

(2002) 10 PAT CK 0040
In the Patna High Court
Case No : Cr. Misc. No. 25173 of 2002

Lallan Choudhary and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 08-10-2002

Acts Referred:

Citation : (2002) 10 PAT CK 0040

Final Decision : Allowed

Judgement

I.P. Singh, J.—This is an application u/s 482 of the Code of Criminal Procedure, 1973 (in short "the Code"). It is directed against the order dated 12.7.2002 passed by the learned 2nd Additional Sessions Judge, Motihari in Criminal Revision No. 8/ 14 of 2002/2002 whereby the revision application directed against the order dated 9.10.2001 passed by Shri O.P. Shrivastava, Judicial Magistrate 1st Class, Sikrahana at Motihari in Tr. No. 1009 of 2001 was allowed in part but the order of the learned Judicial Magistrate refusing to amend and add the charge u/s 395 of the Indian Penal Code was affirmed by the revisional court.

2. Both the parties were heard on this petition on 13.9.2002. The learned A.P.P. on behalf of the State had also made his submissions alongwith the submissions for the learned Counsel for the Petitioners. In view of the detailed hearing of this petition both the parties had agreed that if possible this application may be disposed of at this stage itself. In view of the aforesaid this application is being disposed of at this stage.

3. In this application it has been contended that the informant was living as a tenant in the house of Smt. Pashupati Devi since last 22 years. A Title Suit bearing T.S. No. 401 of 1986 was pending between her and Sarswati Devi wife of accused No. 1 Lallan Choudhary (Petitioner No. 1) in the court of Sub-Judge. It was further alleged that on 7.6.1996 at about 6 P.M. all the nine accused persons named in the F.I.R. variously armed with deadly weapons formed an unlawful assembly and entered into the house of the informant. They indulged in the Loot-

Pat of the household articles, teased the inmates of the house and assaulted the informant badly. However, in the meantime on the arrival of the neighbours they made good their scape after looting various articles worth Rs. 19,000/- as mentioned in Annexure-1 to this petition. It appears that a Complaint Petition No. 223/96 was filed before the S.D.J.M. Sikarhara at Motihari by Shri Yogendra Prasad against the present Petitioners in which also he had alleged that the Petitioners had looted away the household articles from his house and tried to dispossess him from the same. They also teased the female inmates of the house and badly assaulted the complainant (the informant). It appears that on the receipt of this complaint petition the learned S.D.J.M. sent it to police for investigation u/s 156(3) of the Code where it was treated to be an F.I.R. and investigation was taken up.

4. The police after completing the investigation submitted the charge sheet under Sections 452 and 323/34 of the Indian Penal Code After the submission of the charge sheet the cognizance of the offence was taken and the charges were framed under Sections 452 and 323 I.P.C. against the present Petitioners by the learned Magistrate to which they pleaded not guilty. The trial was taken up in course of which some witnesses were also examined. On 4.9.2001 a petition was filed on behalf of the informant under the provision of Section 216 of the Code for altering the charge framed in the case into one u/s 395 of the Indian Penal Code but the same was rejected by the learned Magistrate by his order dated 9.10.2001 as contained in Annexure-2. Against this order Criminal Revision No. 8/14 of 2002/ 2002 was filed which was heard and disposed of on 12.7.2002 by the learned Additional Sessions Judge who concluded that the charge against the present Petitioners be amended or altered into one u/s 380 of the Indian Penal Code since there was no material to frame the charge u/s 395 of the Indian Penal Code.

5. It has been submitted that this order passed by the revisional court was wrong since there was illegality or impropriety in the findings recorded by the learned Magistrate. As such the revisional court was not justified in not interfering with the order passed by the learned Magistrate, and not setting it aside.

6. It has further been submitted that the order passed by the learned Additional Sessions Judge is bad also in view of the Section 397(2) of the Code which clearly speaks that the power of revision conferred by Sub-section (1) shall not be exercise in relation to any interlocutory order passed in any trial, enquiry, appeal or other proceeding. Since the order against which the revision application was filed was interlocutory in nature hence the learned Additional Sessions Judge had committed an error in interfering with the same. In support of this contention the Petitioners have placed reliance on two cases, namely, Amar Nath and Others Vs. State of Haryana and Another, and Jagir Singh Vs. Ranbir Singh and Another, On these grounds it has been contended that the order dated 12.7.2002 passed in Cr. Revision No. 8/14 of 2002/ 2002 by the learned 2nd Additional Sessions Judge, Motihari be quashed.

