

(1986) 11 MAD CK 0015
In the Madras High Court
Case No : Criminal M.P. No. 7453 of 1986

K. Ramasubbu

APPELLANT

Vs

The State and Another

RESPONDENT

Date of Decision : 11-11-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 169, 173, 173(1), 173(2), 173(3)
Penal Code, 1860 (IPC) — Section 379

Citation : (1986) 11 MAD CK 0015

Hon'ble Judges : K.M. Natarajan, J

Bench : Single Bench

Advocate : K. Mohanram, for the Appellant; A.N. Rajan, Government Advocate and S. Elamurugan, for the Respondent

Judgement

1. The accused in C.C. No. 173 of 1986 on the file of the Sub-Divisional Judicial Magistrate, Dindigul, has filed this application under S. 482

Cr.P.C. to quash the said proceedings against him.

2. The said petition came to be filed in the following circumstances. The Assistant Divisional Engineer T. N. E. B. Palani, gave a complaint on 27-

8-1984 alleging that during the inspection of S.C. 160 Neikkarapatti distribution, belonging to the petitioner, he noticed M.R.T. seals provided in

three phase meter in the service missing and that the petitioner has committed theft of electricity by opening the cover of the meter and reduced the

recorded units thereunder. On the basis of the said complaint a case was registered against the petitioner in Cr. No. 435 of 1984 Palani Taluk,

Police station, under S. 397 I.P.C. read with Sections 39 and 44(c) of the Indian Electricity Act. The said complaint was investigated by one

Muthuswami, Sub-Inspector, and he examined as many as ten witnesses and

after obtaining opinion of the Assistant Public Prosecutors (Grade I and Grade II) sent the final report dt. 7-5-1985 under S. 173 Cr.P.C. to the Court, to the effect that no case was made out against the petitioner, and the case was referred as "mistake of fact". Refer notice under S. 169, Cr.P.C. was also served on the petitioner on 18-5-1985 and his acknowledgment was obtained. The Sub-Divisional Magistrate, Dindigul also on receipt of the final report and after perusing the connected records accepted the final report sent by the said Muthuswami and passed an order on 12-6-1985 as follows-Recorded as ""mistake of fact"". The referred charge-sheet has been numbered as 104 of 1985.

3. The Inspector of Police, Palani, as per the direction of the Superintendent of Police, Madurai, and on the advice of the Public Prosecutor, Madurai Dt. reopened the investigation on 27-9-1985 and filed charge-sheet under sections 39 and 44(c) of the Indian Electricity Act read with S. 379, I.P.C. in the same crime number, on 22-1-1986. When the charge-sheet was returned by the Magistrate on 14-2-1986, whether permission has been obtained to reopen, the respondent resubmitted the same on 15-2-1986 stating the circumstances under which it was reopened and seeking permission to investigate the same. The Magistrate passed an order on 19-2-1986 to the effect that permission is granted to investigate the case. He took cognisance of the case and numbered the same as C.C. 173 of 1986 and issued summons to the accused. On receipt of the said summons the accused has filed this application.

4. According to the petitioner, the earlier order passed by the Magistrate on the police report, as mistake of fact, is a judicial order passed by him in his capacity as court and it has become final. Further, the same has not been reversed by a competent forum at the instance of the respondents.

Hence, the entire proceedings are vitiated with illegality and have to be quashed. It is further submitted that on the date when the charge-sheet was

filed no police report was pending since the Magistrate has not taken cognisance on the basis of the earlier report submitted by the Sub-Inspector, and as such, the respondent, though a superior officer cannot reinvestigate or reopen the case and file a fresh charge-sheet.

