

(1991) 11 OHC CK 0045

In the Orissa High Court

Case No : Criminal Revision No"s. 213 and 214 of 1986

Banchhanidhi Mahapatra and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 08-11-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 210, 210(1), 210(2), 223, 239
Penal Code, 1860 (IPC) — Section 148, 149, 173, 294, 323

Citation : (1992) CriLJ 1739

Hon'ble Judges : J.M. Mahapatra, J

Bench : Single Bench

Advocate : B. Rath, for the Appellant; S.K. Das, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Mahapatra, J.—Both the revisions filed by the accused persons in the complaint case bearing ICC 17 of 1983 and G.R. Case No. 1299/82, are directed against the order dated 25-3-1986 of the learned Sessions Judge, Ganjam, Berhampur in Criminal Revisions Nos. 92 and 93 of 1986. The facts of the case and the points of law as also the parties in both the cases being common, both the matters have been heard together and this common judgment would govern both.

2. The facts of the case may be briefly stated thus : Opposite party No. 2 Susanta Kumar Hota lodged FIR on 29-10-82 at Berhampur Sadar Police Station alleging certain overtacts against eight persons who are included amongst the petitioners. The police investigated into the case and eventually submitted final report on 6-4-83. On perusal of the final report, refer notice and Case Diary, the learned Chief Judicial Magistrate took cognizance of the offences under Sections 148, 324, 323 and 426/149, IPC. In the meantime opposite party No. 2 Susanta Kumar Hota filed a complaint case in the court of the Chief Judicial Magistrate, Ganjam, Berhampur on 28-2-83 against the present petitioners and two others

since dead alleging overt acts as averred in the plain paper F.I.R. of the G.R. case referred to earlier (G.R. Case No. 1299/82-Berhampur P. S. case No. 459/82). It is pertinent to mention the admitted position that on the report of the accused persons Banchhanidhi and others (petitioners herein), another police case bearing Berhampur P.S. case No. 457/82 had been started against the informant Susanta Kumar Hota (opposite party No. 2 herein) and others. In the complaint case referred to above, the Chief Judicial Magistrate eventually took cognizance of the offence under Sections 294, 148, 324 and 426, IPC and directed issuance of process against the accused persons, who entered appearance in due course. On 18-7-83 the Chief Judicial Magistrate passed order that the file in the complaint case be clubbed with the G.R. case No. 1299/82. Sometime thereafter the learned Additional Chief Judicial Magistrate who came to be in seisin of the case, on 27-4-84, came to consider the question of framing of charge. He adopted the procedure provided for trial of the offence on police report and on consideration of the materials on record discharged all the accused persons u/s 239, Cr. P.C. on the finding that there was no material for taking cognizance against the accused persons. By the accused persons, the learned Addl. Chief Judicial Magistrate meant the accused persons both in the complaint case, as also in the case initiated on police report. Being aggrieved by this order dated 27-4-84 the complainant-informant preferred revisions before the learned Sessions Judge, Berhampur bearing Nos. 92/84 and 93/84. In both the revisions filed before the learned Sessions Judge, challenge is substantially on the question of discharge of the accused persons u/s 239, Cr. P.C. It was stated that without considering all the materials collected in course of the investigation, the learned trial court was not justified to discharge the accused persons. It was further contended in the revision No. 93/84, that the order of discharge of the accused persons in complaint case ICC 17/83 was wholly illegal and before directing the discharge, he should have recorded the evidence on the side of the complainant as provided for u/s 244, Cr. P.C.

3. The learned Sessions Judge in the two revisions referred to above namely, Crl. Revisions Nos. 92/ 84 and 93/84, while allowing both the revisions set aside the order dated 27-4-84 of the learned Additional Chief Judicial Magistrate, Berhampur discharging the accused persons. He also set aside the order dated 18-7-83 of the Chief Judicial Magistrate directing clubbing of the complaint case with the G.R. case. In essence the direction of the learned Sessions Judge was that the trial court was to proceed with the complaint case and G.R. case separately according to the provisions laid down for trial of the cases. Being thus aggrieved by the reversal order of discharge, the present petitioners who were accused in the complaint case have filed the present revisions challenging the orders of the Sessions Judge in both the revisions.

