

(1966) 11 PAT CK 0002

In the Patna High Court

Case No : Criminal Revision No. 1609 of 1965

Jumrati Mian

APPELLANT

Vs

Bisheshwar Prasad Vishwakarma and Others

RESPONDENT

Date of Decision : 28-11-1966

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 202, 203

Citation : AIR 1967 Patna 361 : (1967) CriLJ 1562

Hon'ble Judges : Kamla Sahai, J

Bench : Single Bench

**Advocate : Dharmashila Lall and Parmeshwar Prasad Sinha, for the Appellant;
J.N. Verma and Radha Raman, for the Respondent**

Final Decision : Allowed

Judgement

Kamla Sahai, J.—This is an application by complainant. Jumrati Mian for setting aside an order of the Sub-Divisional Magistrate of Samastipur whereby the Sub-Divisional Magistrate dismissed his complaint

2. It appears that an occurrence took place on the 28th March 1964. One Mohammad Habib lodged a fardbeyan on the spot, and it was later treated as the first information report. The complainant-petitioner and others were arrested by the police, and they were put in jail. The petitioner was released on the 19th April, 1964. and it was on the 20th April, 1964 that he filed the complaint. It may also be mentioned that the Sub-Divisional Magistrate himself had gone to the place of occurrence on the 28th March. 1964 and the complainant had seen him there

3. After receiving the complaint and after examining the complainant on solemn affirmation the Sub-Divisional Magistrate adjourned the case to the 15th May. 1964 He recorded an order on that date, saying amongst other things:

"Heard the parties through their respective lawyers Also perused the case record of Case No GR 306/64, State v. Sobrati Mian and others under Sections

148/436/379. I.P.C."

The reference is to the case started on Habib's first information report. On the 29th May. he passed orders dismissing the complaint and giving his reasons therefor. Some of the reasons given are on the basis of the petitioner's complaint and on the basis of the statements made by him in the statement on solemn affirmation. No exception can be taken to those reasons

4. Mrs. Lall has however, stated correctly that some of the reasons given by the Sub-Divisional Magistrate relate to matters appearing on the record of the case started on the first information report of Habib. As I have already quoted the Magistrate's order, he appears to have heard the accused persons also. It has been laid down in a number of cases that the accused has no locus standi at a time when the question of issue of processes on the basis of a complaint against him is being decided by the Sub-Divisional Magistrate. Mrs Lall has referred to the decision in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, , in support of her proposition that the Magistrate should not have referred to the police case record. In that case. Mudholkar. J.. who has delivered the judgment of the Court, has observed:

We may point out that since the object of an enquiry u/s 202 is to ascertain whether the allegations made in the complaint are intrinsically true the Magistrate acting u/s 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry u/s 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this "

This is a categorical statement of the law and the Magistrates have to keep in view the fact that they cannot look into materials other than those referred to in the above passage. Mr Varma. who has appeared on behalf of the opposite party has stated that the facts of the case in which the above observations were made were different He has summarised the facts as follows.

5. One Nageshwar Singh was killed. Panchanan Roy lodged a first information report, accusing Prokash Chandra Bose and others as the assailants of the deceased. The police made investigation and submitted final report. One Mahendra Singh filed a petition of complaint in which he accused a different set of people Thereafter Chandra Deo Singh filed another complaint in which he accused the same set of people whom Panchanan Roy had accused in his first information report. The Sub-Divisional Magistrate sent both these complaints for enquiry to a Magistrate, viz. Mr. Chowdhry. The enquiring Magistrate permitted the accused, respondent No. 1 in the Supreme Court to appear through counsel. Seven witnesses were examined on behalf of Chandra Deo Singh. The witnesses were examined as Court witnesses Thereafter, he submitted a report that a prima facie case had been made and against three persons named Upendra Neogi. Asim Mondal and Arun Mondal. and he submitted another report to the effect

that no prima facie case had been made out against respondent No. 1 The Sub-Divisional Magistrate issued processes against the others but dismissed the complaint as against respondent No. 1.

6. The Supreme Court has deprecated the act of the enquiring Magistrate in allowing respondent No. 1 to take part in the proceedings All that the accused is entitled to is to be present either in person or through a Counsel or an agent with a view to be informed of what is going on. Mr. Varma has, however. drawn my attention to the following observations of Mudholkar, J.:

"The power to dismiss a complaint rests only with a Magistrate who has taken cognizance of it. If before issue of process, he had sent down the complaint to a Magistrate Subordinate to him for making the enquiry, he has the power to dismiss the complaint, If in his judgment, there is no sufficient ground for proceeding One of the conditions, how ever. requisite for doing so is the consideration of the statements on oath if any made by the complainant and the witnesses and of the result of the investigation or the enquiry which he had ordered to be made u/s 202, Cr. P. C. In the case before us, an Investigation by a police officer was not ordered by the learned Sub-Divisional Magistrate, but an enquiry by a Magistrate, First Class. He had, therefore, to consider the result of this enquiry It was not open to him to consider in this connection the statements recorded during investigation by the police on the basis of the first information report lodged by Panchanan Roy or on the basis of any evidence adduced before him during the enquiry arising out of the complaint made by Mahendra Singh. All these were matters extraneous to the proceedings before him."

Learned Counsel has argued that these observations were made in the facts and circumstances of that case and the observation which I have quoted above was also made on the basis of those facts. It has to be noticed, however, that what their Lordships have said is that the statements recorded in the course of investigation by the police of the statements recorded during the enquiry on the basis of the complaint made by Mahendra Singh. were extraneous matters It has to be remembered that Chandra Deo Singh's complaint made allegations similar to those made by Panchanan Roy in his first information report The investigation by the police was, therefore, into a case on the same facts; but the statements recorded by the police were held to be extraneous simply because they were recorded by the police in the absence of an order by the Sub-Divisional Magistrate for an investigation u/s 202. In such circumstances, It is difficult to see how the statements recorded in the course of an investigation by the police into a counter-case, as in the present case, can be held not to be extraneous matters.

7. In the circumstances mentioned above, I am of opinion that the learned Sub-Divisional Magistrate's order is vitiated for the reasons (1) that he heard the accused's party and (2) that he referred to the record of statements in the course of the investigation made by the police into Habib's first information report.

8. The application is allowed, and the Magistrate's order is set aside. The case is remanded to him for disposal of the complaint filed by the petitioner in accordance with law keeping in view the observations which I have made above. I need hardly say that it is entirely for him either to dismiss the complaint or to issue process; but I can only say that he can dismiss the complaint on a consideration only of the materials referred to in the observation of Mudholkar, J., which I have first quoted, and after giving an opportunity to the complainant to be heard.