

(1990) 02 AHC CK 0040

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 4136 of 1988

Jai Prakash Narain Rai and Ors.

APPELLANT

Vs

State of U.P.& Ors.

RESPONDENT

Date of Decision : 02-02-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120B, 307

Citation : (1990) 02 AHC CK 0040

Hon'ble Judges : S.R.Bhargava, J

Final Decision : Dismissed

Judgement

S. R. Bhargava, J.—In this petition under Section 482, Cr. P. C., Jai Prakash Narain Rai, Raj Bahadur Rai and Ram Sureman Rai have prayed for quashing order dated 11th February, 1988, passed by Magistrate and quashing of criminal proceeding arising out of crime No. 488 of 1985 State v. Girish Rai and others, P. S. Gorakhpur Cantt, pending in the court of Chief Judicial Magistrate, Gorakhpur.

2. Facts giving rise to this petition are that on 4th October, 1985 at 4.30 p m. one Harish Chandra Singh lodged First Information Report at P.S. Cantt, Gorakhpur against one Girish Rai and the petitioners, with the allegations that on that very day at 7.30 p.m. talks were to be held with Executive Engineer, Distribution Division II, Mohaddipur, Gorakhpur and for working out the strategy informant Harish Chandra Singh, S.S. Upadhyaya, S. N. Singh, Jai Raj Singh, J. K. Ojha and other junior Engineers assembled in the room of Head clerk for discussing the strategy of the talks. At about 3.15 p.m. Girish Rai, who is brotherinlaw (loser) of R. S. Rai, S. D. O. Electricity Department, Mohaddipur and is contractor of the Department, petitioners Jai Prakash Rai and Raj Bahadur came with a Jhola in the slid room. Girish Rai said to Jai Kishun Ojha that the later was harassing his brotherinlaw (gainer), hurled abuses and threatened that he he would kill said Ojha and fired pistol at Ojha. Aforesaid Upadhyaya gave jerk to the hand of Girish Rai whereby the shot tired by Girish Rai went grazing over the head of Ojha. Girish Rai then struck blow of barrel of the pistol on the head

of Ojha. Junior Engineers, assembled in the room, shouted and ran for catching hold of.

3. Girish Rai, Jai Prakash Rai and Raj Bahadur Rai, then all the three of them left behind the pistol, diary, small bag and chaappal, and made good their escape. Ojha was taken to hospital, it was further alleged in the First Information Report that Ram Sureman Rai took casual leave and hatched a conspirach for killing Ojha.

4. On this report case was registered and Civil Police of the Police Station proceeded with investigation which was concluded on 22nd October, 1985. Then Annexure "2" of the petition shows that on 28th November, 1985 U.P. Electricity Board sent a D.O. letter to U.P. Government in Home Department, whereupon the Government directed investigation by the Crime Branch, C. I. D. on 18th December, 1985 the Government directed the Inspector General of Police, C.I.D. that according to the decision of the Government case may be investigated. Superintendent of Police, C. B., C. I. D., Lucknow sent wireless message dated 20th December, 1985 to Station Officer, CB, CID, Gorakhpur for enquiry into the case and for copies of First Information Report etc. It is now not disputed that the local Police submitted charge sheet against all the four persons named in the First Information Report. It is now also not disputed and was categorically stated during arguments in this court that on 15/11/1986 charge sheet came before the Magistrate who took cognizance of the case against all the four persons named in First Information Report. Inspector, CB, CID., Gorakhpur moved application dated 24th January, 1986 (Annexure T of rejoinder affidavit) before the Chief Judicial Magistrate, Gorakhpur for permission for further investigation in the case. It was stated during arguments that on 27th January, 1986 Magistrate accorded permission for further investigation by C.B., C.I.D. case remained psnding. After further investigation CB, CID submitted report dated 20th November, 1987 to the Magistrate. In this report it was inter alia said that R. S. Rai, Jai Prakash Rai and Raj Bahadur Rai were named in the First Information Report on account of enmity. CB, CID criticised the investigation by local Police and specifically pointed out that the investigating officer of the local Police did not pay attention to the statement of R. K. Mani.

5. Petitioners relied upon the report of the Investigating Officer of the CB, CID and asserted that they are liable to be discharged. They moved application dated 11th February, 1988 before the Magistrate for their exoneration. Learned Magistrate passed order that the reason for exoneration were insufficient and dismissed the application. Then the petitioners came to this eout.

6. Parties have exchanged affidavits and their counsel have been heard at length.

7. It was urged on behalf of the petitioners that after order for further investigation by CB, CID, on the report of local police the Magistrate ought not to have taken cognizance and should have stated orders on the report of the local police awaiting report of CB, CID, after further investigation. On behalf of the

petitioners reliance was placed on the Supreme Court case of *State of Bihar v. J. A. C. Seldanha*, 1980 (17) ACC 279. In that case local police had submitted final report. Assistant Public Prosecutor moved application to the Magistrate that final report be not accepted and report after further investigation ordered by the Government be awaited. Learned Magistrate heard the parties and considered it proper to await report on further investigation. He directed that the case may be put up for further orders awaiting report on further investigation. Supreme Court held that the State Government had jurisdiction to order further investigation and that the Magistrate having jurisdiction to try the case committed no illegality in postponing consideration of the final report.

