

(2005) 07 OHC CK 0027

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 4769 of 1997

Manabendra Moharatha ' Mohapatra ' Dulu Dala Behera

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-07-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 190, 319, 482
Penal Code, 1860 (IPC) — Section 302, 34, 395

Citation : (2005) CLT 1019 (Suppl CrI) : (2005) 2 OLR 266

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

Bench : Single Bench

Advocate : G. Tripathy, A.K. Swain and A.P. Mishra, for the Appellant; B. Jalli, P.N. Dash, N.P. Rath, S.C. Sahoo, S.K. Sahoo, G.C. Swain and A.P. Ray, for the Respondent

Judgement

B.P. Das, J.—This application u/s 482 of the Code of Criminal Procedure has been filed with a prayer to quash the order of cognizance dated 25.9.97 taken against the petitioner by the J.M.F.C., Banpur in G.R.Case No. 57 of 1994.

2. The brief facts leading to this application are that one Narasingh Naik lodged an FIR on 11.3.1994 before the Banpur Police Station alleging therein that on the same day at about 5 p.m. while he was returning home alongwith his son-Laxman Naik from Barpatna Jagar Mela, near Gambhari Munda Society Office, the present petitioner instigated some other accused persons to finish Laxman Naik. It is alleged that the informant and his son were chased by the accused persons and were assaulted by means of Lathi resulting in the death of Laxman Naik, the son of the informant. On the basis of the FIR, investigation was done and ultimately charge sheet was submitted under Sections 302/34 of Indian Penal Code (in short, "IPC") against six accused persons but the name of the petitioner was not there in the charge sheet. After receiving the charge sheet, the J.M.F.C., Banpur on perusing the statement u/s 164, Cr.P.C. of opposite parties 2 and 3, namely, Surendra Martha and Bhikari Martha respectively, in his order dated 20.4.95 observed that though a prima facie case under Sections

302/34, IPC had been made out against the present petitioner, the Investigating Officer did not charge sheet him on the ground that there was no credible evidence. Accordingly the J.M.F.C. took cognizance of the said offences against the present petitioner along with others.

3. The petitioner had earlier filed an application bearing No. CrI. Misc. Case 1775/95 u/s 482, Cr.P.C. before this Court and the same was disposed of on 1.7.97 allowing the petitioner to agitate the issue of taking cognizance before the J.M.F.C., Banpur. Accordingly, the petitioner filed an application before the J.M.F.C. to re-consider the order taking cognizance but the said application was rejected, for which this application is filed.

4. According to the learned counsel for the petitioner, the statements recorded under Sections 161 and 164 of Cr.P.C. are contradictory to each other and no credible evidence is available to proceed against the petitioner. The further case of the petitioner is that the J.M.F.C. being the committal Court has no jurisdiction to take cognizance against the present petitioner as the case is triable by a Court of Session and the trial Court is only empowered to take cognizance and issue summons against those persons where complicity is found prima facie from the materials on record. On the aforesaid grounds the petitioner prays to quash the order of cognizance.

5. Learned counsel for the petitioner referring to various decisions submitted that the two witnesses (O.Ps. 2 & 3) examined u/s 161, Cr.P.C. though categorically stated that they had not seen the petitioner at the spot of occurrence, in their statements u/s 164, Cr.P.C, they have stated that the petitioner was instigating other accused persons to do away with the life of the deceased. Surprisingly, according to the learned counsel for the petitioner, though the two witnesses were not brought by the Investigating Officer to the Court for recording their statements u/s 164, Cr.P.C, the informant brought them to Court for such recording. In this regard my attention was drawn to the order dated 5.9.94 passed by the J.M.F.C, Banpur, which indicates that the Magistrate allowed the prayer of the informant to record the statements of Surendra Martha, Bhikari Martha, Bhagi Chhotaray and Sanatan Nayak u/s 164, Cr.P.C.

