

(2022) 12 UK CK 0131
In the Uttarakhand High Court
Case No : Criminal Revision No. 201 Of 2013

Lt. Colonel (Retd.) Balraj Singh Lamba And Another	APPELLANT
Vs	
State Of Uttarakhand And Another	RESPONDENT

Date of Decision : 23-12-2022

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E, 419, 420, 467, 468, 471, 509
Code Of Criminal Procedure, 1973 — Section 154, 156, 156(1), 156(3), 173, 200, 202, 537
Constitution Of India, 1950 — Article 226

Citation : (2022) 12 UK CK 0131

Hon'ble Judges : Ravindra Maithani, J

Bench : Single Bench

Advocate : M.S. Pal, Vikramaditya Sah, Ranjan Ghildiyal, R.P. Nautiyal, Pavan Kumar Nath

Final Decision : Allowed

Judgement

Ravindra Maithani, J

1. The challenge in this revision is made to order dated 26.07.2013, passed in Criminal Case No.2227 of 2013, State Vs. Siddharth Lamba and Another, by the court of Additional Chief Judicial Magistrate, Kashipur, District Udham Singh Nagar ("the case").

2. Heard learned counsel for the parties and perused the record.

3. Facts necessary to appreciate the controversy, briefly stated, are as follows: the respondent no.2 ("the informant") filed an FIR (FIR No. 215 of 2012) on 09.08.2012 against the revisionists for the offences under Sections 419, 420, 467, 468, 471, 120-B IPC, Police Station Kashipur, District Udham Singh Nagar. In this FIR, after investigation, chargesheet under Sections 419, 420, 467, 468, 471, 120-B IPC was submitted against the revisionists and cognizance was

taken, which is the basis of the case. The order dated 26.07.2013 was challenged by the revisionists in C-482 No.667 of 2013 ("the petition"). The petition was decided on 11.07.2013. In fact, it was withdrawn with certain liberties. At the stage of framing of charge, an application was moved for discharge. It has been rejected by the impugned order.

4. In the instant case, before the FIR was lodged, in fact, the informant had filed an application under Section 156(3) of the Code of Criminal Procedure, 1973 ("the Code"), based on which proceedings of Misc. Application No. 126 of 2012, were instituted in the courts of Kashipur, District Udham Singh Nagar ("the 156(3) application"). On the 156(3) application, the court sought a report from Police Station Kashipur. Police Kashipur had reported that no FIR in the matter had been lodged at that police station. Subsequent to it, the application under Section 156(3) of the Code, filed by the informant was rejected on 10.07.2012, by the Judicial Magistrate, Kashipur, District Udham Singh Nagar. In that order, the court below had observed that it appeared that application under Section 156(3) of the Code was then filed by the informant with some oblique motives. Admittedly, the order dated 10.07.2012, passed on the application under Section 156(3) of the Code was never challenged. But, a few days, thereafter, the informant filed the FIR at the police station.

5. The questions that fall for determination in this revision are as to whether, an FIR could be lodged after rejection of an application under Section 156(3) of the Code? Secondly, if after rejection of an application under Section 156(3) of the Code, on the same allegations, an FIR is lodged and chargesheet filed, what would be its effect?

6. Learned Senior Counsel for the revisionists would submit that the informant had firstly filed an application under Section 156(3) of the Code, which was rejected on 10.07.2012. That order had attained finality because it was never challenged. Thereafter, it is argued that concealing the fact that an application under Section 156(3) of the Code filed by the informant had already been rejected, the informant filed an FIR. It is argued that this is impermissible. It vitiates the entire proceedings.

7. On the other hand, learned Senior counsel for the informant would submit that the scope of Sections 156(3) and 154 of the Code are quite distinct and the power of police is independent. It is argued that in the petition, this was argued on behalf of the revisionists that earlier an application under Section 156(3) of the Code had been rejected. It is argued that the similar question cannot be raised again.

8. It is true that in the petition, this was one of the points that was raised by the revisionists, but, the order dated 11.07.2013 of the Court, passed in the petition, reveals that, in fact, that question has not been finally decided by the court then.

9. Under Section 154 of the Code, information in cognizable cases given to police is recorded. Section 154 of the Code is as hereunder:-

"154. Information in cognizable cases.—(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer."

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10. The law is well settled in the case of Lalita Kumari Vs. Government of Uttar Pradesh and Others, (2014) 2 SCC 1. In the case of Lalita Kumari (supra), the Hon'ble Supreme Court recorded conclusions in Paragraph 120, which is as hereunder:-

"120. In view of the aforesaid discussion, we hold:

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise

of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

11. Once an FIR is lodged, the police proceeds to investigate the matter. The provisions subsequent to Section 154 of the Code deals with those situations.