4. The impugned orders of the learned Sessions Judge are based on the findings that as on the date of the filing of the complaint that is on 28-2-83, no investigation in the G.R. case No. 1299/82 was pending the provision of Section 210, Cr. P.C. has no application and for this he relies on the authority of a

decision of this Court reported in 61 1986 C LT 239 (Santosh Kumar Pradhan v. Lalbehari Behera alias Jatia. The further reason set out in the order is that the facts constituting offence in the two cases are different from one another and as such both the cases should not have been clubbed together. On the premises of these facts, he held that the order passed by the learned Chief Judicial Magistrate clubbing both the cases as if the case is a G.R. case is illegal. He further held that as the case proceeded like one instituted on police report, the subsequent order passed in discharging of the accused persons u/s 239, Cr. P.C. was also illegal and could not be sustained. He accordingly set aside the order dated 18-7-83 directing the clubbing of both the cases as also the subsequent order passed in G.R. case No. 1299/82 discharging all the accused persons u/s 239, Cr. P.C.

5. Mr. Rath appearing for the petitioners in assailing the impugned orders has contended that the order of the learned Sessions Judge in holding that clubbing of both the cases was illegal and so unsustainable cannot stand in view of the provisions contained in Section 210(2) Cr. P.C.

6. A perusal of the facts set out in the FIR of the G.R. case as also the complaint petition in the complaint case would reveal that the incident took place on 28-10-82 at about 8 p.m. when some of the accused persons abused the members of the prosecution party in filthy language and being armed with different weapons like Lathis, Chhella, Kati etc. attacked them. It was also averred that two persons Ladukeswar Rath and Subash Chandra Panda were severely injured. The further allegation is that after assault some of them proceeded to the house of the complainant Susanta Kumar Hota and damaged his house. The substance of the allegations contained in the F.I.R. and complaint petition referred to above, under no stretch of imagination lead to the conclusion that two sets of facts constituting offence have been made out in the two cases. On the other hand, I find that on the self same incident, the complainant approached the S.D.J.M. in the complaint case as the police submitted final report and the complainant apprehended that he would not get redressal of his grievance in the hands of the police. The finding of the learned Sessions Judge that facts constituting the offences in both the cases were different cannot therefore be sustained. As to the other ground which according to the learned Sessions Judge would not attract operation of Section 210, Cr. P.C. is, however sustainable.

7. Section 210 of the Code of Criminal Procedure may be extracted for proper appreciation of the points in issue :--

210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence :--

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case) it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police

is in progress in relation to the offence which is the subject-matter of the enquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the Investigating police officer u/s 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

A perusal of the provisions contained in Section 210, Cr. P.C. would clearly go to show that having regard to the facts of the case, and the sequence of events, the provisions of this section of the Code has no application in terms since by the time the complaint case was instituted, the charge sheet in the case instituted on police report had already been submitted and, therefore, no investigation by the police was in progress in relation to the said offence at that point of time. A Bench of this Court in the case of Santosh Kumar Pradhan v. Lalbehari Behera alias Jatia 61 1986 C LT 239, on the facts of the case somewhat similar to the instant case, has taken similar view as indicated above. The few other decisions cited at the Bar, namely Lakshman Jena Vs. Sudhakar Paltasingh, ; 42 1976 C LT 107 (Tikaram Agarwal v. State) and 60 (1985) CLT 17 (Ghanashyam Tripathy v. Suryanarayan Tripathy being distinguishable on facts and the provisions of Section 210 of the Code not having been discussed in the setting of facts as obtained in the present case, these decisions are of no assistance to either party. The Bench decision of this Court referred to above, on the other hand, can be profitably pressed into service as on the facts of the case, the provisions of Section 210 of the Code was held not to be applicable in terms because of the pre-conditions set out in Sub-section (1) of Section 210 of the Code.