7. On behalf of the State the learned A.P.P. has challenged these submissions. He has contended that the Petitioners have no ground to file this application which is against the provisions of law. In support of his contention he has also referred to the various provisions of law to which I will refer to at the appropriate place in this order.

8. From the complaint petition as contained in Annexure-1 it appears that the allegations made against the present Petitioners were that variously armed they entered into the residential premises of the complainant and indulged in looting the articles kept therein. They also badly assaulted the complainant and teased the female inmates of the house. The list of the looted articles worth Rs. 19,000/- has been given in the complaint petition. It was on the basis of this complaint petition that the formal F.I.R. was drawn up but after investigation the police submitted charge-sheet only under Sections 452 and 323/34 of the Indian Penal Code. Since the offence relating to these sections appeared to be triable by the Magistrate of the First Class the learned Magistrate Shri O.P. Srivastava proceeded with the trial of this case after framing of the charge under Sections 323 and 452 of the Indian Penal Code in which he examined four witnesses also. It was at this stage that the learned A.P.P. had filed a petition before him alleging that since from the facts stated in the F.I.R. an offence of commission of loot by more than five persons was made out hence this case was also u/s 395 of the Indian Penal Code. He accordingly, prayed that necessary commitment order in respect of this case may be passed. As stated above the learned Magistrate had refused this prayer stating that no case u/s 395 of the Indian Penal Code was made out. When revision application was filed against this order the learned 2nd Additional Sessions Judge while disposing it of by his order dated 12.7.2002 held that at best a case u/s 380 of the Indian Penal Code was made out against the present Petitioners and directed that the charge be amended accordingly.

9. The parties have been heard at length on the various questions of law involved. The complaint petition on the basis of which an F.I.R. was drawn up disclosed the offences under Sections 147, 148, 149, 448, 452, 323 and 395 of the Indian Penal Code. However after the investigation the charge sheet only under Sections 452 and 323/34 of the Indian Penal Code was submitted by the Police. It further appears that the learned Magistrate without proper appreciation of law on the point treated the case to be only under Sections 452 and 323 of the Indian Penal Code and proceeded with the framing of the charge and the examination of the witnesses. The learned A.P.P. has, however, submitted that the learned trial court was not bound by any finding by the police as mentioned in the charge sheet. He has rightly submitted that upon receiving a report u/s 173 of the Code a Magistrate has full jurisdiction to differ with the conclusions of the police and to direct the accused not sent up for trial to be also put on trial. It was further submitted that he can also take cognizance and issue processes" on the basis of the materials collected during the investigation revealing the commission of an offence. Further it was pointed out that it is well settled that when the i cognizance is taken of an offence it is immaterial which sections are

mentioned while taking the cognizance. These views find support from the Special Bench Case of Kuli Singh and Others Vs. The State of Bihar and Others, In the case of Abhinandan Jha and Others Vs. Dinesh Mishra, it has been held that if the Magistrate on the receipt of the police report or charge sheet, as popularly called, finds that a particular offence is made out he can take cognizance of the same u/s 190(1) (c) of the Code (which has been subsequently corrected to be under 190(1) (b) of the Code by the Hon"ble Supreme Court in the case of H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh), in which it has been held that when a Magistrate orders an investigation u/s 156(3) and receives a police report u/s 173(1) of the Code he may take cognizance of the offence u/s 190(1) (b) itself and not u/s 190(1)(c) of the Code not being bound in any manner by the conclusion arrived at by the police in their report. From the aforesaid decision it is clear that the Magistrate is not bound by the conclusions drawn by the police while submitting the charge sheet. He can differ with the police report and has full jurisdiction to base his conclusion on the strength of the materials collected by the police during the investigation. In other words the final decision in this regard rests with the Magistrate and not with the police. This is the scheme of law applicable to the courts in India. In this back ground I will now proceed to examine the present case.

