

(2021) 10 JH CK 0015

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 300 Of 2014

Md. Anis Ansari And Others

APPELLANT

Vs

State Of Jharkhand And Others

RESPONDENT

Date of Decision : 18-10-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 304A, 304B

Code Of Criminal Procedure, 1973 — Section 173(2), 190, 190(1)(b), 193, 209

Citation : (2021) 10 JH CK 0015

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : A.K. Kashyap, Suraj Kishore Prasad, Md. Faruque Ansari, Shiv Shankar Kumar

Final Decision : Disposed Of

Judgement

Sanjay Kumar Dwivedi, J

1. Heard Mr. A.K. Kashyap, learned senior counsel assisted by Mr. Suraj Kishore Prasad, learned counsel for the petitioners, Mr. Md. Faruque Ansari, learned counsel for opposite party no.2 and Mr. Shiv Shankar Kumar, learned A.P.P. for the opposite party-State.

2. Let the name of Mr. Ravi Prakash be deleted from the cause-list as Mr. Suraj Kishore Prasad has filed Vakalatnama on behalf of the petitioners.

3. The petitioners have filed this petition for quashing the entire criminal proceeding including the order dated 07.01.2014 passed by the learned Judicial Magistrate, Palamau in connection with Pandu P.S. Case No.28 of 2013 corresponding to G.R. Case No.1381 of 2013, whereby, cognizance under Section 304B/34 of the Indian Penal Code has been taken against the petitioners.

4. The case was instituted by the informant alleging therein that the marriage of daughter of informant was solemnized with Anis Ansari on 01.04.2013 and at the time of marriage Rs.2 Lakhs cash and other articles were given. It was also

alleged that thereafter the accused persons started demanding Rs.5 Lakhs and after 25 days the daughter of the informant was ousted from the house by saying that until the demand is fulfilled she would not be kept. After five days, the father-in-law and Bhasur of the daughter of the informant came and took her with them on assurance of providing motorcycle. On 17.05.2013, new motorcycle worth Rs.75,500/- has been given to the husband. It was further alleged that thereafter again the demand was made and for that the daughter of the informant was being tortured and assaulted. On 07.07.2013, son-in-law had informed the informant that her daughter was coming to Daltonganj and at about 11:00 hours, he again informed him that in course of coming to Daltonganj there was an accident of motorcycle in which the daughter of the informant sustained injury. It was also alleged that in the evening at 05:00 p.m., they came then the informant found that her daughter was senseless. She was taken to Sadar Hospital and thereafter she was referred to RIMS, Ranchi where she was admitted. It was also alleged that the daughter of the informant had indicated that her head was smashed on wall then the informant watched that on several parts of body, there was mark of injury of rod on back and also black spot. It was further alleged that the daughter of the informant was thereafter taken to Santevita Hospital, Ranchi where her treatment was done but on 17.07.2013, she died. It was also alleged that on 17.07.2013, the accused persons were pressurizing the informant not to take any step or to inform the police. The postmortem was done and lastly the informant has stated that the accused persons as named in the F.I.R. have killed the deceased. The F.I.R. was lodged on 20.07.2013.

5. Mr. A.K. Kashyap, learned senior counsel appearing for the petitioners submits that the occurrence took place on 07.07.2013 as they met with an accident and wife of petitioner no.1 sustained injury. She was taken to the hospital and she was treated in different hospitals and the doctors have also opined that she died due to accident. He further submits that the F.I.R. has been lodged against the petitioners after 13 days of the occurrence. He draws attention of the Court to the charge-sheet contained in Annexure-2 of the petition and submits that the police has submitted charge-sheet under Section 304A of the Indian Penal Code against petitioner no.1 only and thereafter the learned court has taken cognizance under Section 304B/34 of the Indian Penal Code against all the accused persons. He also submits that the cognizance order is also not a reasoned order. According to him, it was incumbent upon the learned Magistrate when he was differing with the charge-sheet to at least give a reason of difference of the materials of the charge-sheet, which has not been done in the case in hand. He relied upon the judgment rendered by this Court in the case of Pramod Kumar Das & Ors. v. State of Jharkhand, reported in 2014 (2) JBCJ 11 (HC).

6. Paragraphs 11 to 15 of the said judgment are quoted herein below:

"11. Another situation incidental to the issue discussed above may arise when all

the persons accused in a case triable by the court of sessions are exonerated by the police and are not sent up for trial. The question which obviously would crop up to what course would be left for the Magistrate to take up. One by taking recourse of the ratio laid down in the case *Dharam Pal vs. State of Haryana* (supra) may put his point that the Magistrate would be handicapped to take cognizance of the offence as the accused persons have not been sent up for trial. That approach in any view never gets sanction of law when the provision as contained in Section 190(1)(b) of the Code empowers a Magistrate to take cognizance of the offence though Hon'ble Court in the case referred to above has been pleased to hold that the Magistrate does not have power to take cognizance of the offence against the persons not sent up for trial but that proposition has been laid down on the premise that the cognizance is taken of the offence and not against the offender and therefore, once the cognizance is taken, question of taking cognizance of the same offence does not arise and therefore, their Lordships have been pleased to observe that it is either for the Magistrate or to the court of session to take cognizance of the offence. But in a case where all the persons who were the accused are not sent up for trial the Magistrate would not be in a position to take recourse of the provision of Section 209 of the Code for committal of the case to the court of session and thereby it would be travesty of justice that even if materials are there against the accused person they may not be put to trial. This approach if adopted it would be against scheme of the Code wherein the provision as contained in Section 190(1) (b) clearly gives power to the Magistrate to take cognizance on a police report.

