

(2014) 01 JH CK 0074
In the Jharkhand High Court
Case No : Cr. M.P. No. 1413 of 2008

Bigan Mian @ Siraj Mian

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156(3), 161, 173, 173(2)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Citation : (2014) 4 AJR 292 : (2014) 2 JLJR 95

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Jitendra S. Singh, Advocate for the Appellant

Judgement

Rakesh Ranjan Prasad, J.—This application is directed against the order dated 06.05.2008 passed in Balumath P.S. case No. 84 of 2006 (G.R. No. 543A of 2006) whereby and whereunder cognizance of the offence punishable under Sections 147, 148, 149, 447, 341, 323, 325, 307 of the Indian Penal Code has been taken against the petitioner which order was affirmed by the learned Sessions Judge, vide its order dated 21.8.2008 passed in Cr. Rev. No. 9 of 2008. It appears that a case was lodged for commission of offence of murder of one Gajala Parveen against six accused persons including the petitioner.

2. The matter was taken up for investigation. The police after making investigation submitted charge sheet against five accused persons but not against this petitioner. However, the investigation was kept open against this petitioner. Upon submission of the charge sheet, cognizance of the offence was taken against them and the matter was committed to the court of sessions. Subsequently, final form was submitted against this petitioner whereby this petitioner was exonerated from accusation but the Magistrate differing with the finding of the police took cognizance of the offence as aforesaid against this petitioner, vide order dated 06.05.2008.

3. Being aggrieved with that order, a revision application was filed which was

dismissed. Those orders have been challenged before this Court.

4. Mr. Jitendra S. Singh, learned counsel appearing for the petitioner submits that once final form exonerating the accused from accusation was submitted, the Magistrate does not have power to take cognizance of the offence which is triable by the court of sessions in view of the, decision rendered in a case of Dharam Pal and Others Vs. State of Haryana and Another, .

5. In this regard it was submitted that when the Hon''ble Supreme Court found that conflicting views are there; one holding that the Magistrate does have power to take cognizance of the offence even against the person not charge sheeted; other taking view that in such situation the Magistrate does not have power to take cognizance of the offence. The case of Dharam Pal vs. State of Haryana (supra) was referred before the Constitutional Bench, The Constitutional Bench have been pleased to hold that in a case where the accused is not charge sheeted, rather final form is submitted against him exonerating him from accusation, the Magistrate does not have power in a case which is triable by the court of sessions to take cognizance of the offence, rather that power of taking cognizance lies with the sessions court in terms of the provision as contained in Section 193 of the Code of Criminal Procedure when the matter comes up before the court of sessions. In that event, the order taking cognizance and also the order passed by the revisional court are fit to be quashed.

6. The facts which have given rise to the case of Dharam Pal vs. State of Haryana (supra) are that the appellants Dharam Pal and others were made accused in a case along with Nafe Singh in a case triable by the court of sessions. The police after investigation submitted charge sheet against one of the accused, Nafe Singh whereas Dharam Pal and others were not sent up for trial whose names were included in column 2 of the police report, despite the fact that they too had been named as accused in the First Information Report. After going through the police report, the learned Judicial Magistrate, 1st class, Hansi summoned the appellant and three others, who had not been included in the charge sheet for the purpose of facing trial along with Nafe Singh. Thereupon the Magistrate in exercise of his power as contained in Section 190 of the Code took cognizance of the offence against them. That order was challenged before the revisional court. The revisional court dismissed the application. When the matter came up before the High Court, the High Court also dismissed the application. Thereafter Special Leave to Appeal was preferred before the Hon''ble Supreme Court. When the matter was initially taken up by the Hon''ble Supreme Court, it was placed before the Court that number of conflicting decisions are there on the point. On one hand in the case of Raj Kishore Prasad Vs. State of Bihar and another, and also in a case of Naval Kishore Singh Vs. State of Bihar, , it has been held that the Magistrate has no power to add any accused with the accused charge sheeted rather that power lies with the Sessions Judge exercising power u/s 319 of the Code of Criminal Procedure when the case comes to it upon its committed whereas in a case of M/s. SWIL Ltd. Vs. State of Delhi and Another, and also in a

case of *Rajinder Prasad Vs. Bashir and Others*, it has been held that the Magistrate does have power to take cognizance in terms of the provision as contained in Section 193 of the Code of Criminal Procedure. In such situation, the matter was referred before the Constitutional Bench whereby following issues were framed for consideration.