10. As stated above the F.I.R. also disclosed an offence u/s 395 of the Indian Penal Code though the charge sheet only under Sections 452 and 323/34 of the Indian Penal Code was submitted. The question would be whether the Magistrate was bound by this conclusion of the police as mentioned in the charge sheet or was he entitled to peruse the materials collected by the police in the course of investigations, the allegations made in the F.I.R. and draw his own conclusion with respect to the same? The answer would be positively in affirmative.

11. If the learned Magistrate would have applied his mind to the allegations made in the complaint petition on the basis of which the F.I.R. was drawn up it could not have escaped his notice that the allegations also u/s 395 of the Indian Penal Code were made out with respect to the loot of various articles worth Rs. 19,000/- by a mob variously armed with weapons in the course of which the informant was also assaulted. In a situation like this when the allegations made in the F.I.R. also disclosed an offence u/s 395 of the Indian Penal Code but the police submitted the charge sheet only under Sections 452 and 323/34 of the Indian Penal Code what should have been the proper course according to law open to the Magistrate taking cognizance of the offence. Obviously prima facie an allegation also u/s 395 of the Indian Penal Code which is exclusively triable by the court of session was made out in the F.I.R. In this connection I will firstly refer in Section 209 of the Code. It runs as follows:

209. Commitment of case to Court of Session when offence is triable exclusively by it.-When in a case instituted on a police report or otherwise the accused appears or is brought before Magistrate and it appears to the Magistrate that the

offence is triable exclusively by the Court of Session he shall (a) commit, after complying with the provision of Section 207 or Section 208, as the case may be, the case to Court of Session and subject to the provision of this Code relating to bail remand the accused to custody until such commitment has been made.

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12. In this connection the expression appears to the Magistrate that the offence triable exclusively by the court of session is of considerable importance. It has been repeatedly held that when the offence is exclusively triable by the court session, the committing Magistrate has no power to discharge the accused nor can he take oral evidence save where a specific provision like Section 306 enjoins this provision relates to the tender of partition). He can not decide where a primacle case has been made out on merits. He has a limited power to ascertain only where the case, as disclosed by the police support, appears to be sessions triable case he has to commit the case to the court of sessions. If by any error wrong section of the Indian Penal Code is quoted in the police report he can look into that aspect, from the made up facts unsupported by any material report by the police an offence exclusively triable by the court of session is made to appear it is for the sessions court to discharge the accused u/s 227 of the Code but the committing Magistrate has no such power. The aforesaid view finds support from the case of Sanjay Gandhi Vs. Union of India (UOI) and Others, It has been further held that it is not open to the Magistrate to launch a process of satisfy itself that a prima facie case has been made cut on the merits in the course of the order committing the case to the court of session. This jurisdiction once vested in the Magistrate has been eliminated under the new Code. It was further held as follows:

In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect.

13. Thus the law on this point appears to be well settled that the Magistrate has a very limited role to play in exercise of his powers u/s 209 of the Code. If he finds on the basis of the police report or otherwise that the offences are triable exclusively by the court of session he has no alternative but to commit the case to the court of session. Further the expression "it appears to the Magistrate" as used in Section 209 of the Code does not/cannot mean satisfaction of the Magistrate. It does not depend upon the facts of the sufficiency or insufficiency of the material. There is no scope for any enquiry after the process is issued. The Magistrate after performing some preliminary nary duties is ultimately to commit the case to the court of session as is clear from the language of Section 209 of the Code.

14. In the present case, however, the learned Magistrate has not only proceeded

to examine the allegations made u/s 395 of the Code in the F.I.R. but has blindly followed the charge sheet submitted by the police under Sections 452 and 323/34 of the Indian Penal Code without applying his mind to the allegations made in the F.I.R. This he could not have done. The order of the learned 2nd Additional Sessions also suffers from manifest defects. In paragraph 4 of his order which is impugned order before me he has stated that the allegation of theft is a super addition and the police had not found the case true u/s 380 of the Indian Penal Code from the averment made in the complaint petition. As has been already noticed above the allegation of art offence u/s 395 of the Indian Penal Code has been made by the informant and it is not clear from where the learned Additional Sessions Judge could see that the allegations were made u/s 380 of the Code of Criminal Procedure. As a matter of fact this section does not find mention in the complaint petition. In paragraph 2 of his order he has stated that it was argued before him on behalf of the informant that initially the case was instituted u/s 380 of the Code of Criminal procedure. Even if any such averment was advanced before him it was his duty to peruse the complaint petition in which this section does not find mention. On the other hand Section 395 of the Indian Penal Code has been mentioned in it. No doubt in the formal F.I.R. drawn up by the police Section 380 of the Indian Penal Code has also been mentioned but this appears to be without any foundation. Thus on this ground also the impugned order appears to be bad and can not be sustained in the eyes of law.

