

(1993) 02 OHC CK 0003

In the Orissa High Court

Case No : Criminal Revision No. 615 of 1992

Chandrasekhar Mohanty and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 22-02-1993

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2), 173(3), 173(4)

Penal Code, 1860 (IPC) — Section 147, 148, 294, 430, 436

Citation : (1993) CriLJ 3052

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : Satyabadi Das, R.N. Acharya and P. Ch. Das, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Accused persons are petitioners in this revision against order of summoning witnesses named in the supplementary charge-sheet.

2. On information by P.W. 1 on 26-4-1990 against petitioners, they were charge-sheeted after investigation to be tried for offences under Sections 147/148/430/436/294/506 Indian Penal Code. Petitioners were committed to Court of Session for facing trial in respect of offences under Sections 436/437 and 147 Indian Penal Code. When the Investigating Officer was being examined as P.W. 11, learned Associate Public Prosecutor filed an application praying to summon two witnesses in exercise of power u/s 311, Cr. P.C. Subsequently another application was filed by learned Associate Public Prosecutor to summon another two witnesses. Learned trial Judge refused to summon those witnesses on objection of the accused persons. Thereafter an additional charge-sheet was filed before the learned Magistrate u/s 173(8), Cr. P.C. Learned Magistrate forwarded the additional charge-sheet to the Sessions Court where those four persons have been named as witnesses. Learned Assistant Sessions Judge on

receipt of the additional charge-sheet directed to issue summons to the four witnesses. This revision has been filed against the said order.

3. Mr. Satyabadi Das, learned counsel for the petitioners assails the order on four grounds. They are : -

(i) Trial Court having refused to summon the witnesses on the finding that they are not necessary for just decision of the case, additional charge-sheet including the four witnesses should not have been accepted since privilege to prosecution u/s 173(8), Cr. P.C. has been misused.

(ii) Supplementary charge-sheet could not have been entertained without giving opportunity to accused. Since learned Magistrate could not have committed an accused without his appearing or being produced as required u/s 209, Cr. P.C.

(iii) Investigating Officer and other witnesses having already been examined, examination of the four witnesses would be prejudicial to the petitioner since they have come prepared to patch the lacuna of the prosecution; and

(iv) No sufficient reason has been shown. by prosecution for submission of the supplementary charge-sheet.

4. In order to appreciate submissions on Mr. Das, the provisions in Section 173(8), 209 and 311 Cri. P. C. are to be interpreted. They read as follows : -

"173. Report of Police Officer on completion of investigations -

(1) to (7) xxx xxx xxx xxx

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

"209. Commitment of case to Court of Session when offence is triable exclusively by it: - when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall -

(a) Commit, after complying with the provisions of Section 207 or Section 208, as the case may be the case to the Court of session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

"311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

5. Object and reason for incorporating Section 173(8) Cr. P. C. is reflected in the 41st report of the Law Commission. Relevant portion is as follows : -

"A report u/s 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report u/s 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report u/s 173 has been sent, the police cannot touch the case again and cannot reopen the investigation. This view places a hindrance in the way of the investigating agency, which can be unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused."

6. Even at a time when Section 173(8) Cr.P. C. was not in the statute book, Courts in the Country were of the view that in given circumstances, Police Officer can make further investigation after cognizance is taken by the Magistrate. In this Court also the question came up for consideration in the decision reported in Prosecuting Inspector Vs. Minaketan Mahato and Another, . It was held that Police had the right to reopen investigation even after the submission of charge-sheet u/s 173, Cr. P.C. if fresh facts came to light. It was also observed that such fresh investigation can be made even after commitment proceeding had terminated.

7. Scope of further investigation by police u/s 173(8), Cr.P.C. was considered by the Supreme Court in the decision reported in Ram Lal Narang Vs. State (Delhi Administration), and (Om. Prakash Narang v. State (Delhi Admn.)) where it has been laid down : -

"As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by

the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted u/s 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation."

However, in paragraph 21 a guideline has been Indicated for the investigating officer who intend to exercise power u/s 173(8), Cr.P.C. It reads as follows :-

"Anyone acquainted with the day-to-day working of the criminal courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplemental report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate ? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other person. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognisance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is a matter best left to the discretion of the Magistrate, The criticism that is further investigation by the police would trench upon the proceedings before the Court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use of abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a Court and investigate

every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the Magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and instructions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light."

8. Decision of the Supreme Court is clear that u/s 173(8), Cr.P.C. Police can further investigate even if cognizance is taken provided permission has been obtained from the court. Decision of this Court has observed that further investigation can be made during commitment proceeding and even after its termination. After termination of commitment proceeding, prosecution of accused remains pending before Sessions Court where the accused is committed for trial. Therefore, there can be no doubt that further investigation by police is not without jurisdiction or contrary to law when trial in a court of session is continuing, specially in view of wide power of the Police u/s 173(8), Cr.P.C.

9. Observation of the Privy Council in the decision reported in (1944) 71 203 : 1945 Cri LJ 413 (King Emperor v. Khwaja Nazir Ahmed) was reproduced in Ram Lal Narang Vs. State (Delhi Administration), that in India there is a statutory right on the part of the Police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities. Privy Council observed further : -

".....and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own functions, always, of course, subject to right of the Courts to intervene in an appropriate case when moved u/s 491 of the Criminal Procedure Code to give directions in the nature of Habeas Corpus....."