1. Does the Committing Magistrate have any other role to play after committing the case to the Court of Sessions on finding from the police report that the case was triable by the Court of Sessions?

2. If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh to stand trial in connection with the case made out in the police report?

3. Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Sessions to stand trial or whether he was justified in issuing summons against them without following such procedure?

4. Can the Sessions judge issue summons u/s 193 of the Code of Criminal Procedure as a Court of original jurisdiction?

5. Upon the case being committed to the Court of Sessions, could the Sessions judge issue summons separately u/s 193 of the Code or would he have to wait till the stage u/s 319 of the Code was reached in order to take recourse thereto?

6. Was *Ranjit Singh's* case (*supra*), which set aside the decision in *Kishun Singh's* Case (*supra*), rightly decided or not?

7. Their Lordships after taking into account the relevant provisions such as Sections 193, 204, 209, 319 and also decisions rendered in cases, referred to above, have been pleased to reject the submissions of one of the parties that in a case triable by court of session if the accused is not sent up for trial the Magistrate had no other function but to commit the case to court of session which could only resort to Section 319 of the code to array the accused not sent up for trial to face trial. Their Lordships while rejecting such submission did hold hereunder:

24. In our view, the Magistrate has a role to play while committing the case to the Court of Sessions upon taking cognizance on the police report submitted before him u/s 173(3) of the Code of Criminal Procedure. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No. 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of

Sessions, he may commit the case to the Court of Sessions to proceed further in the matter.

25. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Session Court.

27. This take us to the next question as to whether u/s 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Sessions, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

28. In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh's case (supra) that the Sessions Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal u/s 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

8. Thus, it does appear that the Hon'ble Court has been pleased to lay down law that if any accused is not sent up for trial along with other accused, the Magistrate can take cognizance of the offence only against the person charge sheeted and not against the person not sent up for trial whose name gets included in column 2 of the report. But at the same time, Hon'ble Court has said that in spite of that, it is not that the Magistrate does not have power to do anything, rather the course which would be left with him is to commit the case to the court of sessions and it be left with the sessions court to take cognizance against them. Their Lordships while holding so have been pleased to affirm the view which has been taken in a case of Kishun Singh and Others Vs. State of

Bihar, . The facts of that case were that a case was lodged against 20 persons, who had been named, as assailants. After completion of investigation when the charge sheet was submitted, it did not include name of two persons, Kishun Singh and another against whom the police did not find any culpability and thereby final form was submitted. Since the charge sheet has been submitted against 18 named persons, concerned Magistrate committed the case of 18 persons to the court of sessions u/s 209 of the Code. When the matter came up before the Sessions Judge, Darbhanga, application was filed u/s 319 of the Code praying therein to summon those two appellants not charge sheeted as the materials collected during investigation revealed involvement of those two persons. The Sessions Judge after issuing notice arrayed those accused as accused to face trial by virtue of the provision as contained in Section 319. That order was challenged before the High Court. The High Court rejected the application and thereupon when the matter came up before the Hon'ble Supreme Court, the Hon'ble Supreme Court after dealing with the relevant provision was pleased to observe as under:

