

(2002) 02 AHC CK 0004

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 6448 of 2001

Gulab Chand Upadhyaya

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-02-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 102, 154(1), 154(3), 155, 156

Evidence Act, 1872 — Section 27

Citation : (2002) CriLJ 2907 : (2002) 3 RCR(Criminal) 514

Hon'ble Judges : Sushil Harkauli, J

Bench : Single Bench

Advocate : Suresh Chandra Dwivedi and Anju Srivastava, for the Appellant; SC, for the Respondent

Final Decision : Dismissed

Judgement

Sushil Harkauli, J.—The writ petitioner moved an application dated 23-8-2000 u/s 156(3) Cr.P.C. before the Judicial Magistrate alleging that the respondents 4 to 6 herein had threatened and assaulted him, his wife and his brother, and had also damaged his property. It was alleged that the police had refused to register the FIR. It was prayed that a direction be issued by the Magistrate to the police to register the FIR and investigate the case.

2. The Magistrate by his order dated 3-1-2001 directed that the application u/s 156(3) be registered in the Court as a criminal complaint and fixed 5-1-2001 for recording the statement of the complainant u/s 200 Cr.P.C.

3. Instead of giving evidence, as required by the Magistrate, the petitioner preferred a criminal revision against the order dated 3-1-2001, which has been dismissed by the District Judge by judgment dated 11-5-2001.

4. Thus this writ petition under Article 226 of the Constitution of India has been filed with the submission that the Magistrate was not right in directing the

procedure of a complaint case to be adopted, and that he should have directed the police to register and investigate the case.

SECTION 156(3) Cr.P.C.

5. Although it may not be strictly necessary for a complainant to approach the police before filing an application u/s 156(3) Cr.P.C. (see para 7 of the Constitution Bench decision of the Supreme Court reported in A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, but as a matter of convenience and expedition, normally every genuine complainant first attempts to lodge an FIR at the police station. Thus most applications invoking Section 156(3) contain the averment that the police have (wrongly) refused to register the FIR of the cognizable offence. Section 154(1) makes it obligatory for officers in charge of police stations to register FIRs of cognizable offences. If the officer in charge of police station refused to do so, the complainant has the remedy u/s 154(1) Cr.P.C. to send the substance of the FIR to the Superintendent of Police by post who has the power to investigate the offence himself or depute a subordinate officer to investigate. Experience shows that very few complainants avail of this right u/s 154(1) Cr.P.C., apparently due to lack of knowledge.

6. If even the Superintendent of Police also fails to act, in such a situation a complainant, if he wishes to pursue the matter further, adopts one of the following two alternatives. Either he seeks a direction u/s 156(3) Cr.P.C. or he files complaint under Chapter XV Cr.P.C. before the Magistrate.

7. The causes for non-registration of FIR at police stations in cognizable case can vary widely. The overworked police may be indifferent to the common man's woes, the accused may be influential, registering of FIRs may be refused to keep the crime statistics of that police station low. Also, in some cases the police may be aware of the true state of affairs and may refuse to register false or pre-emptive FIRs.

8. In some of such cases the complainants may genuinely require the assistance of the Court by way of a direction to the police to register and investigate the case.

9. It is also possible that in some cases the complainant, with a poor or false case, knows that there is little or no possibility of securing a conviction. Therefore instead of filing a criminal complaint under Chapter XV of Cr.P.C, the complainant seeks the direction u/s 156(3) so that the accused may be arrested by the police and thereby harassed and humiliated.

10. Section 41 Cr.P.C. gives the power to the police to arrest without warrant in cognizable offences, in cases enumerated in that Section. One such case is of receipt of a "reasonable complaint" or "credible information" or "reasonable suspicion" [see Section 41(a) & (g)]. When a Magistrate directs registration of FIR and investigation, it would be a little difficult for the police officer of the rank of inspector or sub-inspector to still contend that the complaint or suspicion is

not "reasonable" or that the information (in the FIR) is not "credible". Although the use of the word "may" in Section 41 Cr.P.C. indicates that, it is not obligatory for police to make arrest in every case. But if arrest is made, it does not require any, much less strong, reasons to be recorded or reported by the police. Thus so long as the information or suspicion of cognizable offence is "reasonable" or "credible", the police officer is not accountable for the discretion of arresting or no arresting. At best the arrested person can be granted bail, or maybe in extreme cases remand can be refused u/s 167 Cr.P.C.

SUGGESTION TO MAGISTRATES

11. Of late a manifold increase in the applications u/s 156(3) Cr.P.C. can be noticed. And almost all orders for investigation passed under that section are challenged by the accused by way of revisions or applications u/s 482 Cr.P.C. or sometimes even writ petitions.

