

Namasivayam Vs. State

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Court : Chennai

Decided On : Jun-16-1981

Reported in : 1982CriLJ707

Judge : M.A. Sathar Sayeed, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 149, 353 and 409; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3), 169, 170, 173, 173(2)(1) and 173(3)

Appeal No. : Crl.M.P. No. 4125 of 1979

Appellant : Namasivayam

Respondent : State

Advocate for Def. : M. Karpagavinayagam, Govt. Adv.

Advocate for Pet/Ap. : G. Krishnan and ;Packiaraj, Advs.

Judgement :

ORDER

1. It appears from the facts of the case that the officials of the Co-opertive Land Development Bank, Sankarankoil, on 13-5-1977 at about 2-30, p.m. at Vasudevanallur, equipped with a distraint warrant, to discharge their official duties as public servants, entered into the house of the petitioner's father Mr. Periaswami

Pillai for removing the articles and have thus removed the movable articles like Radio, fan, Wall-clock, etc., from the house of the petitioner's father since the petitioner's father has not paid the money due and payable to the Co-operative Society. It further appears from the arguments advanced by the petitioner's counsel and from the petition filed by the petitioner, that the petitioner's father preferred a report before the police against the high-handed action of the five officials of the Co-operative Land Development Bank for offences under Sections 147, 454, 380, 505(ii) read with Section 149 I.P.C. It was contended by the petitioner's father, that the Co-operative Land Development Bank officials have no authority to seize the articles from his house. The complaint lodged by the petitioner's father to the police did not materialise and hence, a private complaint was filed before the Court by the petitioner's father and the said complaint was forwarded by the Magistrate to Sivagiri Police Station under Section 156(3) Cr.P.C. The Inspector of police Puliyangudi investigated the complaint forwarded by the Magistrate and filed a charge-sheet before the Sub-Divisional Judicial Magistrate, Kovilpatti. It is the contention of the petitioner that the charge-sheet was returned to the Police, to comply with some technical procedural defects. Thereupon, the police, instead of complying the defects, has submitted its investigation report to the Magistrate and referred the case as a mistake of law. According to the petitioner herein, this procedure adopted by the Police is illegal and contrary to law. But we are not concerned with this for the present.

2. While this was so, one of the accused against whom a complaint was lodged by the petitioner's father, as a counterblast, sent a written complaint against the petitioner herein to the police on 25th May, 1977, (that is, twelve days after the incident) contending that the petitioner herein, on 13th May, 1977, while they were discharging their duties as public servants, has committed acts of assault and used criminal force, against the Bank officials from discharging their duties, warranting the petitioner's conviction under Section 353 I.P.C. This complaint sent by one of the accused, who is no other than the Co-operative official, was registered by the Police as Crime No. 332 of 1977 against the Petitioner herein under Section 353 I.P.C. This complaint was investigated by the Inspector of Police, Puliyangudi, and some of the Co-operative officials were examined and thereafter it was found by the police that no offence as alleged has been made out

against the petitioner and hence the complaint lodged by the Co-operative Official was referred to, as mistake of law. The Judicial Second Class Magistrate, Sankarankoil, out whom the police referred their investigation report, passed orders on 16th July, 1977, as follows :- 'Read orders passed on the refer charge-sheet-Order-Recorded as mistake of law'. Thereafter another Inspector of Police of Sankarankoil, out of his own initiation, conducted fresh investigations on the original complaint of the Co-operative official against the petitioner herein and on the basis of the fresh investigations on the old complaint, filed a charge-sheet against petitioner under Section 353 I.P.C. before the Judicial Second Class Magistrate, Sankarankoil, which is numbered as C.C. No. 366 of 1978 which the petitioner

3. The short contention of the petitioner is, that when once the complaint lodged by one of the Co-operative officials against the Petitioner having been enquired by the police and the Magistrate on the report of the police passed an order as 'mistake of law' on 16th July, 1977, the police has no power to reinvestigate the same complaint or to reopen the investigation at the instance of the Inspector of Police again, and file a charge-sheet against the petitioner under Section 353 I.P.C. According to the petitioner, the acceptance of the report submitted by the police to the magistrate on earlier occasion after due investigation by the police and Dassine an order by the Magistrate on the police report in respect of an alleged offence under Section 353 I.P.C. alleged to have been committed by the petitioner 'as mistake of law', will amount to an acquittal of the petitioner, which has become final unless the said order of the Magistrate is reversed by a competent higher Judicial forum. The other contention of the petitioner is, that reinvestigation of the offence after passing of the order by the Magistrate as mistake of law and filing a charge-sheet against the petitioner on the same offence, without obtaining the permission of the Court, is illegal and contrary to S. 300 CrI.P.C.

