

**(2000) 01 OHC CK 0049**

**In the Orissa High Court**

**Case No :** Criminal Miscellaneous Case No. 2416 of 1998

Abdul Jahangir and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

**Date of Decision :** 05-01-2000

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(1), 156(2), 156(3), 173  
Dowry Prohibition Act, 1961 — Section 4  
Penal Code, 1860 (IPC) — Section 323, 34, 498A, 506

**Citation :** (2000) 89 CLT 280 : (2000) CriLJ 1560 : (2000) 18 OCR 207 : (2000) 18 OCR 158

**Hon'ble Judges :** P.K. Tripathy, J

**Bench :** Single Bench

**Advocate :** S.K. Aziz, S.K. Jena, S. Acharya and R.P. Bhagat, for the Appellant; Additional Government Advocate, Sk. Nizamuddin and J.K. Patro (O.P. No. 2), for the Respondent

**Final Decision :** Dismissed

## Judgement

P.K. Tripathy, J.—Petitioners are the accused persons in I.C.C. Case No. 47 of 1997 which merged with G.R. Case No. 274 of 1997 under the following facts and circumstances.

2. On 2-5-1997, Ashema Bibi, Opposite Party No. 2, filed the complaint petition registered as I.C.C. Case No. 47 of 1997 in the Court of J.M.F.C. Salipur. In that complaint petition, she made allegations against her husband Abdul Jahangir (petitioner No. 1) and the other petitioners regarding demand of dowry and ill-treatment and torture for not fulfilling the dowry demand constituting the offences under Sections 498A/323/506/34, I.P.C. and Section 4, Dowry Prohibition Act. On that date, learned Magistrate passed the impugned order which reads as hereunder-

Order No. 1 dated 2-5-97: Complainant petition is filed through Advocate, Sri P.K. Kanungo and others. Register, Advocate for the complainant, stating that the

complaint petition may be sent to O.I.C. Mahanga P.S. for necessary investigating treating the same as F.I.R. Heard. Perused the complaint petition. As it reveals that is a cognizable offence against the accused persons. The copy of the original complaint petition be sent to O.I.C. Mahanga P.S. for necessary investigation treating the same as F.I.R. and to submit F.F. to this Court on 9-7-97 as per provision u/s 156(3) Cr.P.C.

On 25-1-99, after completion of the investigation, charge-sheet for the above offences was filed in the case registered as G.R. Case No. 274/79 and on that date cognizance of those offences was taken by the learned J.M.F.C.

With the above backdrop of facts in this application u/s 482 of the Code of Criminal Procedure, 1973 (in short "the Code") prayer of the petitioners is as follows :-

It is therefore prayed that this Hon"ble Court may be graciously pleased to quash the order passed on "2-5-97 in complaint case I.C.C. No. 47/97, and the Crl. proceeding initiated in G.R. Case No. 274/97 arises out of I.C.C. No. 47/97; pending in the Court of J.M.F.C. Salipur, Cuttack.

3. Mr. Sk. Aziz, learned counsel for the petitioners, canvassed two points in support of his aforesaid prayer, viz:-

(i) That the above quoted order in the complaint petition and the action thereof by the learned J.M.F.C. Salipur u/s 156(3) of the Code is vitiated because of the Magistrate not complying with the mandatory requirement of law in Section 200 of the Code. In that context, substance of his submission is that even if learned Magistrate decided to forward the complaint petition in accordance with the provision in Sub-section (3) of Section 156 of the Code, yet, in view of the language used in Section 200 it was mandatory on the part of the learned Magistrate to examine the complainant and his witnesses (if such witnesses were present). According to him, since the Magistrate sent the complaint petition for investigation without examining the complainant and recording her statement, the impugned order is vulnerable for breach of the mandatory provision of law in Section 200. Hence, he argued, the whole proceedings i.e., both the complaint case and G.R. case are liable to be quashed. In that context, he relied on the decisions reported in *Shyama Prasanna Das Gupta Vs. The State*, 1987 (2) Crimes 400 (Ram Narain v. Lokuram); 1988 (1) Crimes 801 : (1989 Cri LJ NOC 96) (*Venkatesh Nilappa Talwar v. Laxmavva and Tula Ram and Others Vs. Kishore Singh*, .

