
(1955) 12 RAJ CK 0007
In the Rajasthan High Court

Lumbaram

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 21-12-1955

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 173

Citation : (1957) CriLJ 231 : (1956) RLW 349

Hon'ble Judges : D.S. Dave, J

Bench : Single Bench

Judgement

-ORDER

Dave, J.—This reference comes on the report of the learned Sessions Judge, Jodhpur, dated the 16th of August 1955.

2. The facts giving rise to it are that four persons namely Lumbaram, Kheraj, Pitha and Ghewaria were arrested by the Police on 2nd of May 1955 because they were suspected of committing the murder of one Nawalaram Jat on the previous day. After investigation, the Police challenged three of them. Against the fourth, namely Lumbaram, it was reported that the evidence against him was not sufficient for his prosecution and therefore, he should be discharged.

The negative report against Lumbaram was rejected by the First Class Magistrate, Jodhpur on the ground that no evidence was recorded till then in the court. He ordered that the accused would stand his trial along with others. Against this order, Lumbaram filed an application in revision in the court of Sessions Judge, Jodhpur.

The learned Sessions Judge has expressed a doubt if the procedure adopted by the Magistrate is correct. He has requested this Court to lay down the procedure to be followed in such cases.

3. Learned Counsel for the petitioner has urged that the Magistrate should have either accepted the Police report or rejected it taut he should not have taken

cognizance of the offence, It is contended that the Magistrate could take cognizance on the Police report only if the Police had challenged the accused and made it clear that the facts found against him constituted an offence.

According to learned Counsel, the Magistrate could not take cognizance on a negative report of the Police in any case. In support of his contention he has referred to - "Harbir Singh v. The State" AIR 1952 Pepsu 29 ; and - "Mt. Ido V. Gainda Singh" AIR 1952 Pepsu 38

4. Learned Government Advocate on the other hand has urged that the Magistrate could take cognizance even on the negative report of the police officer if it were found that the facts stated therein constituted an offence. It is however conceded by him that the reasons given by the Magistrate are not correct.

The question for determination is whether a magistrate can take cognizance of an offence when the police makes a report u/s 173, Cr. P. C., that the offence is not made out against the accused. It would be proper to reproduce here Section 190 of the Criminal P. C., according to which cognizance of offence may be taken by a magistrate. It runs as follows:

190 (1), Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence.
- (b) upon a report in writing of such facts made by any police-officer;
- (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

5. It is clear from the provisions of the above section that it lays down three ways in which the cognizance of an offence may be taken by a Magistrate. It can be done either on (1) receiving a complaint of facts constituting an offence or (2) on a report in writing of such facts made by a police officer or (3) upon information received from any person other than a police officer or upon his knowledge or suspicion that such offence has been committed.

Learned counsel for the accused has urged that under Clause (b) of the said section, a magistrate may take cognizance only if a report is made by a police officer that the accused has committed an offence. As mentioned above he relies upon the two decisions of the Pepsu High Court referred above. In the first case, the police had made a report that no offence against the accused had been made out.

The Magistrate, however, recorded the statement of a person at whose instance the criminal proceedings were started. He also recorded some evidence and so it was contended on behalf of the accused that the procedure adopted by the Magistrate was illegal.

Learned Advocate General contended before the learned Judges in the High Court that when the police makes a final report in a case to a magistrate, it becomes his duty to apply his mind to the facts and in order to be able to take a correct decision, it may sometimes be necessary for him to hear the person at whose instance the police started the investigation, or even to take evidence. This contention was repelled by the learned Judge and it was observed as follows:

I cannot accept this contention in its entirety. Section 173 deals with the final report of the Police and it can either amount to a charge or it may contain the recommendation that since no offence having been made out the case should be cancelled. If the report is that an offence had been committed the Magistrate can take cognizance of it u/s 190 (1) (b).

If on the other hand, the report is that the case is false, Clause (1) (b) of Section 190 does not apply and no cognizance of the offence can be taken by the Magistrate. I agree with the learned Advocate General that the Magistrate has every right to look into the Police Diaries, to carefully scrutinise the investigation and to make up his mind independently of what the Police has said as to whether the recommendation made by them is well founded.

In fact, I would go further and say that it is the Magistrate's duty to do all this. This means that it is open to the Magistrate to accept the Police recommendation or not. If he accepts it he is to cancel the case, but if he does not all that he can do is to make a note that he does not agree with the police and does not accept their recommendation.

6. I respectfully agree with the observation in so far as it lays down that the Magistrate cannot take cognizance of the offence u/s 190 (1) (b) if the police reports that there is no evidence against the accused and no offence is made out.

This case, however, does not decide as to what a Magistrate should do if the Police gives out the facts in its report and records a wrong conclusion that no offence is constituted on the basis of those facts. This point arose in the second case of - "Mt. Ido v. Gaında Sigh", (B). In that case it was remarked by the learned Judge that "a report by the police for cancellation of the case cannot be said to be a report of facts which constitute an offence."

With due respect, it may be observed that this cannot hold good in all circumstances. It is not difficult to conceive of a case in which the Police may give all the facts in its report and arrive at a wrong conclusion of law that no offence is constituted thereby.

If the Magistrate comes to the conclusion on the basis of the facts mentioned in the said report that an offence is made out, then there is no reason why he should not be able to take cognizance of the case. He is not bound by the opinion of the Police officers on a question of law.

Therefore, if in any case, there is such a report by the police officer which gives all the facts and on whose basis the Magistrate comes to the conclusion that an

offence is constituted, then, in my opinion, he can take cognizance of the offence and such cognizance would be covered by Section 190 (1) (b).

It may be pointed out that Clause (b) only says that a Magistrate may take cognizance upon a report in writing of such facts which constitute an offence as referred in Clause (a) made by a Police officer. This shows that the Magistrate is empowered to take cognizance on the report of a Police officer if that report contains facts constituting an offence. This view finds support from the case of - "Basudeo Narain v. Emperor" : AIR 1933 Pat 50 (O). In that case it was observed that

A Magistrate may take cognizance only on a , report of the facts by a Police officer; but the opinion of the Police officer as to whether such facts justify the taking of cognizance under Ordinance 5 is irrelevant.

I, therefore, agree with the contention of learned. Government Advocate that it is possible for a Magistrate to take cognizance of an offence on a police report even though the police wants him to accept its negative report if that report contains facts constituting an offence. Such cases would, however, be very rare.

So far as the present case is concerned it is obvious that no complaint has been filed before the Magistrate. He could not therefore take cognizance of the offence under Clause (a). The Magistrate has also not indicated if he wanted to take cognizance upon information received from any person other than a police officer or in his own knowledge or suspicion and, therefore, Clause (c) also does not apply.

He has proceeded to take cognizance of the offence on the simple ground that no evidence was recorded before him. This was obviously wrong. It was not necessary for that court to record evidence before accepting the Police report. He should have applied his mind to the report. If he found that any offence could be constituted on the basis of the facts mentioned therein, he could take cognizance of the offence, otherwise he should have accepted it.

7. The reference is accepted, the file be sent back to the Magistrate concerned with directions to dispose of the Police report in the light of the observations made above.