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Court : Delhi

Decided On : Mar-01-2012

Judge : The Honourable Ms. Justice Mukta Gupta

Appeal No. : CRL. REV.P. 222 OF 2010 & CRL.M.A. NO. 6058 OF 2010(STAY)

Appellant : Gurbax Singh and Another

Respondent : State

Judgement :

1. By this petition, the Petitioners challenge the order dated 28th April, 2010 whereby the learned Trial Court directed framing of charge for offences under Sections 325/506/34 IPC against the Petitioners. The grievance of the Petitioners is that even as per the complaint it is alleged that the Petitioners slapped and threatened the Complainant Bharat Bhushan due to which blood started oozing out from his ear on which they ran away from the spot, thus, at best the Petitioners can be charged for offences under Sections 323/506 IPC.

2. Learned counsel for the Petitioners contends that the opinion of the doctor that there is perforation in the ear and thus the injury was grievous in nature is incorrect. Grievous injuries have been defined under Section 320 IPC and in case the injury falls in anyone of those categories, the accused can be charged for having committed the offence of causing grievous injury. From the facts on record, it is evident that there was no intention to cause a grievous injury. It is stated that

the investigating officer filed an application before the doctor for giving the opinion again, however, no opinion was rendered. Thus, the investigating officer, also, was of the opinion that no case of grievous injury is made out.

3. As per the chargesheet, the Complainant did not cooperate and did not get himself examined thereafter and on this fact being brought to the notice of the senior officers, they directed filing of the chargesheet. Thus, the SHO concerned filed the chargesheet. It is stated that there is no opinion of the SHO himself and in the absence of forming an opinion of the SHO concerned, no chargesheet can be filed. It is further contended that the opinion of the doctor is not binding on the Court and even at the stage of charge, the Court has to look into the material to find out whether the necessary ingredients of Section 325 IPC are made out. Relying upon M.C. Mehta (Taj Corridor Scam) vs. Union of India and Ors. 2007 (1) SCC 110 learned counsel for the Petitioners contends that in the absence of opinion of SHO concerned on filing of the chargesheet, this Court in exercise of its power under Section 482/483 Cr.P.C. will quash the chargesheet and the proceedings pursuant thereto.

4. Learned APP for the State, on the other hand, contends that a perusal of the MLC shows that there was a traumatic perforation in the right ear pursuant to which the complainant had pain in the ear and decreased hearing following trauma. In view of the fact that the ear membrane got perforated, provision of Section 325 IPC is prima facie attracted and whether the same is finally made out or not, the Court will form an opinion only after the entire evidence is led during trial. It is further contended that the intention of the Petitioner is writ large from the fact that by putting the revolver on the ear of the Complainant, the Petitioner threatened him to withdraw the complaint filed in the Court of the learned Metropolitan Magistrate and slapped him so badly that blood started oozing out from his ear. Even in the absence of re-medical examination and a further opinion of the doctor, this Court on the basis of the existing MLC can prima facie form an opinion that a case of grievous injury is made out. Thus, there is no infirmity in the impugned order and the petition be dismissed.

5. I have heard learned counsel for the parties. On 3rd October, 2002 FIR No. 762/2002 was registered on the complaint of Bharat Bhushan wherein he alleged that at about 5:45 a.m. in the morning Gurbax (Montoo Shah) and his son Rocky along with 5-6 workers came and threatened him to withdraw the complaint which he had filed in the Court of Magistrate Sh. Inderjit Singh. Gurbax Singh, Petitioner No.1 gave this threat after putting a revolver on his head and stated that in case he does not withdraw the complaint, he and his family will be finished. Petitioner No.1 further stated that police was with them and thus no harm would be caused to them. Thereafter they slapped the complainant and blood started oozing out from his ear. They ran away from the spot and thus action be taken against the accused persons. The Complainant was medically examined on 3rd October, 2010 at about 7:40 p.m. wherein it was recorded that the Complainant complained of right ear ache and decreased hearing. The case was referred to senior resident ENT, who examined the Complainant and recorded history of right ear ache and decreased hearing following trauma. The senior resident noted traumatic perforation in the ear and on the said basis opined that injury was grievous in nature. The investigating officer was not satisfied with this opinion and thus he filed an application to the CMO, DDU Hospital regarding re-medical examination by ENT Specialist. However, it appears that the Complainant did not join for re-medical examination. The Complainant was not cooperating and also did not identify the remaining co-accused persons. Thereafter, the SHO in consultation with the ACP concerned filed the chargesheet dated 26th February, 2003.

6. Section 320 IPC reads as under :-

“The following kinds of hurt only are designated as “grievous”:-

First.- Emasculation.

Secondly.-Permanent privation of the sight of either eye.

Thirdly.- Permanent privation of the hearing of either ear,

Fourthly.-Privation of any member or joint.

Fifthly.- Destruction or permanent impairing of the powers of any member or joint.

Sixthly.- Permanent disfiguration of the head or face.

