me above, the postmortem report had come into existence even before filing of the civilian and thus, mere negligence or omission by inadvertence or by design by the Investigating Officer in not collecting the said papers and not filing the same Along with the challan would not entitled the petitioner to the benefit of proviso to Section 157(2) of the Criminal Procedure Code . and would not make the challan already filed incomplete.

(9) So, I find no merit in this petition which I, hereby,

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com