

State Vs. Heera and anr.

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Court : Rajasthan

Decided On : May-14-1965

Reported in : 1966CriLJ1202

Judge : D.M. Bhandari and; V.P. Tyagi, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 173, 173(1), 173(2), 173(4), 173(5) and 190(1); Code of Criminal Procedure (CrPC) (Amendment) Act, 1955; [Police Act, 1861](#) - Sections 3; Rajasthan Police Regulations, 1948 - Regulation 321

Appeal No. : Criminal Ref. No. 11 of 1964

Appellant : State

Respondent : Heera and anr.

Advocate for Pet/Ap. : B.C. Chatterji, Dy. Govt. Adv.

Disposition : Reference accepted

Judgement :

Bhandari, J.

1. This case has been referred to a Division Bench by Chhangani, J. as in the opinion of the learned Judge the point involved in this case requires consideration

by a larger Bench.

2. The point referred to us may be stated, as follows:

'Whether a Magistrate empowered to take cognizance of the offence on a Police report can order the Police to submit a charge-sheet in a case in which the officer-in-charge of the Police Station concerned has forwarded a report to the effect that on investigation no offence has been made out.'

3. There are two decisions of this Court on this point and they are *Lumba Ram v. State*, ILR (1956) 6 Raj 469 and *State v. Mohan*, ILR (1959) 9 Raj 671. This matter has been considered by various High Courts in India and there is divergence of judicial opinion on this point. Some of the cases of various other High Courts in India bearing on this point are--*A.K. Roy v. State of West Bengal*, AIR 1962 Cal 135 (FB); *Uma Singh v. Emperor*, AIR 1933 Pat 242; *Raghunath Puri v. Emperor*, AIR 1932 Pat 72; *Sukadeva Sahay v. Harrid Miyan*, AIR 1928 Pat 585; *Mahabir Prasad Agarwala v. State*, AIR 1958 Orissa 11; *State v. Murlidhar Govardhan*, AIR 1960 Bom 240; *Rama Shanker v. State of Uttar Pradesh*, AIR 1956 All 525; *Narendralal Mukherjee v. State*, AIR 1956 Assam 127 (2); *Abdul Rahim v. Abdul Muktadin*, AIR 1953 Assam 112, *Kachu Gogoi v. The State*, AIR 1951 Assam 151; *Venkata Subba Rao v. Naraharisetty Anjanayulu*, AIR 1932 Mad 673; *Harbir Singh v. State*, AIR 1952 Pepsu 29; *Mt. Ido v. Gainda Singh Sobha Singh*, AIR 1952 Assam 38 and *Amar Premanand v. State*, AIR 1960 Madh Pra 12. Before we take up these cases for consideration, we think it proper to consider the provisions of Criminal Procedure Code touching this point.

4. The Criminal Procedure Code empowers the District Magistrate and the other Magistrates with certain administrative and judicial powers. These officers have been invested with these powers for the preservation of law and order, for safeguarding the rights of citizens in the matter of arrest and search and for holding enquiry or trial. On examining some of the provisions contained in Chapters XIV and XV of the Code we find that the Police has been directed to carry on investigation on information received by it in cognizable and non-cognizable cases. Under Section 156 (1) any officer in charge of Police Station may investigate any cognizable case. Under Section 156(8), any Magistrate

empowered under Section 190 may order such investigation. Under Section 157, an officer in charge of a police station is directed to send forthwith a report of the information received by him to a Magistrate empowered to take cognizance of such evidence upon a Police report. Under Section 159 such a Magistrate on receiving such report, may direct an investigation or if he thinks fit at once proceed to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided by the Code.

Usually a report is submitted by the officer in charge of the police station sending a copy of the First Information Report and further mentioning therein that investigation has been taken up by him. After the investigation has been completed, under Section 173 the officer in charge of the police station is to forward to a Magistrate empowered to take cognizance of the offence upon a report in the form prescribed by the State Government setting forth the names of the parties, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and if so, whether with or without sureties. If on investigation it appears to the police officer in charge of the police station that there is sufficient evidence or reasonable ground, such officer shall forward the accused under custody to a Magistrate. The Rajasthan Police Regulations (1948) (hereinafter called 'the Regulations') provide in Regulation No. 315 that in such a case a charge sheet which is a report prescribed under Section 173 of the Code is to be submitted by the officer in charge of the police station to the Magistrate concerned. There can be little doubt that on such a report cognizance of an offence can be taken by the Magistrate under Section 190 (1) (b). Under Section 173, Cr. P. C. the officer in charge of a police station is to submit a report even in cases in which upon investigation it appears to the officer in charge of a police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused to a Magistrate.