12. In the decision dated 6-12-2001 in Criminal Misc. Application No. 6193 of 2001 "Masuriyadin and Ors. v. Addl. District Judge and Ors.", (reported in 2002 Current Bail Cases 36) a single Judge of this Court suggested as follows:

Orders u/s 156(3) merely mean that an alleged cognizable offence should be investigated. It should not normally be open to the accused to say before the revisional or High Court that the allegation about a cognizable offence should not even be investigated. Thus interference by superior Courts with an order of a Magistrate u/s 156(3) should normally be confined to cases in which there are some very exceptional circumstances.

However, the major problem faced by the accused persons in such cases is the apprehension of arrest pending investigation by the police, and more importantly the apprehension about misuse by the police of this power of arrest. It is this apprehension which is causing the accused to file revisions and thereafter applications u/s 482 Cr.P.C. or writ petitions. Much of this litigation in superior Courts can be curtailed if every Magistrate while passing an order u/s 156(3) Cr.P.C. also examines, having regard to the peculiar facts and circumstances of each case, the advisability of including in his order an incidental direction as to whether the power of arrest by the police [Under Section 41 Cr.P.C. ?] for the purpose of investigation should be controlled by saying that the police will not make arrest for the purpose of investigation without first obtaining a warrant for the arrest from the Magistrate.

(Emphasis mine)

In those cases where such a restriction is placed by the Magistrate, if the police, after preliminary investigation, discover some reliable evidence of the involvement of accused in the offence and if the police require his ? for the purpose of (completing ?) investigation, it would be open to the police the facts and material before the Magistrate, who will consider whether arrest on those facts and material would be necessary for the purpose of investigation or not,

and accordingly issue or refuse to issue warrant of arrest.

13. The source of power for placing such restriction by the Magistrate was sought to be derived in that Judgment from the fact that the arrest and detention by police beyond 24 hours is under control of the Magistrate and where a power to do an act (ordering investigation of which arrest is a part) is conferred by statute (Cr.P.C.) that power by necessary implication includes all powers ancillary and incidental for achieving the object. It was also held that the investigation pursuant to an order u/s 156(3) stands on a different footing than voluntary investigation by the police.

14. To add, because arrest is part of investigation, therefore to determine whether power to control arrest (as above) is available to the Magistrate, the crucial question to be asked is whether in the intervening period - after ordering investigation u/s 156(3) Cr.P.C. and - before submission of a police report u/s 173 Cr.P.C. the Magistrate still retains any jurisdiction to intervene in investigation or not.

15. Section 157(1) requires the police to give information of FIR to the Magistrate before embarking upon investigation. If the police officer decides not to investigate or decides not to visit the scene of occurrence, Section 157(2) requires the police officer to state the reasons therefore in his report to the Magistrate. The report is to be submitted through a superior police officer "without delay" (Section 158 Cr.P.C). Upon such report the Magistrate is empowered by Section 159 Cr.P.C. to direct police investigation or to hold a preliminary inquiry himself or through a subordinate Magistrate. It is necessarily implied that even after the preliminary inquiry the Magistrate can direct police investigation under the said Section 159. Any seizure of any property by police is to be reported "forthwith" to the Magistrate u/s 102. Arrestes are to be reported to the Magistrate along with the accused within 24 hours. Upon a complaint the Magistrate can order police investigation u/s 202. The Magistrate can overrule the charge-sheet or the final report submitted u/s 173 by the police. All these factors indicate that the ultimate control of investigation is with the Magistrate.

16. Now about the powers of Magistrate to override the investigating agency even during pendency of investigation. Firstly, he can release the accused by refusing remand (Section 167). Secondly, he can grant bail to accused (Section 437). Thirdly, he can release seized property (Section 457). Fourthly, during progress of investigation by police, the Magistrate is empowered by Section 164 to record any confessional statement. He is also empowered by the same Section to record on oath any statement other than confession, and that statement would form an important part of investigation. Fifthly, if investigation is in progress and in the meantime a criminal complaint is filed the Magistrate can require the "investigating officer" to submit a "report" u/s 210(1). The proposition that the word "report" in Sub-section (1) of Section 210 means a "report" u/s 173, is supported by some precedents, with exceptions also. But I am of the view that it could only mean a charge-sheet or final report (under

Section 173). This view is based upon Sub-sections (2) of Section 210 which expressly refers to Section 173; and also upon the fact that subsection (3) of Section 210 can come into play only if the police report called u/s 210(1) is a charge- sheet or final report. From all these provisions it is clear that though the Magistrate is not expected to intervene in day to day investigation but he is not completely deprived of his powers till the end of investigation.

