

(2000) 07 BOM CK 0092

In the Bombay High Court

Case No : Criminal Application No. 196 of 2000

Dashrath Pralhad Chawhan

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 19-07-2000

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 156, 156(1)

Penal Code, 1860 (IPC) — Section 120B, 302, 380, 406, 420

Citation : (2000) 07 BOM CK 0092

Hon'ble Judges : B.B. Vaganyi, J

Bench : Single Bench

Advocate : Pradip R. Patil, for the Appellant; V.D. Sapkal, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Allowed

Judgement

B.B. Vaganyi, J.—Heard learned Advocate Shri P. R. Patil for the petitioner and learned A.P.P. Shri V. D. Sapkal for respondents Nos. 1 and 2.

2. Rule, made returnable forthwith. With the consent of the learned Advocates for the parties, the matter is heard finally.

3. The petitioner is the brother of deceased Hansraj Chavan. According to the petitioner, Hansraj was murdered on 5-9-1996 and the dead body of deceased Hansraj was buried in the field, with intention to cause the evidence of offence of murder to disappear, with intention of screening the offenders from legal punishment.

4. The petitioner had been to the Police Station to lodge a report of the incident. However, the police authorities refused to take cognizance of the offence. The petitioner, thereafter, filed private criminal case No. 104/1997 in the court of Judicial Magistrate, First Class, Chalisgaon. In all four persons are made accused. The learned Magistrate, by his order dated 25-7-1997, directed Police to carry

out investigation of the offence under sub-section (3) of section 156 of Code of Criminal Procedure. The matter was under investigation by the Police. The learned Judicial Magistrate, First Class, without waiting for report, recalled his earlier order, by his order dated 1-12-1998. The correctness of this impugned order is challenged by the original complainant u/s 482 of Code of Criminal Procedure, 1973, and under Article 227 of the Constitution of India,

5. Learned Advocate Shri P. R. Patil vehemently submitted that once the learned Judicial Magistrate, First Class, referred the complaint disclosing a cognizable offence to the police - authority for investigation, specifically under sub-section (3) of section 156 of Criminal Procedure Code, the learned Judicial Magistrate, First Class, cannot recall his earlier order and take enquiry to himself under the guise of interest of justice. He further submits that the learned Judicial Magistrate, First Class, has no power to review his own order. He further submits that the Magistrate has power to order a police enquiry in a cognizable case where magistrate does not issue process at once. According to Mr. P. R. Patil, learned Advocate, the Judicial Magistrate, First Class, thought it fit to act under Chapter XII of Criminal Procedure Code and, in pursuance of the power conferred on him, passed an order and thereby directed the police authorities to investigate the cognizable offence under sub-section (3) of section 156 of Criminal Procedure Code. Once the Judicial Magistrate, First Class, decides to have investigation through police, by virtue of sub-section (3) of section 156 of Criminal Procedure Code, the Judicial Magistrate, First Class, cannot interfere in the investigation by the police officer. The learned Judicial Magistrate, First Class, therefore, is not at all justified in recalling his own order.

6. Learned A.P.P. Shri V. D. Sapkal has frankly conceded that the impugned order passed by the learned Judicial Magistrate, First Class, is manifestly illegal.

7. I gave anxious consideration to the submissions made at the Bar. From perusal of the impugned order, it is clearly seen that the learned Judicial Magistrate, First Class, was aware that his predecessor had referred the complaint to Police under sub-section (3) of section 156, Criminal Procedure Code, for investigation of a cognizable offence like murder. The Judicial Magistrate, who is successor in office, recalled the earlier order passed by his predecessor simply on the ground that report is not received from the police. The learned Judicial Magistrate, First Class, has mentioned in his short order that the offence u/s 302 of Indian Penal Code is exclusively triable by the Court of Session and, saying so, he found it expedient to enquire into the offence by the Court itself, in the interest of justice.

8. It appears, from the reasons assigned for recalling the earlier order, that the learned Judicial Magistrate, First Class, has some kind of confusion with regard to power of the Judicial Magistrate, First Class, in a case which is exclusively triable by the Court of Session. Proviso to section 202(1) says that the Magistrate is not competent to give direction for investigation where, it appears to the Magistrate, the offence complained of is triable exclusively by the Court of Session. Keeping

in view the proviso (a) to sub-section (1) of section 202 of Criminal Procedure Code, the learned Judicial Magistrate, First Class, thought it fit to recall the earlier order passed under sub-section (3) of section 156 of Criminal Procedure Code.