Seventhly.-Fracture or dislocation of a bone or tooth.

Eighthly.-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.”

7. Thus, Section 320 provides that if there is either permanent privation of an ear or privation of a member or joint or the injured has suffered pain for 20 days, the same would amount to grievous injury. In the present case the injury opined to the Complainant was perforation in the ear with loss of hearing and not permanent privation of an ear or a membrane of a joint. There is no evidence on record to show that the Complainant faced 20 days of pain. Since at this stage the onus is on the prosecution to show that a prima facie case for offence under Section 325 IPC is made out and the prosecution has failed to discharge the said onus, I am of the opinion that the learned Trial Court erred in framing charge under Section 325 against the Petitioners. The charge under Section 325 IPC is modified to one under Section 323 IPC. From a perusal of the facts, it is evident that the Petitioners along with the four other persons came and threatened the Complainant by putting a revolver on his head and asked him to withdraw the complaint filed before the learned Metropolitan Magistrate. The fact alleged thus raise strong suspicion for an offence under Section 506/34 IPC having been committed by the Petitioners. Thus, the charge for offence under Section 506/34 IPC is clearly made out.

8. The next contention of the learned counsel for the Petitioners is that while filing the charge sheet officer in-charge has to form his own opinion. In view of the fact that the investigating officer had moved an application for re-medical examination for which the complainant did not cooperate, the SHO in the absence of the second opinion of the doctor had not formed his opinion and merely on the basis of the direction of the senior officer filed the chargesheet. In M.C. Mehta(supra) the Hon'ble Supreme Court while relying upon H.N. Rishbud AIR 1968 SC 117 held that the opinion has to be of the officer in charge only and no other person. Relevant paras of M.C. Mehta (supra) read as under :-

“20. In *H.N. Rishbud v. State of Delhi*, AIR 1955 SC 196 this Court held that the Code of Criminal Procedure provides not merely for judicial enquiry into or trial of alleged offences but also for prior investigation thereof. Section 5 of the Code shows that all offences shall be investigated, inquired into, tried and otherwise dealt with in accordance with the Code. When information of the commission of cognizable offence is received, the appropriate police officer has the authority to enter into the investigation of the same. Thus, investigation is a normal preliminary for an accused being put up for trial for a cognizable offence. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or his subordinate has to proceed to the spot to investigate the facts and circumstances of the case, and if necessary, take measures for the discovery and arrest of the offender. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of investigation. A subordinate officer may be deputed by him for that purpose. The investigating officer has also the power to arrest the person under Section 54 of the Code. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer such subordinate officer has to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence, he may decide to release the suspected accused. If, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he has to take necessary steps under Section 170 of the Code. In either case, on completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form. Thus, under the Code, investigation consists of proceeding to the spot, ascertainment of the facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence and formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under

Section 173. The scheme of the Code shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for each one of the above steps is that of the officer in charge of the police station (see Section 168 of the Code). This Court had categorically stated in the above judgment that, the final step in the investigation, namely, the formation of the opinion as to whether or not there is a case to place the accused on trial is to be of the officer in charge of the police station and this function cannot be delegated. This Court unequivocally observed that there is no provision for delegation of the above function regarding formation of the opinion but only a provision entitling the superior officers to supervise or participate under Section 551 (corresponding to Section 36 of the present Code). This Court further held that, a police report which results from an investigation as provided for in Section 190 of the Code is the material on which cognizance is taken. But from that it cannot be said that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance.

21. In *Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117 this Court held that when a cognizable offence is reported to the police they may after investigation take action under Section 169 or Section 170 Cr PC. If the police thinks that there is not sufficient evidence against the accused, it may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, it may, under Section 170, forward the accused to a competent Magistrate. In either case the police has to submit a report of the action taken, under Section 173, to the competent Magistrate who considers it judicially under Section 190 and takes the following action:

(a) If the report is a charge-sheet under Section 170 it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)(b); or decline to take cognizance. But he cannot call upon the police to submit a report that the accused need not be proceeded against on the ground that there was not sufficient evidence. (SCR p. 668)

(b) If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report he

can give directions to the police under Section 156(3) to make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed; but if the police is still of the opinion that there was not sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take cognizance under Section 190(1)(c). But the Magistrate cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1)(a) or (c), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to such opinion. (SCR pp. 668-69)

This judgment shows the importance of the opinion to be formed by the officer in charge of the police station. The opinion of the officer in charge of the police station is the basis of the report. Even a competent Magistrate cannot compel the police officer concerned to form a particular opinion. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer in charge of the police station. There is no provision in the Code empowering a Magistrate to compel the police to form a particular opinion. This Court observed that, although the Magistrate may have certain supervisory powers under the Code, it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. The formation of the said opinion, by the officer in charge of the police station, has been held to be a final step in the investigation, and that final step has to be taken only by the officer in charge of the police station and by no other authority.