In the Police Regulations, it is provided in Regulation No. 321 that a final report shall be drawn up by the investigating officer in every investigated case which does not result in charge sheet. In that report a clear statement of the case and of

the evidence is to be given together with the reasons for not sending up any person for trial. The investigating officer shall also suggest with reasons how the case may be entered by the Magistrate for statistical purposes--whether as 'true', 'intentionally false', 'mistake of fact', 'mistake of law', or 'non-cognizable'. Under Regulation No. 322, the Magistrate may accept the Police finding and declare the case accordingly, or may under Section 156 (8) order further enquiry on specified points, or may take cognizance under Section 190 (b) and if the accused persons have not already been arrested, issue further process against them under Section 204 and require the investigating officer to furnish the names and addresses of the witnesses. Thus, the report of the officer in charge of the police station submitted under Section 173 is of two types, one is in the form of charge-sheet and such a report is submitted when it appears to the said officer that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused to a Magistrate and requesting him to take cognizance of the offence. This report we may call 'positive report'. The other report is called final report in the Regulations and such report is submitted when it appears to the officer in charge of a police station or to the police officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate. We may call such a report a 'negative report'.

5. Section 190 empowers the Magistrate referred to therein to take cognizance of any offence upon a police report in writing of such facts made by a Police Officer. There is little controversy on the point that the Magistrate may take cognizance of the offence not only on the positive police report but also on the negative police report. There is also little controversy on the point that when the Magistrate makes up his mind to take cognizance, he is performing a Judicial act. A report in writing by a Police Officer is based on material collected during investigation. In order that a Magistrate may take cognizance of a case on a report or pass orders under Regulation No. 322, it is often necessary to look to material collected by the Police, otherwise he may not be able to pass a proper order under Regulation No. 323, nor can he judicially determine whether he should take cognizance or not on a negative report. This means that the Magistrate may call for the Police diary, examine the statements of the witnesses recorded by the investigating officer and any other document or article prepared or seized during the investigation.

6. Let us now confine ourselves to a case in which the Magistrate concerned has made up his mind to take cognizance of the offence on a negative report. How is he to proceed with the enquiry or trial Regulation No. 323 says that he may require the investigating officer to furnish the names and addresses of the witnesses. He may also order the accused to be brought before him. But the question is how the enquiry or trial is to proceed. In the very nature of things, the case is to be registered as 'State v. X accused.' Further, when the Magistrate has taken cognizance of the matter even on a negative report of a police officer, it is the responsibility of the State to prosecute the accused in the same manner as it is the responsibility of the State to prosecute an accused about whom the police officer in charge of the police station has submitted a positive report.

According to the Code, except in a case to which Section 191 applies, the Magistrate taking cognizance is himself to hold the enquiry or trial. Section 191 deals with a case of which cognizance of an offence has been taken by a Magistrate under Sub-section (1), Clause (c) of Section 190, and lays down that before the evidence is taken in such a case, the accused has to be informed that he is entitled to have the case tried by another Court, and if the accused objects to the trial before that Court, the case is to be transferred to some other competent Court. But a Magistrate who has taken cognizance on a negative report under Section 190 (1) (b) is to conduct enquiry or hold trial himself and he is to do so uninfluenced by the fact that he himself had made up his mind to take cognizance of the offence while the Police had reported that the case was not worth taking cognizance of. The Magistrate is to act in a judicial manner and to conduct the enquiry or trial in a fair manner fair to the accused. This is not possible if the Magistrate himself assumes charge of conducting the enquiry or trial on behalf of the State. He is to direct the State Government to assume charge of conducting the enquiry or trial before him. A convenient way in which this direction can be issued is by asking the Police to submit a charge-sheet and thereafter assume the charge of conducting the case on behalf of the prosecution.