12. Section 156(3) empowers a Magistrate to order for investigation. Section 156(3) of the Code is as hereunder:-

"156. Police officer's power to investigate cognizable case.—(1)

(2)

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

13. A plain language of Section 156(3) of the Code reveals that it is a discretion vested on a Magistrate to order an investigation. The question is as to whether a Magistrate, in all contingencies and circumstances, is bound to order for an investigation, if such an application is made before him? This aspect has been considered by the Hon'ble Supreme Court in the case of Priyanka Srivastava and

Another Vs. State of Uttar Pradesh and Others, (2015) 6 SCC 287. In the case of Priyanka Srivastava (supra), the Hon'ble Supreme Court, in Paras 21, 22 and 25, observed as hereunder:-

21. Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy, (1976) 3 SCC 252 : 1976 SCC (Cri) 380 , had to express thus : (SCC p. 258, para 17)

"17. ... It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173."

22. In Anil Kumar v. M.K. Aiyappa, (2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35, the two-Judge Bench had to say this : (SCC p. 711, para 11)

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

25. Recently, in Ramdev Food Products (P) Ltd. v. State of Gujarat, (2015) 6 SCC 439, while dealing with the exercise of power under Section 156(3) CrPC by the learned Magistrate, a three-Judge Bench has held that : (SCC p. 456, para 22)

"22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine 'existence of sufficient ground to proceed'."

(emphasis supplied)

14. The Court further observed that the Magistrate may verify the facts, the truth, before ordering such investigation. In fact, in the case of Priyanka Srivastava (supra), the Hon'ble Supreme Court directed that such application should be accompanied by an affidavit. In Paragraphs 29 and 30 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

"29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same."

"30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores."

15. In the instant case, an application under Section 156(3) of the Code, filed by the informant had already been rejected by the court of Magistrate on 10.07.2012. Investigation had been denied by the Magistrate on the ground that the application under Section 156(3) of the Code had been filed with oblique motives.

16. Fact remains that the informant, after rejection of her application under Section 156(3) of the Code, filed the FIR in the instant case. The FIR is more or less in-verbatim to the application under Section 156(3) of the Code, except some changes made for making flow of the language. But the informant did conceal the fact in her FIR that her application under Section 156(3) of the Code had already been rejected. Has not it in effect, made the order of Magistrate, having jurisdiction, null and void? What the informant did was, she nullified an order of Magistrate passed under Section 156(3) of the Code, by which

investigation was denied.

17. In case, a police officer investigates without complying the mandatory provisions of law and a chargesheet is filed, in one such situation, in the case of H.N. Rishbud and Inder Singh Vs. State of Delhi, AIR 1955 SC 196, the Hon'ble Supreme Court observed that such defects should be cured at an initial stage. In Para 10 of the judgment in the case of H.N. Rishbud (supra), the Hon'ble Supreme Court observed as hereunder:-

"10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under Section 537 of the Code of Criminal Procedure of making out that such an error has in fact occasioned a failure of justice. It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to Section 537 of the Code of Criminal Procedure indicates that the fact of the objection having been raised at an early stage of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused. It is true that the peremptory provision itself allows an officer of a lower rank to make the investigation if permitted by the Magistrate. But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorizing an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court have to consider the nature and extent of the violation and pass appropriate orders for such

reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of Section 5-A of the Act. It is in the light of the above considerations that the validity or otherwise of the objection as to the violation of Section 5(4) of the Act has to be decided and the course to be adopted in these proceedings, determined.”

(emphasis supplied)

18. A bare reading of the observation made by the Hon'ble Supreme Court in the case of H.N. Rishbud (supra), makes it clear that a preemptory provision of law should not be made a dead letter. No one should be permitted to do so.

19. In the instant case, the FIR, in fact, was of cognizable offences and the police could have investigated it in accordance with law. But, the informant, by a design concealing the actual facts, got the FIR lodged.

(i) In her application under Section 156(3) of the Code, the informant did write that she had gone to Kotwali Kashipur to lodge a report on 09.06.2012, but no action was taken on it.

(ii) The application under Section 156(3) of the Code, filed by the informant, was rejected on 10.07.2012.

(iii) The informant knew that a Magistrate of competent jurisdiction had denied investigation in the matter observing that the informant had filed such application with oblique motives. But the informant concealed these facts. She filed FIR in the police station. It is verbatim to the application under Section 156(3) of the Code.

20. By concealing the order of rejection of her application under Section 156(3) of the Code, the informant got the FIR lodged. She filed the FIR. By doing so, she made the order of Magistrate dated 10.07.2012 redundant by deceitful means. It cannot be permitted to continue. The order of Magistrate of competent jurisdiction had been nullified in the case. Therefore, the investigation that follows on the basis of such FIR and proceedings subsequent thereto are vitiated and for this reason, the entire proceedings of the case deserves to be quashed.

21. The revision is allowed. The entire proceedings of the case are quashed.