4. The question for consideration is, whether the Sub Divisional Judicial Magistrate, Kovilpatti, having passed an order as 'mistake of law' on 16th July, 1977, on the report submitted by the police against the petitioner after enquiry over the complaint of one of the Co-operative officials, can take cognizance of the

offence on the reinvestigation report of the police.

5. I may at the outset state that the contention of the petitioner that under Section 300 CrI.P.C. cognizance of the offence under Section 353 I.P.C. by the Magistrate is barred, has no substance. Section 300 CrI.P.C. contemplates that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried once again for the same offence, nor on the same facts for any other offence, for which a different charge from the one made against him might have been made under sub-section (1) of S. 221, or for which he might have been convicted under sub-section (2) thereof. In this case, the matter was not tried nor the petitioner has been convicted or acquitted after trial and hence the applicability of Section 300 CrI.P.C. to the facts of this case does not arise.

6. The learned counsel appearing for the Petitioner having failed in his attempt to convince me with reference to the applicability of Section 300 CrI.P.C. contends, that the complaint of one of the Co-operative officials to the police against the petitioner under Section 353 I.P.C., having been referred to as a mistake of law by the Judicial Second Class Magistrate, Sankarankoil, on 16th July, 1977, and the Magistrate having Passed an order and recorded as mistake of law on the enquiry of the police report, it does not lie at the hands of the respondent Police to hold reinvestigation of the same complaint and file a charge-sheet before the Magistrate and the Magistrate erred in law in framing a charge against the petitioner under Section 353 I.P.C. There is some substance in the contention of the petitioner's counsel.

7. Section 5 CrI.P.C. provides that an offence under the Penal Code shall be investigated, tried or inquired in accordance with the Provisions contained in the CrI.P.C. investigation of offences are two in nature, one is cognizable and the other is non-cognizable. With reference to cognizable offences, when the complaint is received with respect to such commission of the offence, the concerned police officer takes up the investigation. In the case of non-cognizable offences, the police officer does not investigate without the order of a competent

Magistrate. According to the scheme of the Code, investigation is preliminary to a case being put up for trial for a cognizable offences Investigation starts, on an information relating to the commission of an offence given to a Police officer in charge of the police station. Investigation generally consists of various steps, namely, enquiry by the officers or ascertainment of facts and circumstances of the case from the complaint, proceeding, to the spot by the officer concerned on the allegations of the complaint and discovery and arrest of suspected offender and the collection of evidence for the arrest of the offender relating to the commission of the offence which in turn may consist of examination of various persons including the accused person and the reduction of the statement into writing with reference to seizures in mahazars and formation of opinion as to whether on materials collected by the police officers, there is a case to place the concerned person in action against whom, complaint is lodged before the Magistrate for trial and filing of the charge-sheet under S. 173 Cr.P.C. Sections 169 and 170 Cr.P.C. do not contemplate submission of any report by the police officer to the Magistrate although they do state what the police has to do in either case, the final report of the police is to be submitted to the Magistrate under sub-section (1) of S. 173 Cr.P.C. If the Magistrate, on the other hand, disagrees with the report submitted by the police, then the accused comes into the picture and thereafter he has a right to be heard and to adduce evidence in support of his innocence. But in case an order is passed by the Magistrate under S. 173(3) Cr.P.C. in agreement with the police report that there is no case against the person accused, it goes in favour of the person accused. But it is open to the Magistrate to agree with the police report and take cognizance of the offence under S. 190(1)(b) or to take the view that the facts disclosed do not make out an offence and decline to take cognizance. As pointed out by the Supreme Court in *State of Bihar v. J. A. C. Saldanna* : 1980 CriLJ98 :

'There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate

into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under S. 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the Police function of investigation comes to an end subject to the provision contained in S. 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence Proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate'.

8. In the instant case, on an investigation of the complaint lodged by one of the Co-operative officials against the petitioner, the report was registered as Crime No. 332 of 1977 and investigation was conducted by the Inspector of Police and a report was submitted to the Magistrate to the effect that there is no case or merit in the report with the result, the Magistrate has passed an order under S. 173 CrI.P.C. to the effect that the entire matter is recorded as mistake of law. I may further state that before passing such an order. The Magistrate scrutinises the complaint and the report submitted by the police on the complaint and the Magistrate acts judicially. Orders passed by a Magistrate either on the police report to the effect, that no case had been made out, or taking cognizance by the Magistrate of the offence levelled against the petitioner are such orders, that, they cannot be viewed separately and considered different from the entire judicial process of which they are intended to form a part. I am taking this view following the majority judgment of the Supreme Court reported in Kamalapati Trivedi v. State of West Bengal : 1979 CriLJ679 which reads as follows :-