The question now arises, can there be any valid object if the Magistrate follows such a course. The Magistrate takes cognizance on a negative report and is empowered to do so under Section 190 (1) (b). The Magistrate, in order that the

enquiry or trial may be fair to the accused has to direct the State to discharge its duty conducting the enquiry or trial on behalf of the prosecution in the same manner as if the Police had submitted a positive report. In these circumstances, if the Magistrate orders that the charge-sheet is to be submitted to him, He is only directing that the State should assume charge of conducting the case on behalf of the prosecution in the same manner as if a positive report has been submitted before him. In our opinion, it will be misconstruing the whole situation to say that the Magistrate is interfering with the investigation when he orders submission of charge-sheet under the aforesaid circumstances. The investigation is complete and the Magistrate does not act as an administrative officer, superior to the officer in charge of the police station or investigating officer in directing the submission of the charge-sheet. He is acting as a judicial officer as in essence he is directing the State to assume charge of the prosecution. The principle that it is of the utmost importance that the Judiciary should not interfere with the Police in matters which are within their province and in which the law imposes on them the duty of enquiry which has been laid down by their Lordships of the Privy Council in *Emperor v. Nazir Ahmed*, AIR 1945 PC 18, and reiterated by their Lordships of the Supreme Court in *State of West Bengal v. S.N. Basak*, AIR 1963 SC 447, is not at all attracted when the Magistrate directs the State to assume charge for conducting the prosecution in such a case. He is only ensuring that the enquiry or trial may be conducted fairly.

When a senior Police officer or any other officer directs his junior to submit a charge-sheet in a case in which in the view of the junior no case is made out, he is over-ruling the opinion of the junior in administrative capacity. Section 3 of the Police Act provides that except as authorised under the provisions of that Act, no person, officer, or Court shall be empowered by the State Government to supersede or control Police functionary. It is only the District Magistrate who has some sort of administrative control over the Police and other Magistrates have no such administrative control. In our humble view, no executive order can emanate from a Magistrate superseding the final report. But the matter assumes a different complexion when a Magistrate has already taken cognizance and he is only directing the State to assist him in holding an enquiry or trial. The most convenient way of seeking such assistance is to direct the Public Prosecutor to proceed with

the case if charge-sheet on a positive report has been submitted by the Police. The only step further is a direction to the Police to submit a charge-sheet. This procedure, as already pointed out, facilitates the holding of the enquiry or trial, and it does not cause any prejudice to the accused, rather it informs him of the nature of the accusation he is to face. It is in this sense that we look into the matter and hold that a Magistrate by a judicial order can ask the officer in charge of the Police Station to submit a charge-sheet.

7. The Bombay High Court in AIR 1960 Bom 240, has taken the view that a Magistrate is empowered to direct the Police to submit charge-sheet because the Magistrate is required by law to make a judicial enquiry and also because the Magistrate has supervisory control over the investigation by the Police officer in the course of an investigation of an offence and that the absence of a provision expressly conferring such power is not decisive. We respectfully differ from this statement of law to the extent it is stated that the Magistrate has power to supervise the investigation. We have already pointed out that the Magistrate cannot exercise any supervision over the investigation as Section 3 of the Police Act expressly says so. Here we may point out that we are not saying so, with regard to a District Magistrate.

Under the Criminal Procedure Code, the power has been given to a Magistrate under certain circumstances to direct investigation by the Police. Sections 159 and 302 may be referred to in this connection. No power has been given in the Criminal Procedure Code to a Magistrate to supervise the investigation, and as pointed out by their Lordships of the Privy Council in AIR 1945 PC 18, it is of utmost importance that the Judiciary should not interfere with the Police in matters which are within their province and into which the law imposes upon them the duty of enquiry, and such interference is not warranted by an exercise of Inherent jurisdiction of the Court.

In AIR 1963 SC 447, this view has been again emphasised by their Lordships of the Supreme Court. Holding of test identification parades, recording of statement of witnesses and confessions of the accused, issuing of warrant of arrest are no doubt some of the duties of the Magistrate and these duties have been entrusted

to the Magistrate to safeguard the right of citizen. These duties do not confer any power upon a Magistrate to supervise the investigation.