9. It is well settled position of law that a Judicial magistrate who receives a complaint disclosing offence exclusively triable by the Court of Session, is not at all debarred from sending the private complaint to the police for investigation under sub-section (3) of section 156 of Code of Criminal Procedure. A reference with profit can be made to *Orissa Cement Ltd. Vs. State of Orissa and Another*, . The Supreme Court has held that in view of first proviso to section 202(1) of Criminal Procedure Code, a Magistrate who receives a complaint disclosing the offence exclusively triable by the Court of Session, is not debarred from sending the same to the police for investigation u/s 156(3) of Criminal Procedure Code. The Apex Court has observed as under:

The power to order police investigation u/s 156(3) is a different from the power to direct an 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 session of the case. That is to say, in the case of complaint regarding 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 190(I)(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-cognizance 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(1). 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 procedure prescribed. In such a situation, the Magistrate is empowered u/s 202 to direct, within the limits circumscribed by that 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 the proceedings already instituted upon a complaint before him.

10. In my view, once the competent police officer is asked to carry out investigation of the offence punishable u/s 302 of Indian Penal Code, under sub-section (3) of section 156 of Code of Criminal Procedure, the learned Judicial Magistrate, First Class, has no power to interfere in the investigation which is in progress.

11. In this behalf, I would like to refer the case *King Emperor vs. Nazir Ahmad*,

46 Cri.L.J. 1945 Page 413decided by the Privy Council. It is observed in this case that the Judiciary should not interfere with the Police in matters which are within their province and into which the law imposes upon them the duty of enquiry. It is further observed that the functions of the Judiciary and the Police are complimentary 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 function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved u/s 491, Criminal Procedure Code to give directions in the nature of habeas corpus. The Privy Council has also said that under sections 154 to 156 of Code of Criminal Procedure the police have statutory right to investigate the cognizable offence, without requiring the sanction of the Court.

12. I would also like to refer the decision of Division Bench of Calcutta High Court in case of Kanai Lal Agarwalla Vs. The State and Others, . One Kanai Lal Agarwalla moved the Additional Chief Presidency Magistrate on 1-5-1973, under sub-section (3) of section 156 of Code of Criminal Procedure for a direction in the matter of investigation of offences punishable under sections 380, 420, 406, 120B of Indian Penal Code. The learned Magistrate directed the Deputy Commissioner of Police of the Detective Department of Calcutta to take cognizance and to investigate. Accordingly, the police took cognizance. In course of investigation, accused surrendered in Court and obtained bail. In the course of investigation, accused moved learned Additional Chief Presidency Magistrate and requested him to recall the order to investigate. The learned Magistrate recalled his earlier order and discharged all the accused persons. The correctness of the said order was challenged before the Calcutta High Court. The Division Bench of the Calcutta High Court has held that section 156(3) empowers the Magistrate to direct the police to investigate a cognizable offence. Once the Magistrate gives such a direction, the police takes cognizance of the offence and starts investigation. The magistrate having directed such investigation cannot tinker with or hamper with the investigation started by the Police by a subsequent order of re-call of his order u/s 156(3) and discharge the accused. If he does so, he exceeds his jurisdiction and acts in a manner which is not in accordance with the procedure established by law.

13. After having examined the correctness of the impugned order passed by the Judicial Magistrate, First Class, in the light of legal position as discussed above, I am of the clear opinion that the learned Judicial Magistrate, First Class, has exceeded his jurisdiction and committed a mistake of law. The learned Judicial Magistrate, First Class, is not at all justified in recalling his earlier order. Such kind of inherent jurisdiction does not at all vest in the learned Judicial Magistrate, First Class. The impugned order passed by the Judicial Magistrate, First Class, therefore, suffers from illegality.

14. In the result, Criminal Application is allowed. The impugned order dated 1-12-1998, passed by the Judicial Magistrate, First Class, Chalisgaon, is hereby

quashed and set aside. Rule is made absolute.