(ii) That there has been inordinate delay in filing the complaint inasmuch as the complaint petition discloses the occurrence to have taken place in the month of March, 1997 (15-3-1997) whereas, admittedly the complaint petition was filed on 2-5-97. Because of this delay, according to him learned Magistrate should have refused to take any action either u/s 156(3) or under Chapter XV of the Code. In that respect, he referred to the decision of *Kumari Gita Byas v. Smt. Surya Tanti* (1989) 2 OCR 404.

4. Sk. Nizamuddin, learned counsel appearing for the complainant/opposite party No. 2 on the other hand argued that the impugned action of the Magistrate is not violative of the provisions u/s 200 as the learned Magistrate before taking cognizance of the offences sent the complaint petition for investigation u/s 156(3) of the Code. In support of that contention, in addition to relying on the case of Tularam (Supra), he also relied on the case of Sarup Ram Vs. State of Haryana, So far as the contention of the petitioners regarding delay is concerned, he argued that, at that stage, learned Magistrate was not required to consider the question of delay and apart from that there was no delay in filing the complaint petition.

5. Learned Additional Standing Counsel appearing for the State (opposite party No. 1) in defending the action of the learned Magistrate also advanced argument supporting contention of Mr. Nizamuddin and he relied on the cases of Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, and Dr. Moizuddin v. State of Bihar 1991 (3) Crimes 769.

6. To appreciate the position of law vis-avis contentions of the petitioners relevant provisions in the Code be properly understood. Chapter XII of the Code relates to "Information to the Police and their powers to Investigate. Section 156 appearing in that Chapter provides "Police Officers power to investigate cognizable case" and Sub-section (3) therein provides that "any Magistrate empowered u/s 190 may order such an investigation as above mentioned" i.e., to say under Sub-sections (1) and (2) of Section 156. Chapter XIII of the Code deals with "Jurisdiction of the Criminal Courts in Inquiries and Trials". So far as the present problem is concerned, the aforesaid Chapter has no relevance. Chapter XIV of the Code prescribes "Conditions Requisite for Initiation of Proceedings". Section 190 in that Chapter provides that-

190. Cognizance of offences by Magistrates:- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
  - (b) upon a police report of such facts;
  - (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
- (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-section (1), of such offences as are within his competence to inquire into or try.

7. The above quoted Section 190 makes it clear that the cognizance taking Magistrate may take cognizance of any offence in any of the three modes as has been provided in Clauses (a) to (c) of Sub-section (1).

Chapter XV deals with "complaints to Magistrates". It consists of Sections 200 to 203. Sections 200 and 202 which are referred to and interpreted at the stage of argument and relevant for the purpose are quoted below :-

200. Examination of complainant:- A Magistrate taking cognizance of an offence of complaint shall examine" upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complainant is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192:

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process:- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been made over to him u/s 192 may if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer, or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an inquiry under Sub-section (1) the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of a police-station except the power to arrest without warrant.

8. Putting emphasis on the language appearing in Section 200 that "A Magistrate taking cognizance of an offence on complaint shall examine" and from the language used in Clause (b) of the proviso to Sub-section (1) of Section 202 that "...unless the complainant and the witnesses present (if any) have been examined on oath u/s 200." Mr. Aziz argues that the complaint petition could not have been forwarded u/s 156(3) of the Code without examining the complainant and recording her statement. Argument, as above, though sounds logical but it is devoid of legal support behind it because, for taking recourse to Section 156(3) the Magistrate is not dependent of the provisions in Section 200 of the Code. On the other hand language in Clause (4) of Sub-section (1) of Section 190 provides that cognizance of any offence, may be taken upon receiving a complaint. In other words, the above stated provision of law empowers a Magistrate to take cognizance of offence upon receipt of the complaint and Section 200 of the Code and for that matter relevant provisions in Section 202 of the Code provide the procedure to be followed when cognizance of the offence is being taken. So provisions in Sections 200 and 202 of the Code provides for the procedure when the cognizance taking Magistrate taking cognizance of the offence proposes to proceed further. Section 156(3) of the Code, on the other hand, provides for an action by the Magistrate before taking cognizance of the offence. To state in a more clear manner, sequence and manner in which Sections 156, 190, 200 and 202 occur be properly visualised, and understood.