31. As stated above, the formation of the opinion, whether or not there is a case to place the accused on trial, should be that of the officer in charge of the police station and none else. Under the CBI Manual, the officer in charge of the police

station is the SP. In this connection, we quote hereinbelow the CBI Manual, which though not binding on this Court in Supreme Court monitored cases, nonetheless, the said Manual throws light on the controversy in hand. We quote clauses 6.1 and 19.15 of the CBI (Crime) Manual, 2005 hereinbelow:

“Director, CBI - Matters to be shown to DCBI

6.1. Director, CBI should be informed of all important matters and his advice or instructions obtained wherever this is considered necessary by Special Director, Additional Director, Joint Directors, DIGs, Director of Prosecution, Director, CFSL and other senior officers. In particular, the following matters should be referred to him.

* * *

19.15. SP's report is a very important document and should be prepared personally by the SP in the prescribed format. The departments/government undertakings concerned assess the CBI investigation of their cases solely on the basis of the SP's reports. The report should be grammatically correct, clear and unambiguous. The report should be brief without repetitions and should contain all necessary data. The internal differences of opinion among CBI officers should not find mention in the SP's report, which should advance all arguments to justify the final order passed by the competent authority in CBI. The final recommendation should be precise. If sanction is required, the relevant section (including sub-section) of law under which sanction is required should be mentioned with brief grounds. In some of the cases, charge-sheets cannot be filed and only complaints by certain statutory authorities can be filed in the court. In such cases, the relevant section prescribing the filing of a complaint should be mentioned in the SP's report. It should be borne in mind by the SP that the efficiency and the quality of work done by CBI would be viewed mainly on the basis of the SP's report and, therefore, no effort should be spared to make it factually correct, systematic, cogent and logical.”

(emphasis supplied)”

9. It may be noted that in *M.C. Mehta (supra)* the Court was considering whether charge sheet could be filed on the basis of the opinion of the Special Public Prosecutor/Attorney General. It was held that the Superintendent of Police who is the officer in charge of the police station in CBI is not legally obliged to take the opinion. It was further observed that there was no difference of opinion in the team concerned and the question of thus seeking opinion of the Attorney General did not arise. It was the report of the Superintendent of Police which is required to be filed under Section 173 Cr.P.C. either by himself or his superior officers.

10. The Hon'ble Supreme Court further relied upon the decision in *R. Sarla vs. T.S. Velu*, (2000) 4 SCC 459 wherein also a similar question arose. In that case the High Court had directed the investigating officer to take opinion of the Public Prosecutor before filing of the chargesheet. This direction of the High Court was held to be contrary to law as in the entire framework of Cr.P.C. there was no provision for seeking the opinion of the Public Prosecutor before filing of the chargesheet. In *R. Sarla(supra)* however their Lordships held that though the officer in charge of the police station was not bound to take the opinion of the prosecutor however he may take the opinion of his senior officer. Their Lordships in *R.Sarla(supra)* held:

"8. The question here is not simply whether an investigating officer, on his own volition or on his own initiative, can discuss with the Public Prosecutor or any legal talent, for the purpose of forming his opinion as to the report to be laid in the court. Had that been the question involved in this case it would be unnecessary to vex our mind because it is always open to any officer, including any investigating officer, to get the best legal opinion on any legal aspect concerning the preparation of any report. But the real question is, should the High Court direct the investigating officer to take opinion of the Public Prosecutor for filing the charge sheet.

9. Investigation is defined in Section 2(h) of the Code, as including "all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf." We are only concerned in this case with the investigation

to be conducted by a police officer and hence the latter limb of the definition has no relevance now. Chapter XII of the Code contains provisions regarding "information to the police and their powers to investigate".

10. After dealing with various aspects of the investigation from Section 154 to Section 168 of the Code, the statute says in the next two sections regarding the subsequent step. Section 169 of the Code enjoins on the officer in charge of the police station concerned to release the accused from custody on executing a bond if it appears to him that "there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate". Section 170 of the Code directs that if upon investigation "it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a magistrate empowered to take cognizance of the offence upon a police report". Section 173(1) casts an obligation for completing the investigation without unnecessary delay and Sub-section (2) enjoins on the officer in charge of the police station to forward to the magistrate a report in the form prescribed by the State Government, on completion of such investigation. The aforesaid power of the officer in charge of the police station is subjected only to the supervision of superior police officers in rank as envisaged in Section 36 of the Code. There is no stage during which the investigating officer is legally obliged to take the opinion of a Public Prosecutor or any authority, except the aforesaid superior police officer in rank".

11. It is thus apparent that the officer in charge of the police station can seek guidance from his senior officer under Section 36 Cr.P.C. A charge sheet so filed by the officer in charge of the police station on the supervision/direction of the senior officers cannot be said to be vitiated. Thus, in view of the aforesaid discussion, the impugned order dated 28th April, 2010 is modified to the extent that charge under Section 323/506/34 IPC be now framed against the Petitioners and the trial be proceeded with in accordance with law.

12. Petition and application stand disposed of. Trial Court be sent back. Order Dasti.