In this case it cannot be contended that the State Government had no jurisdiction to order further investigation by CB, CID, nor this contention has been raised on behalf of the opposite parties. But the facts of the instant case are altogether different. It was asserted on behalf of the petitioners that the Magistrate had knowledge of the order of the Government for further investigation by CB, CID. A court knows only that fact which is on its judicial record. On behalf of the petitioner no document forming part of the record of the Magistrate has been filed to show that the Magistrate had the order of knowledge of the State Government directing further investigation by CB, CID. A court also knows a fact which it can take judicial notice, fact that the State Government ordered further investigation by CB, CID is not a fact of which judicial notice can be taken. Mere assertion of interested petitioners in the affidavit accompanying their petition to the effect that the Magistrate had knowledge of the order of the State Government, can have no significance. In the instant case the petitioners moved no application before the Magistrate concerned that order regarding cognizance or consideration of the report of the local police be postponed till report of CB, CID, after further investigation. In para 25 of their judgment their Lordships of the Supreme Court in the aforementioned case said :

"Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the Investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the court the police function of investigation comes to an end subject to the provision contained in Section 173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the court, and to award adequate punishment according to law for the offence proved to the satisfaction of the court. There is thus a well denned and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate."

8. On behalf of the petitioners reliance was placed on the Supreme Court cases *Kashmeri Devi v. Delhi Administration* and another, (1988) 2 Cr JR (SC) 408 and

Radhey Shyam v. Kunj Behari, 1990 UP Cr R 15 : 1990 JIC 124 (SC). In the former cases further investigation was directed to be made by the Central Bureau of Investigation and in the later case further investigation was made by CID. In both the cases adjective "independent" was used for the agency to make further Investigation. It was argued on behalf of the petitioners that the further investigation made by CB, CID exonerating the petitioners is of independent agency and should override the report of the local police. In the latter case in para 6 of their judgment their Lordships said :

"As to how much acceptance has to be given to the investigation done by the CID and the statements of witnesses recorded by its officers is a matter which can be determined only after the trial is held and the witnesses and the Investigating Officer adduce their evidence on oath."

9. In cases triable by Magistrate even the stages of discharge under Section 239 Cr. P.C. and framing charge are stages of trial. If on the perusal of the case diary and the police report the Magistrate finds that the charge against the accused is groundless he can discharge the accused and the trial ends. But in cases exclusively triable by Sessions Judge, the Magistrate has no jurisdiction to proceed under Section 239, Cr.P.C. If the police report indicates the accused with offences exclusively triable by Court of Sessions the Magistrate is bound to commit the case to Sessions under Section 209, Cr. P.C. Then the Sessions Judge takes up the trial. If the Sessions Judge finds that there is no sufficient ground to proceed against the accused he may discharge the accused under Section 227 Cr. P.C. If the Sessions Judge exercises its power of discharge under Section 227 against all or some of the accused the trial against the discharge accused concludes. In the instant case the report was for offences under Sections 307 and 307 read with Section 120B, IPC. The Magistrate could not have discharged the petitioners. He could not have reviewed the earlier order of taking cognizance. He was duty bound to commit the accused to sessions and the Sessions Judge would have jurisdiction to go into the case diary and Police report submitted by local police as well as CB, CID. If on the perusal of the papers and the reports of both the investigations the Sessions Judge comes to the conclusion that there is no prima facie evidence of common intention or conspiracy against the petitioners he may discharge them under Section 227, Cr. P. C. But it cannot be said that the Magistrate had no jurisdiction to take cognizance on earlier police report and was bound to exonerate or discharge the petitioners.

10. Then comments may be made on the First Information Report of the case. Girish Rai alone committed the criminal act of firing pistol and striking barrel of the pistol. He alone uttered the violent words, petitioner Ram Sureman Rai was not at all present at the spot. According to First Information Report he is related with Girish Rai. Relationship could have enraged Girish Rai to commit criminal act at the spurt of the moment. Petitioners Jai Prakash Narain Rai and Raj Bahadur Rai had accompanied Girish Rai. But at the spot they did not commit any overt act from which common intention or conspiracy can be inferred. It is evident

from the First Information Report that the Junior Engineers, assembled in the room, challenged and chased not only Girish Rai but also petitioners Jai Prakash Ndrain Rai and Raj Bahadur Rai. So even if they did not share any common intention with Girish Rai they would have fled for their life. Hence, from the fact that they fled from the spot no inference of common intention or conspiracy can be drawn. If the two investigation do not disclose any evidence of common intention or conspiracy the petitioners will be entitled to discharge under Section 227 Cr.P.C. The Case Diary and the investigation papers of the two agency are not before this court, nor in any proceedings under Section 482 Cr. P. C. this court can exercise jurisdiction to scrutinise the evidence collected during the investigation and override the jurisdiction of the Sessions Judge under Sections 227 or 228 Cr.P.C. Hence, the proper course for the Magistrate would be to commit all the four accused to sessions. It is noteworthy that there are two conflicting police reports and the letter exonerates the petitioners. Hence, the Magistrate should commit the accused to sessions in the early part of the day so that the petitioners may obtain bail from the Sessions Judge on the same day.

11. In view of the aforementioned discussions no interference is required in this petition which is hereby dismissed. Stay order is vacated.