5. The only point that arises for consideration in this quash proceedings is whether, in view of the fact that the Sub-Inspector who investigated the

case submitted a report under S. 173 Cr.P.C. to the Magistrate that the matter has been referred as "mistake of fact" and on the basis of the

report the Magistrate accepted the finding and passed orders to the effect "Recorded as mistake of fact" the subsequent investigation by the

Inspector of Police and filing the charge-sheet is legal and proper. Already a similar question came up for consideration before this Court and the

Supreme Court. In *Namasivayam v. State*, 1981 MLW (Cri) 151 : 1982 Cri 707, Sathar Sayeed J. after considering the earlier decisions of the

Supreme Court reported in *State of Bihar and Another Vs. J.A.C. Saldanha and Others*, and *Kamalapati Trivedi v. State of West Bengal*, 1979

MLW (Cri) 48 : 1979 at P. 698 held -

In this case, the police had once put up a detailed report after complete investigation and on the basis of the report filed by the respondent before

the Magistrate against the petitioner, the Magistrate passes an order, which is judicial in nature, to the effect that there is no case and the complaint

is recorded as "mistake of law". The Magistrate, while passing the order, exercised his judicial power and discretion and it is an "order" and unless

that order is set aside, reinvestigation of the case on the same complaint not by the Superintendent of Police, but at the instance of the Inspector of

Police, for the same offence, is an illegality. I can understand if the respondent agitates the earlier order passed by the Magistrate on 16th July,

1977 which was recorded as "mistake of law" at a higher forum and at the same time, starts reinvestigation of the case at the instance of the

Superintendent of Police or the magistrate, and a charge-sheet is filed against the petitioner, then there is some substance in it. But, that is not the

case here. In this case, the Magistrate has not taken cognisance at all on the earlier police report submitted by the respondent under S. 173,

Cr.P.C. Had there been the police report against the petitioner pending before the Magistrate, and if no order is passed on the police report by the

Magistrate and if the respondent, while the report is pending before the magistrate, holds a further detailed inquiry and collects several other

particulars of the offence committed by the petitioner and submits a further report, then it can be said that the further investigation by the

respondent is not barred when the cognisance of the offence has yet to be taken by the magistrate. But, the case before us is, that there is no

cognisance at all of the earlier enquiry report, and when once the Magistrate passes an order as "mistake of law" on the earlier enquiry report, submitted by the police, it is a judicial order, for the Magistrate has passed the said order after applying his mind on the report submitted by the police, and taking cognisance of the same offence by the Magistrate on a reinvestigation of the case by the police without any fresh complaint by the complainant and without obtaining any permission from Court, is illegal, perverse and contrary to law and should not be allowed to sustain and has, therefore to be set aside.

In *Nagalingam v. State*, 1985 MLW (Cri) 991, S. A. Kader J. also was of the opinion that an order passed by a Magistrate on perusing the records and the final report of the police is a judicial order in his capacity as court.

6. On the other hand, it was contended by the learned Government Advocate that in view of S. 173(8), Cr.P.C. the police can file a fresh charge-

sheet on the reinvestigation and there is no bar in filing charge-sheet even though originally it was referred as "mistake of fact". Section 173(8),

Cr.P.C. reads as follows -

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been

forwarded to the Magistrate, and whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or

documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of

sub-secs. (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-

section (2).

Sub-section (2) refers to the "report" to be submitted in the form prescribed by the State Government to the court by the investigating officer as

soon as it is completed. According to the learned counsel for the petitioner, Section 173(2), Cr.P.C. refers to a case where the offence is made

out. *Natarajan J. (as he then was) in Periasami v. Inspector of Police Ponnagaram Police Station, Dharmapuri* 1984 MLW (Cri) 36 : 1984 Cri LJ

239 held -

Section 173(8), Cr.P.C. has been newly added in order to make it expressly clear

that merely because an investigating officer has sent a police report to the magistrate, he will not stand precluded from making further investigation in the case and submitting to a further report or reports to the Magistrate regarding the additional evidence gathered by him in the further investigation. Because of this express provisions, it should not be taken that if a police officer had committed an error in giving full and proper particulars regarding the names of parties, the nature of information, the names of witnesses, etc. in his first report, he cannot correct the mistake by filing a second report, he cannot correct the mistake by filing a second report. When the Code provides for even further investigation being done after a report is filed before a Magistrate, there can be no bar whatever for the Police filing a second or revised report on the materials already gathered during the investigation especially when the second report is intended to set right certain mistakes or omissions in the first report. The matter should, therefore, be viewed in its proper perspective.

