**Tarapada Sarkar Vs. the State**

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**Court** : Kolkata

**Decided On :** Dec-12-1958

**Reported in** : AIR1959Cal640,1959CriLJ1163

**Judge** : S.K. Sen, J.

**Acts** : Code of Criminal Procedure (CrPC) , 1898 - Sections 4, 4(1), 155(2) , 173, 190(1), 251A and 252

**Appeal No.** : Criminal Revn. No. 1222 of 1958

**Appellant** : Tarapada Sarkar

**Respondent** : The State

**Advocate for Def.** : Surathi Mohan Sanyal, Advs.

**Advocate for Pet/Ap.** : Ajit Kumar Dutt and ;Provas Kumar Sen, Advs.

**Judgement** :
ORDER

**S.K. Sen, J.**

1. This rule was issued on the application of the petitioner for quashing a proceeding under Section 506 of the Indian Penal Code pending before the Police Magistrate, Alipore, and in the alternative for the direction that the case should be

tried according to the procedure laid down in Section 252 and the subsequent sections of the Criminal Procedure Code.

2. The facts of the case are briefly as follows: The police while investigating a cognizable case, namely, an offence under the Arms Act, became aware of a non-cognizable offence, namely, an offence of criminal intimidation, punishable under S, 506 or the Indian Penal Code committed or alleged to have been committed by the petitioner Tarapada Sarkar. The police investigated into that offence also without having obtained any order from a Magistrate for the investigation of the non-cognizable case. The police, after investigation, submitted a charge-sheet in the cognizable case under the Arms Act and submitted a report styled as complaint for the prosecution of the petitioner in respect of the non-cognizable offence, namely, criminal intimidation punishable under Section 506 of the Indian Penal Code. The learned Police Magistrate took cognizance of the offence under Section 506 of the Indian Penal Code on the report submitted by the Officer-in-Charge Tallygunge P. S. and after the appearance of the accused, he decided that the case had been started on a police report and, therefore, he could proceed to try the case under new procedure prescribed by Section 251A of the Criminal Procedure Code. In that view he directed that the copies of the report and the record of the evidence made by the police and other document mentioned in Sub-section (4) of Section 173 of the Code be furnished to the accused free of cost. This order was passed on 5-6-1957. On 19-6-1957, according to the order of the learned Magistrate, copies of police report and other necessary documents were supplied to the accused. On 18-7-1957, when the trial was to be taken up, an objection was taken on behalf of the accused as regards the procedure to be followed in the trial of the case; and the learned Magistrate heard arguments of both sides on the point on 26-7-1957 and then held that he had properly taken cognizance on the police report under the provisions of Section 190(1)(b) of the Code, and that he could treat the report of the police as a report submitted by the Police after investigation within the meaning of Section 173 of the Code and, therefore, the trial should proceed under the new provisions of Section 251A of the Criminal Procedure Code.-

3. After moving the Sessions Judge for making a reference the accused petitioner has obtained this rule from this Court, praying that the proceedings be quashed altogether as the learned Magistrate had taken cognizance of the case wrongly, and praying in the alternative that in any case it should be ordered that the case be tried in accordance with the old procedure contained in section 252 and subsequent sections of the Code.

4. Mr. Ajit Kumar Dutt appearing on behalf of the petitioner has not pressed the first point, He has conceded that the learned Magistrate was right in his view that cognizance of the case was rightly taken on the report of the police under the provisions of Section 190(1)(b) of the Criminal Procedure Code. In fact, after the amendment of the wording of Clause (b) of Section 190(1), it has been held in numerous cases that a Magistrate is entitled to take cognizance eyen of a non-cognizable case upon a report in writing of the facts made by any police officer. Even in the case on which Mr. Dutt has relied in support of his contention on the second point regarding the correct procedure for the trial namely, Manik Chand v. The State, : AIR1958 Cal324 , the law on the point was discussed at p. 108 (of Cal WN): (at pp. 333-334 of AIR) and other pages, and it was held that the established position of law was that since the amendment of Section 190(1)(b) a report by a police officer on even a non-cognizable offence was not a complaint within the meaning of Section 4(h) of the Code, and cognizance of the non-cognizable offence could be taken on the report: of the police under Section 190(1)(b) just as on a report concerning a cognizable offence. Accordingly, it must be held that the learned Magistrate took; cognizance of the case legally and properly, and therefore, no question can arise about quashing the proceedings before the learned Magistrate.

5. Next, there is the point whether the new procedure laid down in Section 251A should be followed or old procedure as laid down in Section 252 and subsequent sections of the Code. On this point Mr. Dutt has urged that definitely the old procedure as laid down in Section 252 and subsequent sections should be followed and that the learned Magistrate was wrong in his view that since the report had been submitted after an investigation, even though without obtaining the order of the Magistrate, it could be treated as _a report after investigation

within the meaning of Section 173 of the Criminal Procedure Code and, therefore, the new procedure should be followed. In the case of : AIR1958 Cal324 referred to above, although their Lordships were dealing with the procedure for commitment of enquiry and not with the procedure for trial of a warrant case, they dealt with this point incidentally and they took a view which definitely supports the contention of Mr. Dutt, In that case their Lordships were dealing with a case of investigation by the Calcutta police and Section 156 of the Code had not yet been extended to the Calcutta police. Accordingly, their Lordships held that the investigation by the police was under the Calcutta Police Act and not under the provisions of Chapter 14 of the Code. In the circumstances, their Lordships held that even though the report submitted by the police was a report within the meaning of Section 190(1)(b) of the Code on which the Magistrate was entitled to take cognizance, still it was not a report of the police after investigation within the meaning of Section 173 of the Code and, therefore, the old procedure for commitment proceedings should be followed. The same reasoning apply to cases where the police are not legally competent to investigate because the police have not obtained the order of a Magistrate for investigation of a non-cognizable case under the provisions of Section 155(2) of the Criminal Procedure Code.