9. Section 156 occurs in Chapter XII, i.e., the provisions relating to "Information to the Police and their Powers to Investigate". That provision is mutually exclusive from Section 190 appearing in Chapter XIV which relates to taking of cognizance. Forwarding of a complaint u/s 156(3) by the Magistrate for investigation by Police is an act which must happen before the Magistrate applies his judicial mind to take cognizance of the offence. In other words, upon receipt of the complaint petition and after taking cognizance of the offence recourse to Section 156(3) cannot be taken by such Magistrate. At the stage of taking cognizance of offences on the basis of complaint received, as provided in Section 200 of the Code, the cognizance taking Magistrate is bound to record the statement of the complainant which is popularly known as "initial statement". At that stage if witnesses are present their statements shall also be recorded. However, complainant and witnesses, if any, need not be examined if the case falls under the categories as provided in clauses (a) and (b) of the first proviso. (Second proviso being not relevant is not discussed here). Without complying with the provisions in Section 200, as narrated above, Magistrate cannot proceed further, with the complaint petition, in accordance with the provision u/s 202, of the Code. Taking of cognizance of the Offences is thus the condition pre required for that purpose.

10. The term "taking cognizance of an offence" in the above context means application of judicial mind to the facts stated in the complaint petition regarding commission of an offence. It is prima facie view taken on due application of mind to the facts stated in the complaint petition and thereafter to proceed in

accordance with the procedural law. In the case of R.R. Chari Vs. The State of Uttar Pradesh, the Apex Court stated 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.

While adopting the above ratio, the Apex Court in the case of Tula Ram (supra) stated that at page 11; of Cri LJ -

It seems to us that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations.

11. At this stage, it is relevant to look to the citations referred to by the parties.

In the case of Shyama Prasanna Das Gupta (supra), a Division Bench of Calcutta High Court, while in session of an appeal after conviction, held that when a police officer investigated and thereafter filed a petition of complaint, he does so not as a public servant but as a complainant and as such, his examination u/s 200 of the Code is essential and if he is not examined as a complainant as required u/s 200, the entire proceeding being bad in law is liable to be quashed. Needless to say that the above ratio has no bearing so far as the point of controversy raised by the petitioners in this case. Be that as it may, according to Clause (a) of the first proviso in Section 200, if a public servant acting or purporting to act in the discharge of official duties, makes a complaint in writing, Magistrate need not examine the complainant and the witnesses. That being the statutory provision, this Court does not accept the above proposition of law of the Calcutta High Court.

12. In the case of the Ram Narain (supra) the facts before the Rajasthan High Court was that after receipt of a complaint, without examining the complainant, as provided in Section 200, the cognizance taking Magistrate ordered for a police investigation in accordance with the provision in Sub-section (1) of Section 202. That course adopted by the Magistrate was found not to be in accordance with the mandatory provision in Section 200. The above ratio is not at all helpful to the petitioner's case inasmuch as in the present case. Magistrate took recourse to provision 156(3) and not to Sub-section (1) of Section 202 of the Code.

13. In the case of Venkatesa Nilappa Tavar (supra) the point of law came for consideration before learned single Judge of the Karnataka High Court was as to whether examination of witnesses is mandatory when the Magistrate after recording the statement of the complainant ordered to issue process u/s 204 of the Code. The facts and circumstances in that case had no reference to Section

156(3) of the Code. Hence the ratio in that case is of no help to the petitioners in this case.