15. In paragraph 14 of this application it has been submitted that in view of the ratio decided in *Amar Nath and Others Vs. State of Haryana and Another*, and *Jagir Singh Vs. Ranbir Singh and Another*, the order passed by the learned Additional Sessions Judge is wholly illegal and is fit to be set aside. I will firstly like to mention here that according to well established norm of giving any citation the names of the parties should be mentioned. This has not been done. However, the first case is the case of *Amar Nath and Ors. v. State of Haryana and Ors.* in which it was held that where a revision against a particular order is expressly barred u/s 397(2) of the Code to such a case the provision of Section 482 of the Code will not apply. On this basis the High Court in a petition filed u/s 482 of the Code refused to interfere against an order summoning the Appellant holding the same to be interlocutory and barred u/s 397(2) of the Code. However, this decision has been modified in the case of *Madhu Limaye Vs. The State of Maharashtra*, in which it has been held that a plain reading of Section 482 of the Code however, shows that nothing in the Code which could include Section 397(2) of the Code also shall be deemed to limit or affect the inherent powers of the High Court. It was further held that a happy solution of this problem would be to say that the bar provided in Sub-section (2) of Section 397 operates only in exercise of the revisional power by the High Court then since there is no provision in the Code for the redress of the grievance of the aggrieved party, the inherent powers u/s 482 of the Code would come into play. It has further been clarified by the Hon'ble Supreme Court in the case of *Raj Kapoor and Others Vs. State and Others*, in which was held that the inherent

power of the High Court does not stand repelled where the revisional power u/s 307 overlaps. Nothing in the Code, nor Section 397 can affect the amplitude of the inherent power preserved in Section 482. Similar view has been taken in the case of *Municipal Corporation of Delhi v. Ram Krishna Rohtagi and Ors.* (AIR 1963 S.C. 67). In view of what has been stated above reference only to the case in *Amarnath* (supra) has been made in POM graph 14 of the revision application in much as the view taken in this case has been modified by the subsequent decision as noticed above. As such this is not (sic) of second revision application. On the other hand under the facts and circumstances of this case the powers u/s 482 of the Code can be exercised this Court in setting aside an order which is not in accordance with law.

16. Further in this very paragraph of division application a Reference has been made to the case reported in *Jagir Singh Vs. Ranbir Singh and Another*, though here also the names of the parties have not been mentioned. Par particularly it refers to the case of *Jagir Singh Vs. Ranbir Singh and Another*, This relates to the power imposed u/s 397(3) of the Code and it has been held that revision application against the order of the Magistrate can not be heard both by the Sessions Judge or also by the High Court. In this case the power of supervision under Article 227 of the Constitution was under con-consideration vis-a-vis the power imposed u/s 397(3) of the Code. As I have already noticed above in the case of "Raj Kapoor (supra) it has clearly been held that power u/s 397 of the Code will not apply to the powers of Code u/s 482 of the Code to which a reference has already been made by me earlier. Hence this decision is of no consequences. So far as the present case is concerned this application has been filed u/s 482 of the Code according for which in exercise of the inherent powers his Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice. A very wide power has been given in terms of this section to this Court. I have already noticed the infirmities in the order passed by the learned Magistrate who in a case triable as a session case has not only proceeded to frame charge but has also examined four witnesses. Similarly the learned Additional sessions Judge while passing the order in revision has directed that the charge u/s 380 of the Indian Penal Code; for which there does not appear to be any basis in the record of the case; may be framed by the Magistrate. Both the orders appear to be palpably wrong and can not be sustained in the eyes of law. In view of what has been stated above and in exercise of power u/s 482 of the Code both these orders which are palpably wrong and against the provisions of law are quashed. The Magistrate is directed to proceed in the matter in accordance with law as contained in Section 209 of the Code.

17. The application is ordered accordingly.