'..... And yet it can hardly be argued that the presiding officer of the Court does not act as a Court when passing such an order. Really, the right to adduce evidence and be heard is to be taken into consideration as being available at one stage of the proceedings or the other. Thus in the case of an order passed by a

Magistrate under sub-section (3) of S. 173 of the Code in agreement with the police report does not call for any hearing or the production of any evidence on the part of the accused, as it goes in his favour. If the Magistrate, on the other hand, disagrees with the report submitted by the Police and takes cognizance of the offence, the accused comes into the picture and thereafter shall have the right to be heard and to adduce evidence in support of his innocence. Viewed in this context, all orders passed by a Magistrate acting judicially (such as orders of bail and those passed under sub-section (3) of S. 173 of the Code discharging an accused or orders taking cognizance of the offence complained of) are parts of an integral whole which may end with a definite judgment after an inquiry or a trial, or earlier according to the exigencies of the situation obtaining at a particular stage, and which involves. If need be, the adducing of evidence and the decision of the Magistrate on an appreciation thereof. They cannot be viewed in isolation and given a character different from the entire judicial process of which they are intended to form a part'.

9. In the instant case, the Magistrate, after receiving the report from the Police lodged by the complainant herein, took his judicial discretion applied his mind on the police report as to how the report is to be dealt with, and thereafter passed an order on 16th July, 1977, as 'Recorded as mistake of law'. When once such an order is passed against the petitioner herein by the Judicial Second Class Magistrate, Sankarankoil on the report submitted by the Sub inspector of Police, the matter becomes final and another Inspector of Police, Sankarankoil, cannot reopen the investigation suo motu without taking permission of the Court which passed such an order, and file charge-sheet against the petitioner as has been done in this case.

10. The learned Public Prosecutor contends that an investigating officer is required to submit his report and if no case is made out, still the, Magistrate is empowered to take cognizance of the case. He further contends that if, on the report of the police, the Magistrate is not satisfied, still the Magistrate can order further enquiry under S. 156(3) CrI.P.C. and the Court has no judicial control over investigations and over the manner or the circumstances in which an investigating officer makes his report under S. 173 CrI.P.C. According to the Public Prosecutor, the

investigating officer's act is wholly administrative and, therefore, there is nothing to prevent the investigating officer submitting another report in supersession of the earlier one and he can do it on his own initiative or under the direction of the Superintendent of Police or the District Magistrate, and hence, the learned Public Prosecutor contends, that reopening of the investigation by the Inspector of Police before submitting the charge-sheet against the accused is not illegal and there is no illegality in proceeding and reinvestigating the case against the petitioner and by such reinvestigation it cannot be said that there is any illegality committed by the investigating officer in submitting the charge-sheet after previously submitting his final report to Court. To substantiate his argument, reliance is placed by the learned Public Prosecutor on a decision reported in *Rama Shankar v. State of U.P.* : AIR1956 All525 .

11. There is no doubt that an investigating officer's act is wholly administrative and there is nothing to prevent the investigating officer to submit another report in supersession of an earlier one and he can do it on his own initiative or under the direction of the higher officials or the District Magistrate. Reliance is also placed by the learned Public Prosecutor on an unreported judgment of Maheswaran, J. in Crl.R.C. No. 110 of 1980 dated 10th February, 1981. That was a case where the petitioner accused was charged for an offence under S. 409 IPC. The petitioner/accused in that case contended that the Government, after due enquiry and on basis of the report received from the Registrar of Co-operative Societies, ordered the case registered against the accused as Crime No. 56 of 1973 on the file of Kollencode Police Station be withdrawn and on the basis of that order the inspector concerned filed a report before Court praying permission to withdraw from the Prosecution and the Court granted permission. Thereafter a fresh charge-sheet was presented and the Court took cognizance of the offence and the case was numbered as C.C. No. 253 of 1979. The petitioner/accused in that case contended that the subsequent filing of the charge-sheet is motivated and is the result of political vendetta and therefore, the charge-sheet should be rejected. The learned Judge, after going through the facts of the case, observed :

'The Government memo referred to only states that the case registered in Crime No. 56 of 1973 on the Kollencode Police Station against the revision-petitioner, Ex.

President of the Munchirai Co-operative Land Development Bank be withdrawn. In my view, the withdrawal of the case in Crime No. 56 of 1973 does not operate as a bar for filing a charge-sheet subsequently for the same offence, for earlier no charge-sheet was filed. Further it is reported that the Court has merely recorded the letter of the Sub-Inspector of Police dropping action. No order of acquittal or an order operating as such, was passed by the Court. There is, therefore, no impediment in filing a charge-sheet, subsequently as no charge-sheet was filed in Crime No. 56 of 1973'.