10. Decision of the Supreme Court reported in H.N. Rishbud and Inder Singh Vs. The State of Delhi, was considered by the Supreme Court where further investigation was contemplated even after taking cognizance on a police report. Observation that invalidity of investigation does not vitiate result unless miscarriage of justice is caused thereby.

11. However, at all stages Court is to guard against miscarriage of justice. As has been observed in H.N. Rishbud and Inder Singh Vs. The State of Delhi, .

"It does not follow that the invalidity of the investigation is to be completely ignored by a Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the

circumstances of an individual case may call for."

In *Ram Lal Narang Vs. State (Delhi Administration)*, permission of the Court is therefore, held to be necessary.

12. There is no material in this case that prosecution had taken prior permission of the Court for further investigation. I cannot approve conduct of the Investigating Officer and have no doubt that a few such officers in the police force ill-repute the entire cadre as a result of which people do not have confidence on the cadre which is essential for internal security in the republic. This may be on account of mala fides or on account of lack of adequate legal training. I prefer to accept the later in this case. In *Ram Lal Narang Vs. State (Delhi Administration)*, , no permission had been obtained. It was observed :

"Though the investigating agency would have done better if it had informed the Ambala Magistrate and sought for his formal permission for the second investigation, we are satisfied that there has been no illegality."

In this case also there is no illegality. Accordingly, on account of absence of permission, on the facts of this case, I am not, inclined to interfere with the order.

13. Further charge-sheet in this case is mainly to examine four witnesses who had not been named earlier in the charge-sheet. Mr. Das, learned counsel for petitioner submitted that learned Assistant Sessions Judge had refused to summon these witnesses earlier in exercise of power u/s 311 Cr.P. C. When the object of the additional charge-sheet is to examine the said witnesses by naming them as charge-sheet witnesses, prosecution has attempted to over reach the Court. This is an abuse of the process of the Court. There is force in the submission. In case such abuse would have caused prejudice to petitioners and there would have been miscarriage of justice, I would not have hesitated to interfere with the order. It is stated that the witnesses are now brought as eye-witnesses to connect petitioners when other witnesses examined did not connect the petitioners with offence. This can be well appreciated by learned trial Judge while assessing their evidence after recording the same. Delay in examination of eye-witnesses and their veracity are within the domain of appreciation. Petitioners have been committed. They are facing trial. Examination of a few more witnesses would not be miscarriage of justice when learned trial Judge is not helpless in the matter. If these witnesses are really eye-witnesses as claimed, they should not be excluded from being examined. When application for their examination u/s 311 Cr.P.C. was filed, trial court had no material in support that they are eyewitnesses. Now that their statements are recorded during investigation, for the purpose of examining them, there is some material. Merely because petitioners have filed a public interest litigation under Article 226 of the Constitution against the employer of the informant and Forest Officials, there cannot be an inference that Police Officer would be hostile against them to get the versions in the mouth of the witnesses to be eye-witnesses. If really that is so, learned trial Judge can initiate prosecution against those witnesses for having

made false statement before the investigating officer. In interest of the society, such persons should be examined on oath. When accused would not be prejudiced if they are examined as discussed earlier; I am not inclined to interfere with the order.

14. Once the witnesses are named in the charge-sheet, Court has no discretion. It has to summon them unless prosecution declines to examine them. Where the witnesses are formal and relevant facts they are to prove can otherwise be admitted to evidence, question may be different.

15. Submission of Mr. Das that petitioners were not before the Magistrate and therefore, learned Magistrate could not have given permission for further investigation. For investigation, police does not require presence of accused and therefore, for granting permission, their presence was not necessary. Since they had already been committed for trial, requirement of Section 209 Cr.P.C. is not violated. Mr. Das is correct in his submission that the accused would be prejudiced if further witnesses are examined after examination of the investigating officer. This prejudice of the accused can be mitigated if I direct that the investigating officer shall be recalled and further examined.

16. Receiving document during trial of accused in a sessions Court was subject matter for consideration in a decision of this Court reported in (1989) 2 OCR 52 (Benudhar Mohanty v. State of Orissa). It was observed : -

"There can be no dispute that the Court of Session cannot receive a document from the investigation Officer which has not been sent by the learned Magistrate. Investigating agencies should not be encouraged to contravene the formalities prescribed under the Code of Criminal Procedure or to have defective investigation which would be rectified by the Public Prosecutor in the Court of Session. However, procedure is handmaid of justice. If there is no bar to receive a document by the Court of Session when sent by the Magistrate u/s 207 Cr.P.C. read with Section 173(8) thereof rest would be only a matter of formality for adherence to the procedure which would only delay the trial against the public policy of expeditious disposal. Procedure is only handmaid of justice. If the learned Sessions Judge would have adjourned the trial to give chance to the prosecution to bring it to record following Sections 173(8) and 207 Cr.P.C. there was no scope for interference since that would have been the correct procedure unless it would have been brought to notice of the Court that the accused was prejudiced by the order. Where, however, some procedural formalities have been overlooked, there is no scope for interference with the order subject to some directions to be given which would protect the interest of the accused."

In the present case, I do not find that statements of four witnesses have been furnished to accused. Learned Trial Judge shall take steps in this regard to furnish the copies if not furnished whereafter trial shall be resumed.

17. Before concluding, I make it clear that any observation in this order shall not influence the learned Sessions Judge in appreciating the evidence to the

prejudice of the accused persons which shall be considered on their own merits.

18. In result, subject to the directions given, impugned order is modified and revision is allowed to that extent.