

(1982) 11 PAT CK 0028

In the Patna High Court

Case No : Criminal Miscellaneous No. 2075 of 1982

Mahanth Singh and Others

APPELLANT

Vs

The State of Bihar and Mossomat Aliman

RESPONDENT

Date of Decision : 23-11-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173, 173(1), 190(1), 200
Penal Code, 1860 (IPC) — Section 190, 190(1), 190(1)(a), 190(1)(b), 190(1)(c)

Citation : (1983) PLJR 86

Hon'ble Judges : B.P. Jha, J

Bench : Single Bench

Advocate : Y.V. Giri, for the Appellant; Rameshwar Prasad, Government Pleader No. 6 and Mr. Manwendra Roy, for the Respondent

Judgement

B.P. Jha, J.—This criminal miscellaneous petition has been filed against an order dated 30th November, 1981. By the impugned order, the learned Magistrate accepted the final report submitted by the police u/s 173 of the Code of Criminal Procedure (Here in after referred to as the Code). By the same order, the learned Magistrate also took cognizance of the offence u/s 370 of the Indian Penal Code against the petitioners on the basis of the project petition filed by the first informant, by the earlier portion of the order, the learned Magistrate accepted the final report and by the latter portion of the order, the learned Magistrate took cognizance of the offence u/s 379 of the Indian Penal Code against the petitioners.

2. The simple point for consideration is : Whether the Magistrate can take cognizance in respect of the facts constituting the same offence on the basis of a protest petition which was also the subject matter of the final form ?

3. In the present case, the facts constituting the offence u/s 379 of the Indian Penal code were common both before the investigating officer as Well as in the pro-left petition. There is no dispute to this effect.

4. The effect of the earlier portion of the impugned order was that the final form was accepted and the accused were discharged in respect of the offences u/s 379 of the Indian Penal Code. By the latter portion of the impugned order, the learned Magistrate took cognizance of the offence u/s 379 of the Indian Penal Code. The facts constituting the offence in final form as well as in the protest petition were identical. In my opinion, in a case of this type the Magistrate has no authority to take cognizance upon the protest petition or the complaint petition. In this connection section 190 (1) of the Code is referred to which reads as follows;

190. Cognizance of offences by Magistrates--

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence--

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

5. This point has been decided by the Supreme Court in *Abhinandan Jha and Others Vs. Dinesh Mishra*, . The relevant portion of the judgment in Paragraph No. 15 is as follows;

Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, u/s 173, that no case is made out for sending up an accused for trial, which report as we have already indicated, is called in the area in question, as a "final report" ? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings.

6. On a perusal of this portion of the decision of the Supreme Court, it is clear that option has been given to the Magistrate to accept the final report. If he accepts the final report, then the Magistrate will close the proceeding. The Magistrate has the option not to accept the final report, and the Magistrate can take cognizance of offence on the basis of the facts constituting the offence, as mentioned in the final report.

7. The Supreme Court decision in the earlier case has also been followed by a Division Bench of the Supreme Court in *H. S. Bains v. The State (Union Territory of Chandigarh)* (1980 CLJ 1308) where it has been held as follows;

Thus, a Magistrate who on receipt of a complaint, orders an investigation u/s 156 (3) and receives a police report u/s 173(1), may, thereafter, do one of three things; (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence u/s 190 (1), (b) on the basis of the police report and issue process; this he may do without

being bound in an manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence u/s 190 (1) (a) on the basis of the Original complaint and proceed to examine upon oath the complainant and his witnesses u/s 200. If he adopts the third alternative, he may hold or direct an inquiry u/s 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.

8. On a perusal of this finding of the Supreme Court, it is clear that on the receipt of report u/s 173 of the Code, the Magistrate may accept the final report, or, he may take cognizance u/s 190 (1) (b), or, he may take, cognizance u/s 190 (1) (a) of the Code. To accept a final form is a judicial order. Such an order remains in force unless and until it is set aside by the higher court. If such an order is not set aside, then such an order has got a judicial force. If the final report is accepted, and, thereafter, cognizance is taken on the basis of the complaint or the protest petition in respect of the facts constituting the same offence which was mentioned in the final form, then there will be contradictory judicial order before the court. It is in this circumstance that section 190 (1) of the Code was framed by the law maker. The Magistrate can take cognizance of the offence in any of the three ways. If the Magistrate drops the proceeding, on the basis of the police report, then on the same facts the Magistrate is not authorised to take cognizance on the basis of the complaint either u/s 190 (1) (a) or u/s 190 (1) (c) of the Act. This view is also being supported by a judgment of this court in *Bhuneshwar Prasad Sinha and others v. The State of Bihar and another* (1981) Criminal Law Journal 795). In the result, the petition is allowed and the latter portion of the order dated 30th November, 1981, by which cognizance was taken in respect of the offence under sect. on 379 of the Indian Penal Code against the petitioner is hereby quashed. The accused shall not be put on trial in respect of the offence u/s 379 of the Indian Penal Code.