

(1992) 12 OHC CK 0001

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1595 of 1992

Col. Shyamsundar Mohanty

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 03-12-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(3), 173(8)

Citation : (1993) 1 OLR 166

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : G.N. Monapatra, for the Appellant; S.S. Rao, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

L. Rath, J.—The question that falls for decision in this case is the competence of the Magistrate to permit further investigation into a case after accepting the final report submitted by the police in the same case. The facts necessary to disclose the prosecution case are that an FIR was lodged on 28-4-1987 by the D.S.P., Vigilance (Special Ceil), Cuttack on the allegation that the petitioner, while he was the S.P., Signals had misused his official position by starting a training institute under the name and style "Career Institute" in his official residence oriented at giving coaching to trainees. For the purpose, he made advertisements in the papers and attracted young persons for admission in the institute. Pamphlets, application forms and prospectus were prepared utilising office papers. The forms were also typed and cyclostyled using the office machines. The petitioner collected Rs. 140/- from different candidates at the rate of Rs. 5/- from each, through money orders or postal orders, between 17-9-1985 to 11-12-1985. The institute however was not started but the money was not refunded to the candidates and was misappropriated. The prosecution of the petitioner was, however, not sanctioned and final report was submitted u/s 173(2). On 21-12-1988 the learned Chief Judicial Magistrate, Cuttack passed

orders as follows :

"Perused the final report submitted by the I.O. The case is returned on F.R.T. u/s 5(2) read with 5(1) (c) and (d) P.C. Act/409/420 IPC due to want of sanction order from the competent authority. The final report is accepted. Return the seized articles/documents to the person from whom seized."

2. On 24-11-1990 an application was filed before the C. J M., Cuttack by the inspector of Vigilance, Cuttack Shri P.C. Patra, the I. O. in the case, that the final report No. 14 dated 15-11-1988 had been, submitted in the case as sanction for the prosecution was, not received from the competent authority but that some new materials, having come to light in the meantime and the petitioner having retired from Government service, sanction for his prosecution was not necessary and orders might be passed to re-open the investigation and submit the final form afresh after further investigation.

3. The learned C.J. M. allowed the prayer on 26-11-1990. On 16-3-1991 the petitioner filed an objection before the C.J.M. seeking rescinding of the order of 26-11-1990 to which the Special Public Prosecutor, on behalf of the State, filed objection. The learned C.J.M. after considering the objection overruled the contention that after acceptance of final report the Court had no power to re-open the case for further investigation. The learned C.J.M. also held that since order had been passed on 26-11-1990 to re-open the case for further investigation, it was not within his power to review the order as it would be encroaching upon the powers of the revisional Court. The petition having been rejected, the present application has been filed u/s 482, CrPC to quash the order of 26-11-1990 and the proceeding. Vigilance G.R. Case No. 30 of 1987 pending in the Court of the C.J.M.

4. Mr. Mohapatra, learned counsel for the petitioner, has urged that the acceptance of the final report by the C. J. M. was a judicial act and" since that order had become final not being challenged before any higher" fcrurn," it was not competent for the learned Magistrate to again direct" re-opening of the case for further investigation there being no power of the" C.J.M. to review his own earlier order. To substantiate the submission that acceptance of final report is a judicial act, reliance was placed by him on 1988 (II) OLR 288 (Jaladhar Das and Ors. v. Sridhar Das), Kamlapati Trivedi Vs. State of West Bengal, and Jitendra Nath Ghosh and Another Vs. The State, . The argument is opposed by the learned Addl. Govt. Advocate contending the order passed accepting the final report to be not a final order and in no way curtailing the power of the Court to take cognizance of the offence at any time subject to legitimate exceptions u/s 468 of the Code of Criminal Procedure or otherwise.

5. Indisputably the order of the Megistrate accepting the the final report submitted by the police is a judicial act as was held by the Supreme Court in Kamlapati Trivedi Vs. State of West Bengal, as also by this Court in 1988 OLR 288 (supra). Section 173. Cr PC itself does not say that an order is. to be passed