14. In the case of Devarapalli Lakshminarayana Reddy and others (supra) while in seisin of a similar matter, it has been clearly and categorically stated by the Apex Court, that at page 1366; of Cri LJ -

17. Section 156(3) occurs in Chapter XII, under the caption; "Informaiton to the Police and their powers to investigate" while Section 202 is in Chapter XV which bears the heading "of complaints to Magistrate". The power to order police investigation u/s 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power u/s 156(3) can be invoked by the Magistrate before he takes cognizance of the offence u/s 90(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-conizance stage and avail of Section 156(3). It may be noted further that an order made under Sub-section (3) of Section 156 is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation u/s 156(3). Such an investigation embraces the entire continuous process which begins with the collection of evidence u/s 156 and ends with a report or charge sheet u/s 173. On the other hand, Section 202 comes in at a stage when some evidence, has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered u/s 202 to direct within the limits circumscribed by the section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation u/s 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

15. In the case of Tula Ram (supra), the Apex Court, while accepting the above quoted ratio in the case of Devarapalli Lakshminarayana Reddy (supra), has held that -

14. xxx xxx xxx xxx xxx

Thus on a careful consideriation of the facts and circumstances of the case following legal propositions emerge :-

1. That a Magistrate can order investigation u/s 156(3) only at the precongnizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation u/s 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as

contemplated by Section 202 of the Code.

2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives;

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses. (b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the Police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

(4) Where a Magistrate orders investigation by the police before taking cognizance u/s 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action u/s 190 as described above.

Referring to the above quoted Sub-paragraph (a) in paragraph 2, it was stated by learned counsel for the petitioners that soon after receipt of a complaint and before passing an order for investigation in accordance with provision u/s 156(3), the cognizance taking Magistrate is bound to record the statement of the complainant in accordance with provision u/s 200, Cr.P.C. That argument is wholly untenable in view of the position of law detailedly discussed and also the above quoted from the Apex Court.

16. In the case of Swarup Ram (supra) the Punjab and Haryana High Court have followed the ratio in the case of D. Lakshminarayana Reddy (supra). In the case of Dr. Moizuddin (supra) Patna High Court have followed the ratio in the case of Tula Ram (supra).

17. So far as relating to matter of investigation and taking cognizance of offences, provision of law is placed in the Code in such a systematic manner that the confusion which arose in the mind of the petitioner should not have arisen. Discussion made in detail about the position of law which finds full support from the authoritative pronouncement by the Apex Court (as quoted above) clearly indicates that after receipt of a complaint but before taking cognizance of the offences Magistrate can forward the complaint petition u/s 156(3) of the Code. But he cannot resort to Section 156(3) of the Code after taking cognizance of the offence. In the present case, the fact situation clearly indicates that learned Magistrate at the pre-cognizance stage forwarded the complaint by resorting to provisions in Section 156(3) of the Code, that action being perfectly in



accordance with the law and procedure, it needs no interference.

18. The other contention of the petitioners regarding delay in filing the complaint is premature. That contention, if raised, can be properly considered at the time of trial and while deciding the case on merit. For the purpose of record, it may be stated that Section 468 provides for the ban to taking cognizance after lapse of the period of limitation and Section 469 provides the period from which point of limitation shall commence. Keeping in view the said provisions, it cannot be said that cognizance of the alleged offences has been taken after expiry of the period of limitation. In that context, the ratio in the case of Kumari Gita (*supra*) is not available to be applied in this case because the question of delay was commented upon in the Criminal Appeal after a full dressed trial.

19. In the result, there is nothing to interfere with the impugned order, not there is any reason to quash the Criminal Proceedings in accordance with the prayer of the petitioners. The Criminal Misc. case is thus, dismissed. Send back the L.C.R. to the Court below with a direction to take up the trial of the case as expeditiously as possible.