That was a case where originally the charge-sheet was filed against four persons under S. 36(a) of the Tamil Nadu Forest Act, and subsequently a revised charge-sheet was filed to the effect that two other persons along with four others entered into a criminal conspiracy in committing theft of sandalwood from the patta land. There the question arose whether, in view of S. 173(1), Cr.P.C. on the evidence available, the subsequent charge-sheet can be filed. On a perusal of S. 173(8), Cr.P.C. the investigating officer is certainly empowered to forward a further report or reports on the basis of the further evidence available subsequent to the filing of the original charge-sheet. The same question was also considered in

Namasivayam Vs. State, and Sathar Sayeed J. held in para 13, as follows -

I may at this stage state that if a police officer after he lays a charge-sheet gets information or additional information, he can still investigate and lay further charge-sheet. Where the first report made by the police to the Magistrate, though was incomplete, contained all the particulars and a supplementary report containing all the particulars is filed subsequently giving the particulars and details of the witnesses, who are merely formal witnesses, the first report is in fact a complete report as required by S. 173(2)(i), Cr.P.C. and it is not vitiated by the mere fact that the supplementary report is filed subsequently. But, that is not the case here.

The same question was considered by a Division Bench of the Kerala High Court in *In Re: State*, wherein it was held -

Law is well-settled that the police has the right to reopen the investigation even after the submission of the charges under S. 173 Cr.P.C. if such

facts come to light. The Police has the right to file a supplementary charge-sheet after a final report under S. 173 Cr.P.C. was filed. If a police-

officer after laying charge gets further information, he can still investigate and lay further charge-sheet. If fresh facts come to light after a final report,

Magistrate's permission is not necessary for further investigation. So in this case the police officer was right in bringing to the notice of the Sub-

Magistrate that the charge was laid against a wrong person.

All these cases only deal with cases where originally charge-sheet was filed against accused and subsequently revised charge-sheet was filed on

getting fresh materials. But, that is not the case here. In the instant case, the investigating officer after making investigation by examining as many as

ten witnesses referred the case as "mistake of fact" and submitted a report to this effect to the court and the Magistrate has also accepted the same

and ordered "Recorded as mistake of fact". As held by this court and the Supreme Court in the earlier cases referred to, the said order is a judicial

order. If really the prosecution was aggrieved by the said order and wants to reopen the case, they should have agitated the matter and challenged

the said order passed by the Magistrate and then after obtaining necessary order from the higher forum, reinvestigated the case. It was observed

by Sathar Sayeed, J. in the above quoted decision -

There must be a limit for investigation of the complaint by the Police. The police cannot at the instance of one officer after enquiry, say that there is

no case against the petitioner and that report having been accepted by the Magistrate, subsequently at the instance of another police officer, as in

this case the Inspector of Police says that there is a case against the petitioner.

It is needless to say that under S. 173(3), Cr.P.C. it is open to the Magistrate either to agree with the police report or not to agree with the same

and he can direct further inquiry and give suitable directions. Even in cases when the report was filed charging the accused, it is open to the

Magistrate either to take cognisance of the offence under S. 190(1)(b), Cr.P.C. or take the view that the facts disclosed do not make out an

offence and decline to take cognisance. In *Kamlapati Trivedi Vs. State of West Bengal*, it was held -

Thus in the case of an order passed by a Magistrate under sub-section (3) of S. 173 of the Code in agreement with the police report does not call

for any hearing or the production of any evidence on the part of the 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 S. 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 of 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 given a character different from the entire judicial process of which they are intended

to form a part.

Thus, in view of the ratio laid down in the above decision, it is clear that the order passed by the Magistrate on the basis of the first report

submitted by the Sub-Inspector is a judicial order. The second revised report contemplated under S. 173(8) of the Code is only in case where the

charge-sheet is filed and subsequently revised or additional charge-sheet is contemplated on the further materials available, and not in a case where

the case was already referred as mistake of fact and accepted by court.

7. For all these reasons, I am of the view that the proceeding against the petitioner is liable to be quashed and consequently it is quashed. The

petition is allowed.

8. Petition allowed.