8. Cases in which it has been held that the Magistrate cannot direct the Police to submit the charge-sheet mainly proceed on the view that in doing so the Magistrate is interfering in the investigation, or is acting as an officer superior to the investigating agency. On a closer analysis, however, we find that such is not the case. The Magistrate when he is directing the submission of a charge-sheet in the circumstances referred to above is not acting as a senior administrative officer over-ruling in administrative capacity the decision of the police officer in charge of police station or investigating officer. He is acting in judicial capacity, as in his opinion the ends of justice demand that there must be enquiry or trial before him on the facts of the case which are contained in the report submitted by the Police and in the Police diary, and for that purpose he is asking the Police to submit a charge-sheet so that the case may be conducted on behalf of the State by the Public Prosecutor.

9. In some of the cases, it has been laid down that cognizance under Section 190 (1) (b) can be taken only when a report has been submitted by the Police of facts which constitute an offence. This view proceeds on the ground that the words 'such facts' in Section 190 (1) (b) refer to the facts which constitute an offence as the word 'such' has reference to Section 190 (1) (a) which precedes Section 190 (1) (b) and which states that cognizance can be taken upon receiving a complaint of facts which constitute such offence. To re-inforce this argument it may be argued that at least after the amendment of Section 173 by the Amendment Act of 1955 by which Sub-section (4) has been remodelled and Sub-section (5) is added, the only report that can be submitted under Section 173 is a positive report because Sub-s. (4) provides that after forwarding a report under Section 173 the officer in charge of a police station is bound to furnish or cause to be furnished to the accused a copy of the report forwarded under Sub-section (1) and of the first information report and of other documents or relevant extracts thereof on which the prosecution relies. The argument comes to this that no negative report is to be submitted to a Magistrate under the provisions of the Criminal Procedure Code. Let us examine this contention. Sub-section (1) of Section 173 casts a duty on the

officer in charge of the police station to forward to a Magistrate a police report after every investigation is completed. Now such report may be a positive report or a negative report. Again, under Section 173 (1) (b), the complainant is also entitled to know the result of the investigation and the officer in charge of a police station is to inform the complainant of the action taken by him. This provision is inserted for the purpose that the complainant may move the Magistrate to take cognizance of the offence even on a negative report, if he is dissatisfied with the result of the investigation. This also shows that a negative report can be submitted to the Magistrate. Again, under Sub-section (2) of Section 173, a superior Police officer appointed under Section 150 (a) may direct the officer in charge of a police station to make further investigation pending the orders of the Magistrate. The implication of Sub-section (2) is that a negative report can be submitted to the Magistrate and in a case where there is some lacuna in the investigation, the superior police officer of police station has a right to direct further investigation. On the phraseology of Sub-sections (1) and (2), we are of opinion that submission of a negative report is contemplated under Section 173, and addition of Sub-sections (4) and (5) by the Amending Act cannot affect the meaning to be assigned to Sub-sections (1) and (2).

10. Now turning to Section 190, Cr. P. C., we may point out that under Section 190 (1) (a) when it is said that a Magistrate can take cognizance of any offence, upon receiving a complaint of facts which constitute such offence, the meaning is that it is for the Magistrate to see whether the Facts complained of in the complaint constitute an offence or not. The same view is to be attached to Section 190 (1) (b). It is for the Magistrate to see whether the facts mentioned in the report, whether positive or negative, constitute an offence or not and for that purpose he can refer to the material collected by the investigating authority including the case diary. Thus, even on a negative report if the facts mentioned in the report including the material collected by the investigating officer disclose that there is a prima facie case to be enquired into or tried, the Magistrate may proceed to take cognizance. We respectfully beg to differ from the contrary view taken in AIR 1952 Pepsu 29, AIR 1952 Pepsu 38 and AIR 1932 Mad 673.

11. So far cases of this Court are concerned, in ILR (1950) 6 Raj 469 : (1957) Cri LJ 231), Dave, J. has held that even on the negative report cognizance can be taken by a Magistrate. We are in respectful agreement with that view, though our reasons for taking the view are slightly different. In ILR (1959) 9 Raj 671, Jagat Narayan, J. has held that a Magistrate has power to direct the police to submit a charge-sheet in a cognizable case. The point involved in that case was not exactly the same as before us but the concluding observations of the learned Judge are, as follows:--

'The order of the learned S. D. M. was not only legal but was a very proper one in the circumstances of the case. The intention underlying the Code of Criminal Procedure is that as far as possible cognizable cases should not only be investigated by the police but they should also be prosecuted by the State 'at its own expense. Where the police fail to do their duty the S. D. M. must direct them to carry it out.'

These observations are in consonance with our view.