The facts in that case are different from the facts in the instant case. That apart, Maheswaran, J., had no opportunity of considering the decision of the Supreme Court reported in Kamalapati Trivedi v. State of West Bengal : 1979 CriLJ679 . Under the circumstances, the unreported judgment of Maheswaran, J., cited by the learned Public Prosecutor is not applicable to the facts of the present case.

12. The point that is argued and urged by the learned counsel Mr. Krishnan appearing for the petitioner in the instant case is, that when once an enquiry report is submitted by the police to the Magistrate under S. 173 Cr.P.C. and the Magistrate having acted on such report which was based on the due investigation by the Police, and on the basis of such report when the Magistrate passes an order 'Recorded as mistake of law', the order is a judicial order and the matter ends there, unless the said order is agitated before a higher Forum. The learned counsel for the petitioner further contends that the police, in the instant case, on the same complaint lodged by one of the Co-operative officials and on the same facts, having submitted a report as 'referred', cannot reinvestigate the case again, at the instance of another Inspector of Police and submit another report superseding the earlier report and lay a charge-sheet against the petitioner without taking Permission of the Magistrate who passed the order as 'Recorded as mistake of law'. I agree with the contention of the petitioner's counsel. There must be a limit for investigation of the complaint by the police. The police cannot at the instance of one officer after enquiry, say that there is no case against the petitioner and that report having been accepted by the Magistrate, subsequently at the instance of another police officer, as in this case Inspector of Police, say that there is a case against the petitioner. The contention of the learned counsel is to allow

prosecution to send another report to the Magistrate who has already passed final order over the report of the police that there is no case made out against the petitioner, the Magistrate ought not to have taken on his file the charge-sheet, as he has done in this case, against the petitioner over the same complaint.

13. I may at this stage state that if a Police officer after he lays a charge-sheet gets information or additional information he can still investigate and lay further charge-sheet. Where the first report made by the police to the Magistrate, though was incomplete, contained all the Particulars and a supplementary report containing all the particulars is filed subsequently giving the Particulars and details of the witnesses who are merely formal witnesses, the first report is in fact a complete report as required by S. 173(2)(1) Cr.P.C. and it is not vitiated by the mere fact that the supplementary report is filed subsequently. But that is not the case here. In this case, the police had once put up a detailed report after complete investigation, and on the basis of the report filed by the respondent before the Magistrate against the petitioner the Magistrate passes an order, which is judicial in nature, to the effect that there is no case and the complaint is recorded as 'mistake of law'. The Magistrate, while passing the order, exercised his judicial Power and discretion and it is an 'order' and unless that order is set aside, reinvestigation of the case on the same complaint not by the Superintendent of Police but at the instance of the Inspector of Police for the same offence is an illegality. I can understand if the respondent agitates the earlier order passed by the Magistrate on 16th July, 1977 which was recorded as 'mistake of law', at a higher forum and at the same time, starts reinvestigation of the case at the instance of the Superintendent, of Police or the Magistrate, and a charge-sheet is filed against the petitioner, then there is some substance in it. But that is not the case here. In this case the Magistrate has not taken cognizance at all in the earlier police report submitted by the respondent under S. 173 Cr.P.C. Had there been the Police report against the petitioner Pending before the Magistrate, and if no order is passed on the police report by the Magistrate and if the respondent, while the report, is pending before the Magistrate, holds a further detailed inquiry and collects several other particulars of the offence committed by the petitioner and submits a further report then it, can be said that the further investigation by the respondent is not barred when the cognizance of the offence has yet to be taken

by the Magistrate. But the case before us is, that there is no cognizance at all of the earlier enquiry report, and when once the Magistrate passes an order as 'mistake of law' on the earlier enquiry report submitted by the police, it is a judicial order, for, the Magistrate has passed the said order after applying his mind on the report submitted by the police, and taking cognizance of the same offence by the Magistrate on a reinvestigation of the case by the police without any fresh complaint by the complainant and without obtaining any permission from Court, is illegal, perverse and contrary to law and should not be allowed to sustain and has, therefore, to be set aside.

14. Accordingly, on the facts of the case, I am of the view that the respondent cannot embark on the reinvestigation of the matter on the complaint boosted by one of the Co-operative officials, on the same facts and on the same materials of the case and on the same cause of action which was already referred to as a mistake of law and now file a charge-sheet before the Sub-Divisional Judicial Magistrate, Kovilpatti, who has numbered the case as C.C. No. 366 of 1978 and I am of the view and I hold that the entire proceedings against the petitioner in C.C. No. 366 of 1978 are vitiated with illegality, and have to be, and are accordingly quashed and this petition is allowed.

15. Petition allowed.