13. The question then is whether de hors Section 319 of the Code, can similar power be traced to any other provision in the Code or can such power be implied from the scheme of the Code? We have already pointed out earlier the two alternative modes in which the Criminal Law can be set in motion; by the filing of information with the police u/s 154 of the Code or upon receipt of a complaint or information by a Magistrate, The former would lead to investigation by the police and may culminate in a police report u/s 173 of the Code on the basis whereof cognizance may be taken by the Magistrate u/s 190(1)(b) of the Code. In the later case, the Magistrate, may either order investigation by the police u/s 156(3) of the Code or himself hold an inquiry u/s 202 before taking cognizance of the offence u/s 190(1)(a) or (c), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred u/s 191) or commit him for trial u/s 209 of the Code if the offence is triable exclusively by a Court of Sessions. As pointed out earlier cognizance is taken of the offence and not the offender. This Court in *Raghubans Dubey vs. State of Bihar* stated that once cognizance of an offence is taken it becomes the Court's duty "to find out who the offenders really are" and if the Court finds "that apart from the persons sent up by the police some other persons are involved, it is its duty to proceed against whose persons" by summoning them because "the summoning of the additional accused is part of the proceeding initiated by its taking cognizance of an offence". Even after the present Code came into force, the legal position has not undergone a change; on the contrary the ratio of *Dubey* case was affirmed in *Hareram Satpathy vs. Tikaram Agarwala*. Thus far there is no difficulty.

14. We have now reached the crucial point in our journey. After cognizance is taken u/s 190(1) of the Code, in warrant-cases the Court is required to frame a charge containing particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was

committed. But before framing the charge Section 227 of the Code provides that if, upon a consideration of the record of the case and the documents submitted therewith, the Sessions Judge considers that there is not sufficient ground for proceeding against the accused, he shall, for reasons to be recorded, discharge the accused. It is only when the Judge is of opinion that there is ground for presuming that the accused has committed an offence that he will proceed to frame a charge and record the plea of the accused (vide Section 228). It becomes immediately clear that for the limited purpose of deciding whether or not to frame a charge against the accused, the Judge would be required to examine the record of the case and the documents submitted therewith, which would comprise the police report, the statements of witnesses recorded u/s 161 of the Code, the seizure-memoranda, etc., etc. If, on application of mind for this limited purpose, the judge finds that besides the accused arraigned before him the complicity or involvement of others in the commission of the crime *prima facie* surfaces from the material placed before him, what course of action should be adopt?

15. The learned counsel for the State, therefore, argued that even if two views are possible, this being a matter of procedure not likely to cause prejudice to the person or persons proposed to be summoned, the court should accept the view which would advance the cause of justice, namely, to bring the real offender to book. If such an approach is not adopted, the matter will slip into the hands of the investigation officer who may or may not send up for trial an offence even if *prima facie* evidence exists, which may in a given situation cause avoidable difficulties to the trial court. Take for example a case where two persons A and B attack and kill X and it's found from the materials placed before the judge that the fatal blow was given by A whereas that blow inflicted by B had fallen on a non-vital part of the body of X. If A is not challenged by the police, the Judge may find it difficult to charge B for the murder of X with the aid of Section 34 of the IPC. If he cannot summon A, how does he frame the charge against B? In such a case he may have to wait till evidence is laid at the trial to enable him to invoke Section 319 of the Code. Then he would have to commence the proceedings afresh in respect of the added accused and recall the witnesses. This, submitted counsel for the State, would result in avoidable waste of public time. He, therefore, submitted that this Court should place a construction which would advance the cause of justice rather than stifle it.

16. We have already indicated earlier from the ratio of this Court's decisions in the cases of Raghubans Dubey and Hareram that once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was

precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Sessions by a Magistrate, under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case u/s 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Sessions complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record. The Full Bench of the High Court of Patna rightly appreciated the shift in Section 193 of the Code from that under the old Code in the case of Sk. Lutfur Rahman as under:

Therefore, what the law u/s 193 seeks to visualize and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are prima facie guilty of the crime as well..... Once the case has been committed, the bar of Section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the Court of Session with the fullest jurisdiction to summon any individual accused of the crime.

We are in respectful agreement with the distinction brought out between the old Section 193 and the provision as it now stands.

9. After holding so, their Lordships did not find any illegality with the order impugned.

10. Under the circumstances, Constitutional Bench has been pleased to uphold the ratio laid down in Kishun Singh's case whereas the ratio laid down in Kishore Singh and Ranjit Prasad's case does not seem to have been approved.