by the Magistrate regarding acceptance or otherwise of the final report. All that Sub-section (3) of Section 173 says is that a superior officer of police who has been appointed u/s 158 of the Code and has been directed by the State Government by general or special order may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation. Section 173(3) hence contemplates an order to be passed by the Magistrate and such order can either be accepting the report submitted to the Court or not accepting the same. The Magistrate is not bound by the report submitted by police and before taking cognizance can direct further investigation into the case exercising his power u/s 156(3), CrPC. It is also open to him to accept the report submitted u/s 169, Cr PC whereafter the matter should ordinarily come to an end But it must be clearly understood that the order passed by the Magistrate u/s 173(3) is neither a final order nor is an acquittal, a fact which was clearly pointed out in the Full Bench decision of the Punjab and Haryana High Court in Suresh Chand Vs. State, . The very question was dealt with in that case in the context of authority of the Magistrate to proceed against an accused even after acceptance of the final report submitted by the police, on the basis of a private complaint lodged in the protest of the final report. Explaining such power of the Magistrate, it was pointed out that the order accepting the final report is neither a final order nor an acquittal of the accused. In the very 1988 (II) OLR 288 relied upon by the learned counsel for the petitioner, I had occasion to observe :

"The powers u/s 190, CrPC of the Magistrate are in no way controlled by the provisions of Section 173, CrPC under which the final report is submitted to him. No doubt while acting u/s 173(3) in accepting a . final report, the Magistrate also acts in a judicial capacity, but the order passed can hardly be called a judgment."

By now it is the settled position of law that when police submits final report in respect of an accused with the conclusion of there being no plausible evidence against him to proceed, it is not an end of the matter and that the informant has still a right to protest. His protest petition is to be treated as a complaint and the Magistrate can proceed against the accused taking cognizance of the offence on the basis of that complaint. If that is possible, there is logically no reason as to why after acceptance of the final report the Magistrate would be debarred from taking cognizance on the basis of a report submitted again after further investigation by the police. Section 173(8) is an independent power vested in the police with an overriding effect that nothing in Section 173, which obviously includes Sub-section (3) thereof, shall be deemed to preclude further investigation in respect of an offence after a report under Sub-sec, (2) has been forwarded to the Magistrate and if upon such investigation, the officer in charge of the police station obtains further evidence, he has to forward to the Margistrate a further report or reports regarding such evidence in the form prescribed and thereafter the provisions of Sub-sections (2) to (6), as far as may be, would apply again. The provision thus authorises that whatever action might have been taken by the Magistrate u/s 173(3) earlier, that would not prevent a

further investigation into the same offence and that once on the basis of such further investigation further materials either oral or documentary are unearthed, the officer in charge has to forward the report or reports and thereafter the provisions of Sub-sections (2) to (6) would operate and the Magistrate after considering the reports may either reject or accept the same. Nothing prevents the Magistrate to take cognizance of the offence on the further materials brought to his notice. The only rider so far as the provision is concerned is that the investigating agency can invoke the provisions of Section 173(3) only if fresh materials are unearthed by way of further investigation. No second report u/s 173(2) can be sent on the basis of the same materials which had been earlier sent to the Court and on which a judicial order had been once passed by the Magistrate u/s 173(3).

As was pointed out by this Court in 1988 (II) OLR 288 (supra), the power of the Magistrate u/s 190 is an independent power and can be exercised either upon police report or upon a private complaint or upon information received from a person other than a police officer or even upon his own knowledge. Such power of the Magistrate is not limited by the provisions of Section 173. Hence, if new materials are brought forth u/s 173(8), nothing would preclude the Magistrate to take cognizance of the offence on the basis of the said materials. To hold the contrary would also lead to incongruous results and would amount to say that even if the police subsequently unearth that the earlier final report was a product of fraud or collusion, or had not accounted for important evidence, the Magistrate would yet be powerless to take cognizance.

6. The view taken by me have also been followed by the Lucknow Bench of the Allahabad High Court in Criminal Revision No. 144 of 1976 decided on 3-5-78 (Lalta Prasad v. State of U.P. and Ors.). Unfortunately the full report of the decision is not available but has been reported by way of a note in Ganga Singh Vs. The State of Rajasthan, to show the Court to have held that where an accused had been discharged on acceptance of the final report u/s 173 but only because of that the Magistrate directs dropping of the proceeding when fresh report in respect of the offence is submitted, the action of the Magistrate, is illegal and that the discharged accused can be prosecuted on the fresh report.