6. A plea of alibi was taken on behalf of the petitioner, i.e. on the date of occurrence he was at Kakatpur as his car had met with an accident there, for which Station Diary was made vide Entry Nos. 180 and 190 dated 11.3.94. As the petitioner was implicated in a murder case and plea of alibi was taken at the threshold and further Station Diary entries indicated that the matter was compromised, this Court by its order dated 30.8.2000 directed the C.B.I. to enquire into the matter and submit report. Accordingly, a report was submitted by the Superintendent of Police, C.B.I., Special Crime Branch, Calcutta. It is observed that some evidence is there to suggest that an accident had taken place between the car of Manabendra Maharatha, the accused-petitioner and the cycle of Sk. Kalim at Kakatpur on 11.3.94 but strong circumstantial evidence casts serious doubts on the whole event. In view of this, this Court was not

inclined to quash the order of cognizance on the ground of plea of alibi. Question arises whether the Magistrate can add an accused in a case triable by the Sessions Court when he was not charge sheeted by the Police. According to the learned counsel for the petitioner, taking cognizance and at the instance of the informant, issuing process and perusal of the statements recorded u/s 164, Cr.P.C. are irregular. Relying upon the judgment of the apex Court in the case of *Ranjit v. State of Punjab*, reported in (1998) 15 OCR 476 (SC), learned counsel for the petitioner submits that the term "evidence" in Section 319 is the evidence tendered during trial. If the offence is triable by Court of Session the materials placed before the committal Court cannot be treated as evidence collected during the inquiry or trial. The Court of Session is to take cognizance pursuant to commitments.

Further relying upon the case of *Kishori Singh and Ors. v. State of Bihar and Anr.* reported in (2000) 19 OCR 647, learned counsel for the petitioner submits that offence (s) relating to murder and criminal conspiracy alleged against the persons named in the FIR but not charge sheeted are triable by Court of Session and the Magistrate cannot issue process against such persons.

Relying upon all these decisions, he makes out a case that the instant case is exclusively triable by a Court of Session and submits that as no material except the statements of two witnesses u/s 164, Cr.P.C. were available, taking of cognizance of offences under Sections 302/34, IPC by the learned Magistrate is unlawful.

7. Mr. S. Sahoo, learned counsel for opposite party No. 4 draws my attention to a decision in the case of *Raghubans Dubey Vs. State of Bihar*, , and submits that cognizance is taken by Court of offences, not the offenders. Once a Court takes cognizance, it is its duty to find out who the offenders really are, and once it comes to the conclusion that apart from the persons sent by the Police some persons are involved, it is its duty to proceed against such persons. Summoning the additional accused is a part of the proceeding initiated after his taking cognizance of offences.

8. Further countering the argument of the learned counsel for the petitioner, Mr. Sahoo, learned counsel appearing for opposite party No. 4, submits that the apex Court in the case of *Rajinder Prasad v. Bashir and Ors.*, reported in (2002) 23 OCR 404 has held that the Magistrate has power u/s 190, Cr.P.C. not only to add offence but also new accused persons on the basis of the evidence collected by the Police. This case relates to an offence u/s 395, IPC.

9. Taking the rival contentions of the parties into consideration, I may refer here to a decision of this Court in the case of *Banikantha Panigrahi and Ors. v. State of Orissa and Anr.*, reported in (2002) 22 OCR 75, where cognizance was taken against a person not named in charge sheet but implicated by witnesses whose statements u/s 164, Cr.P.C. were recorded on informant's application after submission of charge sheet leading to issuance of process. This Court referring to

the decisions reported in (2000) 19 OCR 746 (Kishori v. State) (2000) 19 OCR 712 (Brajananda v. State), Raghubans Dubey Vs. State of Bihar, , Hareram Satpathy Vs. Tikaram Agarwala and Others, , Ram Lal Narang Vs. State (Delhi Administration), and Raj Kishore Prasad Vs. State of Bihar and another, held that in such a situation the act of a Magistrate can be equated with a suo motu inquiry in a proceeding pending for commitment. Since the scope of that inquiry does not provide examination of witnesses such inquiry is ab initio void.

10. On perusal of the impugned order dated 25.9.97, I find that the learned J.M.F.C., Banpur has solely relied upon the statements u/s 164, Cr.P.C. made by the witnesses at the instance of the informant and issued process against the petitioner. As discussed above the action of the Magistrate is not in conformity with the law settled in this regard in the case of Banikantha Panigrahi (supra), which is also a later judgment. Accordingly, the matter is remanded to the J.M.F.C., Banpur for re-hearing and passing necessary orders looking into the decisions of this Court as well as the apex Court as cited above. The order taking cognizance against the petitioner dated 25.9.97 in G.R. Case No. 57 of 1994 is quashed. The N.B.W. issued against the petitioner be cancelled.