The question is, whether, when the provision of Section 210 in terms does not apply to the facts of the case, the clubbing of both the complaint and the G.R. case would be permissible. The Bench decision referred to above, which followed the decision of the Apex Court in the case of Harjinder Singh Vs. State of Punjab and Others, , held that the clubbing of the two cases on the facts of the case was impermissible. Following the dictum of law laid down in the two aforesaid authorities, and having regard to the facts of the instant case I am of the view that clubbing of both the cases was not permissible.

8. The learned trial court having clubbed both the cases following the provisions of Section 210 Cr. P.C. and having followed the procedure of trial of warrant cases and having discharged the accused persons finding no grounds to frame

charge against them was reversed in revision. The revisional court, namely, the learned Sessions Judge found that the provisions of Section 210 Cr. P.C. in terms does not apply to the facts of the present case, and so also the provisions of Section 223, Cr. P.C. Accordingly he held that it was not proper and permissible in law to club both the cases in terms of the provisions of Section 210, Cr. P.C. what he did was that while setting aside the orders passed by the learned Chief Judicial Magistrate, he directed both the G.R. and the complaint case to be proceeded with separately according to law. In the present revision the main contention raised by Mr. Rath was that the clubbing of both the cases was proper and that the facts of both the G.R. case and the complaint case being identical trial of both the cases separately should not have been directed by the learned sessions court.

9. In the light of my discussions in the foregoing paragraphs holding that provisions of Section 210, Cr. P.C. in terms do not apply to the facts of the present case. I would uphold the decision of the learned Sessions Judge that clubbing of both the cases was impermissible and not sanctioned by law. Now the question is, whether both the cases should be tried independent of each other in accordance with the provision of law contained in the Code, or whether the cases should be tried analogously or successively. No authority has been placed before me by the learned counsel on either side that Section 210(1), Cr. P.C. not being applicable to the facts of a particular case, in that the complaint case was filed after the closure of the investigation by the police in the G.R. case, it would still be open to the trial court to try the common accused persons in both the G.R. and complaint cases as provided in Sub-section (2) of Section 210, Cr. P.C. and to try the case of residual accused persons of the complaint case in accordance with the procedure laid down in Criminal Procedure Code, that is, provisions contained in Sections 244 to 247 in Chapter XIX, the Chapter meant for trial of warrant cases by Magistrate in respect of cases instituted otherwise than on police report. It is submitted by Mr. Rath that by trial of both the cases simultaneously the principle of double jeopardy would be attracted and for the same offence some accused would have to face the trial twice. There can be no two opinions that a person should not be tried for the same offence twice. In the instant case, however, cognisance has been taken by the learned Chief Judicial Magistrate both in the complaint case and in the case instituted on police report. The police had submitted final report, yet the learned Chief Judicial Magistrate on perusal of the police papers did not accept the final report, but took cognizance of the offence. In such a situation taking of cognizance by the learned Chief Judicial Magistrate not having been directly challenged before the sessions court or before this Court, it would be improper to direct the enquiry as to whether the taking of cognizance in the police case was proper or improper, and consequently whether the trial on the basis of the police case should be proper, when on somewhat identical facts cognizance has been taken in the complaint case. To get over the difficulties posed in this case, I propose to follow the view taken by this Court in S. K. Pradhan's case 61 1986 C LT 239 (supra) following the ratio of

the decision of the Apex court in Harjinder Singh Vs. State of Punjab and Others, .

10. I would accordingly direct that proper course to adopt would be that the two cases should be tried together by the same court but should not be consolidated, that is to say, the evidence would be recorded separately in both the cases one after the other, except to the extent that witnesses for the prosecution who were common to both the cases be examined in one case and their evidence be read as evidence in the other. The trial court should, after recording the evidence of prosecution witnesses in one case, withhold the judgment and then proceed to record the evidence of the witnesses in the other case and thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments, taking care that the judgment in one case is not based on the evidence recorded in the other case.

11. On the aforesaid analysis, both the revisions stand dismissed. The learned trial court would dispose of both the cases in accordance with the directions given above. The lower Court Record be transmitted forthwith.