7. Mr. Mohapatra, learned counsel for the petitioner, has placed reliance, to support his submission, on 1987(1) Crimes 914 (K. Ramasubbu v. State, through the Inspector of Police), a decision of the Madras High Court taking the view that where final report as a "mistake of fact" has been accepted by the Magistrate, a subsequent investigation of the same case and filing of charge-sheet are not legal and proper and the proceeding is liable to be quashed u/s 482, CrPC. A distinction was made in the case on police filing charge-sheet and again a revised charge-sheet sometime after, and a case where the Magistrate had passed order u/s 173(3) accepting the report and submission of charge-sheet thereafter. The Court took the view that since the order passed u/s 173(3) is a judicial order and is not challenged by the prosecution in higher forums, the effect of the order

cannot be taken away by submitting a subsequent charge-sheet. Reliance for the view was purported to be drawn from the decision of the Supreme Court in 1979 LWC. 48 (SN) (Kamalapati Trivedi v. State of W.B.) wherein the following observations were made :

"Thus in the case of an order passed by a Magistrate under Sub-section (3) of Section 173 of the Code in agreement with the police report does not call for any hearing of the production of any evidence on the part of accused, as it goes in his favour. If the Magistrate, on the other hand, disagrees with the report submitted by the police and takes cognisance of the offence, the accused comes into the picture and thereafter shall have the right to be heard and to adduce evidence in support of his innocence. Viewed in this context, all orders passed by a Magistrate acting Judicially (such as orders of bail and those passed under Sub-section (3) of Section 173 of the Code discharging an accused or orders taking cognisance of the offence complained of) are parts of an integral whole which may end with a definite judgment after an inquiry or a trial, or earlier according to the exigencies of the situation obtaining at a particular stage, and which involves, if need be, the adducing of evidence and the decision of the Magistrate on an appreciation thereof. They cannot be viewed in isolation and gives a character different from the entire judicial process of which they are intended to form a part."

All that the Supreme Court pointed out in that case was that the Magistrate acting u/s 173(3) act as a Court and that the order passed by him is in a judicial process which is an integral whole and may culminate in a definite judgment after the inquiry or the trial. It was pointed out that even bail orders are also judicial orders. The Apex Court never observed that all orders passed in judicial process are final orders and could never be re-opened. The effect of an order u/s 173(3) accepting the final report is that the order cannot be re-opened on the same materials, judicial mind having already been applied to those and the decision reached. But when new materials come forth, there is no inherent lack of jurisdiction to proceed again upon such materials. For such reasons and the reasons indicated earlier, I do not find myself in the agreement with the view expressed by the Madras High Court.

8. A further pertinent question which needs clarification is that the power u/s 173(8) to be exercised by the investigating agency is not dependent on any orders of the Court. The application filed by the Inspector of Vigilance in Court seeking orders to re-open the investigation was not necessary as the provision does not contemplate any such application to be filed or permission to be sought for and for that matter, the Court is also not authorised to grant any such permission. The power under the provision is exclusively available to the Investigating Officer to take up further investigation in the matter. It is an out and out a wholly executive act with the only rider that if because of such further investigation any new material is unearthed, the officer-in-charge under compelling duty to forward the same to the Magistrate to be dealt with by him.

9. Mr. Mohapatra further submits that so far as the instant case is concerned the very process of re-opening of the investigation is a gross abuse of the process of the investigating agency and of the Court since the only ground urged to re-open the investigation is that the petitioner had not been proceeded against because of want of sanction but that since after his retirement no sanction was necessary, further investigation in the matter might be carried on. While it is true that the process of the Court cannot be utilised to prosecute a person only because he has in the meantime retired and sanction for his prosecution is not thereafter necessary for an offence which he had committed which required sanction to prosecute him while in office, yet if some new materials come into existence justifying re-opening of the investigation and sub-mission of further report, that process cannot be faulted only because on the earlier occasion sanction was necessary but was no longer required at a later point of time. The question will vary from facts to facts and case to case. In the particular case, it appears from the application of the Inspector of Vigilance that some new materials have come into existence. What those materials are not known. If in fact there are no materials unearthed by further investigation and the petitioner is purported to be prosecuted on the very same old and stale materials, obviously such process cannot be allowed to continue. Again if in the process of making any further investigation a colourable exercise of power is made, that also may be questioned at the appropriate time. But at this stage no such case arises nor is pleaded. Mr. Mohapatra has also argued regarding the delay caused by the investigation but until a definite action is taken against the petitioner, I would not like to consider the same. As and when the investigation proceeds and the petitioner feels the process of law to have been* abused against him, it would be open for him to approach this Court to quash the investigation or the proceeding before the Court.

10. In that view of the matter, I do not find any merit in the application. The petition is dismissed.