12. We do not think it would serve any useful purpose by taking into consideration the other cases of the various other High Courts. We have assigned our reasons for taking the view that a Magistrate may direct the Police to submit a charge-sheet even on a negative report.

13. We may, however, refer to the Full Bench decision of the Calcutta High Court in AIR 1962 Cal 135 (FB). In that case, the following question was referred to the Full Bench:--

'When the police upon investigation has submitted a final report under Section 173 of the Criminal Procedure Code, can a Magistrate direct the police to submit a charge-sheet, or in the alternative, can he take cognizance on the statement of facts contained in the final report and/or the materials contained in the case diary and issue process against the accused ?' (Page 137: Para. 2).

After reviewing the entire case law on the subject, S.K. Sen, J. came to the following conclusion:--

'My reply, therefore, to the question referred to the Full Bench for decision is that when the police upon investigation has submitted a final report, a Magistrate cannot direct the police to submit a charge-sheet; but he can take cognizance on the statement of facts contained in the final report, and for the purpose of deciding whether further action should be taken, he may refer to the police diaries of the case including the statements under Section 161 of the Code, and if satisfied that there is a prima facie case against one or more accused he may issue process or in the alternative direct the police officer to produce them before the Court if the accused are on bond taken by the police. Cognizance cannot, however, be taken on the materials contained in the case diaries independently of the final report.' (Page 145/146, Para. 32).

The other Judges, except Bhattacharya, J., took the same view though the reasons given are slightly different.

14. None of the Judges of the Full Bench has held that if the Magistrate does not agree with the negative report submitted by the Police, he cannot take cognizance. S.K. Sen, J. has taken the view that cognizance can be taken on the statement of facts contained in the final report but cognizance cannot be taken on the material contained in the case diaries independent of the final report; the Police diaries can only be referred to for the purpose of being satisfied that there is a prima facie case against one or more accused. The learned Judge has stated that in a case when the facts stated in the Police report do not constitute an offence the Magistrate-

'must leave it to the aggrieved party to file a complaint or protest petition which may be treated as a complaint and he may take cognizance thereon.' (Page 142).'

One has to concede that in order to enable the Magistrate to take cognizance under Section 190 (1) (b) there must be a Police report before him. This does not mean that in taking cognizance the Magistrate is tied down to the statement of facts contained in the final report. It is quite possible to visualise a case in which in the opinion of the Magistrate the statement of facts contained in the final report does not correspond with the material contained in the case diary and the Magistrate is not satisfied with the statement of facts contained in the report

submitted to him. On the other hand, he is satisfied on examining the police diary that there is a prima facie case to be enquired into. There can be no valid objection if the Magistrate takes cognizance in such a case. For example, in a case of kidnapping, the statement of facts in the report is that the girl was not a minor but the case diary reveals that the girl was a minor; the Magistrate may ignore the statement of facts in the report and may take cognizance of the facts contained in the police diary even though cognizance is being taken on the material contained in the case diary independent of the final report. In our humble opinion, there is nothing wrong if such a course is adopted. We agree with the learned Judge that a Magistrate cannot pass an executive order directing the investigating officer to submit a charge-sheet in supersession of the negative report already submitted by him for the purpose of enabling him to take cognizance. But In our view in his judicial capacity he can direct the Public Prosecutor to conduct the case and for that purpose direct the police to submit a charge-sheet.

15. In the instant case the Sub-Divisional Magistrate, Jhalawar, directed the Police to submit a charge-sheet. We should not in the ordinary circumstances interfere with his order but the case is old one and on examining the case diary, we find that this is not at all a case in which the learned Magistrate should have directed the police to submit a charge-sheet, Mst. Kanwari is the woman who is said to have been abducted. She was major at the time of her abduction. The case is that she was abducted by fraud by the accused Hira and Rama. She has given as many as four statements. The first was recorded in the F. I. R. in which she did not give the name of the accused. She has also not given her true name and her father's true name but gave false names. The various statements given by her before the Police and before the Second Class Magistrate, Aklera only show that she was not fraudulently taken away but she was a consenting party. In such a case, no useful purpose would be served by directing the Police to submit a charge-sheet. We do not think that there was any justification to call for a charge-sheet.

16. In this view of the matter, the Reference is accepted and the order of the Sub-Divisional Magistrate, Jhalawar, dated 11-4-1962 is set aside.