6. Mr. Surathi Mohan Sanayal appearing for the State has urged that though the police officer did not obtain an order under Section 155(2) of the Code for investigating the non-cognizable offence, still there was an investigation made by the police along With the investigation that was held into the cognizable case, namely, the case under the Arms Act, and that in the circumstances the report submitted by the police in respect of the non-cognizable offence could be treated as a report after investigation within the meaning of Section 173 of the Code, even though there might be an irregularity inasmuch as an order of a competent Magistrate was not taken under Section 155(2) of the Code. The learned Magistrate was also inclined to take the same view, and that is why he held that the new procedure should be followed for the trial. The learned Magistrate observed on the authority of Emperor v. Shivaswami Guruswami, ILR 51 Bom. 498 : (AIR 1927 Bom 440) that the investigation into a non-cognizable offence even without a Magistrate's order, when done along with the investigation into a cognizable offence, is a legal investigation. There is undoubtedly some note in

B.B. Mitra's Commentary of the Criminal Procedure Code supporting the view taken by the learned Magistrate and urged by Mr. Sanayal, because the note is as follows: 'A police officer is not competent to make an investigation into a non-cognizable offence, but the investigation of a non-cognizable offence would not be illegal if it is made during the investigation of a cognizable offence' and the authority cited is ILR 51 Bom 498: (AIR 1927 Bom 440). But looking into the case, ILR 51 Bom 498: (AIR 1927 Bom 440), I find even though in that case one of the learned Judges of the Division Bench of the Bombay High Court which decided the case considered the question whether or not the investigation by the police was legal. In the circumstances, what they actually decided was not that the investigation into a non-cognizable offence even without obtaining the order of the Magistrate under Section 155(2) was a legal investigation or that the report submitted thereafter amounted to a charge-sheet was a report within the meaning of Section 173 of the Criminal Procedure Code, but that in the circumstances, the Magistrate should treat the report about the non-cognizable offence as a complaint within the meaning of Section 4(h) of the Code and take cognisance thereon; and it could not be said that the learned Magistrate after having taken cognizance on the police report into a non-cognizable offence acted illegally and without jurisdiction. In Shivaswami's case ILR 51 Bom 498: (AIR 1927 Bom 440), their Lordships of the Bombay High Court were following the decision of an earlier Bombay Full Bench case, namely, King Emperor v. Sada, ILR 26 Bom 150, where under the Code before its amendment in 1923 it was held that a police report about a non cognizable case could not be considered a police report within the meaning of Section 190(1)(b) and it could only be treated as a complaint and the Magistrate could take cognizance thereof by treating it as a complaint under Section 190(1)(a) of the Criminal Procedure Code. But since the amendment of the relevant provisions of Section 190(1)(b) of the Code in 1923, this decision of the Full Bench of Bombay High Court must be regarded as having become obsolete, and in any case the view of the Calcutta High Court and other High Courts is that since the amendment of 1923, a Magistrate can take cognizance even of a non-cognizable offence on a police report under Section 190(1)(b) and not under Section 190(1)(a). Thus the case of ILR 51 Bom 498: (AIR 1927 Bom 440), is no authority for the proposition that where the police has investigated a

non-cognizable offence without the Magistrate's order along with the investigation of a cognizable offence, a report submitted by the police can be treated as a report under Section 173 of the Criminal Procedure Code. In view of the express provisions of the Code on the point, it must be held that where a police officer investigates into a non-cognizable offence without obtaining an order of the Magistrate before hand under Section 155(2), the report which he submits after investigation cannot be treated as a report after investigation within the meaning of Section 173 of the Code because only the report submitted after a legal investigation comes within the scope of Section 173 of the Code. I must therefore, accept the contention of Mr. Dutt and hold that the trial should be held under the old procedure contained in Section 252 and the subsequent sections of the Code and not under the new procedure contained in Section 251A of the Code.

7. It is true that in this case the accused petitioner has obtained the advantage of the new procedure, because he has received without cost copies of the report of the police and other documents which are referred to in Sub-section (4) of Section 173, and he now gets the advantage of the trial under the old procedure also by which he will have sufficient time before the cross-examination; but his acceptance of the copies of the relevant documents to which he was only entitled under the new procedure cannot amount to waiver, because under the criminal law no such waiver by the accused is recognized. Even though the accused has got advantage of the new procedure, it must still be held that he should be legally tried under the old procedure.

8. Accordingly, this rule is made absolute in part; the prayer for quashing the proceedings pending before the Magistrate under Section 506 of the Indian Penal Code is rejected, but it is directed that the learned Magistrate will now proceed under the old procedure as contained in Section 252 and the subsequent sections of the Code.