11. Thus, the position which has emerged out is that if a case is registered for the offence/offences triable by the court of session against two or more accused persons and the charge sheet is submitted against some of them and rest are not sent up for trial, then the Magistrate does have power to take cognizance of the offence only against the person charge sheeted. However, the court is further required to find out whether materials are there or not against the persons not sent up for trial to be taken by the sessions court. If the court does find prima facie material to proceed with the trial, he needs to commit the case to the court of sessions. Similarly, if the charge sheet is submitted against some of the accused persons and the matter is kept open for further investigation against

some of the accused persons and the court takes cognizance of the offences against the persons charge sheeted, he needs to commit the case to the court of sessions in terms of the provision as contained in Section 209 of the Code of Criminal Procedure.

12. Subsequently, if the charge sheet is submitted against other accused who had not been charge sheeted earlier, some recourse is to be adopted by the court i.e., to find out as to whether there has been material against that person to proceed with the trial and if the Magistrate is satisfied that the materials are there, he simply needs to commit the case to the court of sessions and thereby it is for the sessions court to take cognizance of the offence in terms of the provision as contained in Section 193 of the Code of Criminal Procedure and to proceed with the trial.

13. Another situation incidental to the issue discussed above may arise when all the persons accused in a case triable by the court of sessions are exonerated by the police and are not sent up for trial. The question which obviously would crop up to what course would be left for the Magistrate to take up. One by taking recourse of the ratio laid down in the case *Dharam Pal vs. State of Haryana* (supra) may put his point that the Magistrate would be handicapped to take cognizance of the offence as the accused persons have not been sent up for trial. That approach in any view never gets sanction of law when the provision as contained in Section 190(1)(b) of the Code empowers a Magistrate to take cognizance of the offence though Hon'ble Court in the case referred to above has been pleased to hold that the Magistrate does not have power to take cognizance of the offence against the persons not sent up for trial but that proposition has been laid down on the premise that the cognizance is taken of the offence and not against the offender and therefore, once the cognizance is taken, question of taking cognizance of the same offence does not arise and therefore, their Lordships have been pleased to observe that it is either for the Magistrate or to the court of session to take cognizance of the offence. But in a case where all the persons who were the accused are not sent up for trial the Magistrate would not be in a position to take recourse of the provision of Section 209 of the Code for committal of the case to the court of session and thereby it would be travesty of justice that even if materials are there against the accused person they may not be put to trial. This approach if adopted it would be against scheme of the Code wherein the provision as contained in Section 190(1)(b) clearly gives power to the Magistrate to take cognizance on a police report.

14. Therefore, upon a receipt of a police report u/s 173(2) of the Code of Criminal Procedure a Magistrate is entitled to take cognizance of an offence u/s 190(1)(b) even if the police report is to the effect that no case is made out against the accused. The Magistrate can ignore the conclusion arrived at by the I.O. and independently apply his mind to the facts emerging from the investigation taking into account the statements of the witnesses examined by the police during the investigation and take cognizance of offence, if he thinks fit,

in exercise of power u/s 190(1)(b) and direct the issue of process to the accused. The aforesaid proposition has been laid down in a case of India Carat Pvt. Ltd. Vs. State of Karnataka and Another, .

15. Similar view has been taken subsequently also in a case of Rajinder Prasad vs. Bashir and others (supra) wherein it has been held as under:

a Magistrate has jurisdiction to take cognizance of offence against such person also who have not been arrested by the police as accused person, if it appears from the evidence collected by the police that they were prima facie guilty of the offence alleged to have been committed. Section 209 refers back to Section 190 as is evident from the words instituted on a police report used in Section 190(1) (b) of the Code. The cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to conclusion that apart from the persons sent by the police some other persons were also involved, it is duty to proceed against those persons as well.

16. Here, it would be pertinent to record that if the Magistrate does differ from the finding given in the police report, then he is required to assign reason for differing with the opinion of the police which proposition has been laid down in a case of Dr. Mrs. Nupur Talwar Vs. C.B.I., Delhi and Another, .

17. Here in the instant case as has been noted above, the Magistrate by differing with the opinion of the police has taken cognizance of the offence against the petitioner who had not been sent up for trial and thereby he seems to have committed wrong in view of the decisions referred to above. Accordingly, the order taking cognizance is hereby quashed. However, the matter is again remanded back before the Magistrate to proceed in the matter in accordance with law as indicated above.