17. Apart from the reasons given above, it is also clear that u/s 156(3) Cr.P.C. the Magistrate need not allow the application of the complainant in toto. For example if there are 5 offences alleged, it is legally permissible for the Magistrate to order investigation into say 3 offences only, holding that the other offences are not made out. Again if there are say 5 accused, the Magistrate can validly direct registration and investigation against 3 only saying that no offence is made out against the remaining 2 accused. Thus a limited investigation can also be ordered by the Magistrate. Therefore he can also limit the investigation by controlling the power of arrest which is a part of investigation. Lastly, keeping in view the circumstances obtaining in the present times, and the abolishing of anticipatory bail in Uttar Pradesh, the advantages of taking this view far outweigh the disadvantages, and will also reduce the burden on higher Courts. Therefore it was rightly concluded in Masuriyadin's case (supra) that the restriction could be placed by the Magistrate upon the power of arrest of police.

A FURTHER QUESTION

18. For purpose of deciding, whether to place restriction on arrest as or even for considering whether to issue a direction to register and investigate, can be Magistrate 156(3)? A learned single Judge of this Court has held that he cannot. The decision is reported in 2001 Current Bail Cases 430 "Bhageloo and Anr. v. State of U.P. and Ors.". Apart from the reasons given in that decision, the view appears to be justified also because in a regular investigation, the report u/s 173 is accompanied by the details of investigation and the statements of witnesses examined during investigation. If a final report is submitted, notice is required to be given to the complainant. Upon examining the final report the complainant in his protest petition can say that there are other witnesses who have not been examined, or that the statements of witnesses have not been correctly recorded u/s 161 Cr.P.C. and on that basis he can get the final report rejected by the Magistrate. On the other hand a pre-investigation police report, if permitted to be called, need not contain any details of investigation. It may contain a bald statement by the police officer that upon inquiry he has found the version of the complainant to be not correct. The complainant in that situation would be greatly handicapped, and the Magistrate may also find himself unable to give any cogent reason for over-ruling such report.

19. However there is no logical reason why the Magistrate cannot himself make a brief inquiry (akin to Section 159 Cr.P.C.) to satisfy himself about the allegations before ordering registration and investigation of the offence. There appears to be no reason why the trained judicial mind of the Magistrate should not be put to

use for curbing frivolous applications u/s 156(3) at the very threshold. However at this stage the Magistrate is not holding trial. Therefore, if he finds the story of the complainant unconvincing, the Magistrate may examine the complainant and/or one or two key witnesses or ask for their affidavits, or ask for a copy of the injury report, or make such other inquiry as the circumstances of the case may require, to lend assurance to the case of the complainant before issuing a direction u/s 156(3) Cr.P.C.

GUIDE TO DISCRETION OF MAGISTRATE

20. Reverting back to the present case, Section 155 Cr.P.C. deals with non-cognizable offences and Section 156 deals with cognizable offences. In a recent decision of the Supreme Court in Suresh Chand Jain Vs. State of Madhya Pradesh and Another, it has been laid down that a magistrate considering an application u/s 156(3) Cr.P.C. may without taking cognizance direct the police to register and investigate the case, or he may take cognizance and proceed under Chapter XV Cr.P.C. However this discretion of the Magistrate obviously cannot be unguided or arbitrary. No decision was cited before me to throw any light upon the considerations which should weigh with the Magistrate to guide his discretion.

21. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police u/s 156(3) to register and investigate an alleged cognizable offence, why should he

(A) grant the relief of registration of a case and its investigation by the police u/s 156(3) Cr.P.C, and when should he

(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.

22. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example .

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery u/

s 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

23. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still u/s 202(1) Cr.P.C. order investigation, even thought of a limited nature {see para 7 of Suresh Chand Jain Vs. State of Madhya Pradesh and Another,

THE CASE IN HAND

24. In the instant case, the incident took place in the house and in the presence of the complainant. All the accused with their names and addresses are known to the complainant. The witnesses of the incident are also known to him. Although it was stated in the application that the brother and wife of the complainant are being restrained but there is no such averment at later stages therefore it is not a case of continuing abduction where recovery was required. There is also no allegation of any property having been taken away by the accused so no recovery of property was needed. Also it is not a case where any other material evidence is required to be collected and kept preserved. Thus this is not a case where any "investigation" was required by the police for launching a successful prosecution.

25. Therefore, the Magistrate has rightly passed the order adopting the procedure of a complaint case under Chapter XV.

26. No interference under Article 226 of the Constitution of India is called for. The writ petition fails and is dismissed.