12. Therefore, upon a receipt of a police report under Section 173(2) of the Code of Criminal Procedure a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) even if the police report is to the effect that no case is made out against the accused. The Magistrate can ignore the conclusion arrived at by the I.O and independently apply his mind to the facts emerging from the investigation taking into account the statements of the witnesses examined by the police during the investigation and take cognizance of offence, if he thinks fit, in exercise of power under Section 190(1)(b) and direct the issue of process to the accused. The aforesaid proposition has been laid down in a case of *M/s. India Corat Pvt. Ltd. vs. State of Karnataka and others* [(1989) 2 SCC 132].

13. Similar view has been taken subsequently also in a case of *Rajinder Prasad vs. Bashir and others* (supra) wherein it has been held as under :-

"a Magistrate has jurisdiction to take cognizance of offence against such person also who have not been arrested by the police as accused person, if it appears from the evidence collected by the police that they were prima facie guilty of the offence alleged to have been committed. Section 209 refers back to Section 190 as is evident from the words 'instituted on a police report' used in Section 190(1) (b) of the Code. The cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to conclusion that apart

from the persons sent by the police some other persons were also involved, it is duty to proceed against those persons as well".

14. Here, it would be pertinent to record that if the Magistrate does differ from the finding given in the police report, then he is required to assign reason for differing with the opinion of the police which proposition has been laid down in a case of Nupur Talwar vs. Central Bureau of Investigation [(2012) 2 SCC 188].

15. Here in the instant case as has been noted above, the Magistrate by differing with the opinion of the police has taken cognizance of the offence against the petitioner who had not been sent up for trial and thereby he seems to have committed wrong in view of the decisions referred to above."

7. With regard to submission of the charge-sheet against some of the persons and taking cognizance against other persons, learned senior counsel appearing for the petitioners relied upon the judgment rendered by this Court in the case of Bigan Mian @ Siraj Mian v. State of Jharkhand, reported in 2014 (2) JBCJ 68 (HC).

8. Paragraphs 11 to 17 of the said judgment are quoted herein below:

"11. Thus, the position which has emerged out is that if a case is registered for the offence/offences triable by the court of session against two or more accused persons and the charge sheet is submitted against some of them and rest are not sent up for trial, then the Magistrate does have power to take cognizance of the offence only against the person charge sheeted. However, the court is further required to find out whether materials are there or not against the persons not sent up for trial to be taken by the sessions court. If the court does find prima facie material to proceed with the trial, he needs to commit the case to the court of sessions. Similarly, if the charge sheet is submitted against some of the accused persons and the matter is kept open for further investigation against some of the accused persons and the court take cognizance of the offences against the persons charge sheeted, he needs to commit the case to the court of sessions in terms of the provision as contained in Section 209 of the Code of Criminal Procedure.

12. Subsequently, if the charge sheet is submitted against other accused who had not been charge sheeted earlier, some recourse is to be adopted by the court i.e, to find out as to whether there has been material against that person to proceed with the trial and if the Magistrate is satisfied that the materials are there, he simply needs to commit the case to the court of sessions and thereby it is for the sessions court to take cognizance of the offence in terms of the provision as contained in Section 193 of the Code of Criminal Procedure and to proceed with the trial.

13. Another situation incidental to the issue discussed above may arise when all the persons accused in a case triable by the court of sessions are exonerated by the police and are not sent up for trial. The question which obviously would crop

up to what course would be left for the Magistrate to take up.

One by taking recourse of the ratio laid down in the case *Dharam Pal vs. State of Haryana* (supra) may put his point that the Magistrate would be handicapped to take cognizance of the offence as the accused persons have not been sent up for trial. That approach in any view never gets sanction of law when the provision as contained in Section 190(1)(b) of the Code empowers a Magistrate to take cognizance of the offence though Hon'ble Court in the case referred to above has been pleased to hold that the Magistrate does not have power to take cognizance of the offence against the persons not sent up for trial but that proposition has been laid down on the premise that the cognizance is taken of the offence and not against the offender and therefore, once the cognizance is taken, question of taking cognizance of the same offence does not arise and therefore, their Lordships have been pleased to observe that it is either for the Magistrate or to the court of session to take cognizance of the offence. But in a case where all the persons who were the accused are not sent up for trial the Magistrate would not be in a position to take recourse of the provision of Section 209 of the Code for committal of the case to the court of session and thereby it would be travesty of justice that even if materials are there against the accused person they may not be put to trial. This approach if adopted it would be against scheme of the Code wherein the provision as contained in Section 190(1) (b) clearly gives power to the Magistrate to take cognizance on a police report.

14. Therefore, upon a receipt of a police report under Section 173(2) of the Code of Criminal Procedure a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) even if the police report is to the effect that no case is made out against the accused. The Magistrate can ignore the conclusion arrived at by the I.O and independently apply his mind to the facts emerging from the investigation taking into account the statements of the witnesses examined by the police during the investigation and take cognizance of offence, if he thinks fit, in exercise of power under Section 190(1)(b) and direct the issue of process to the accused. The aforesaid proposition has been laid down in a case of *M/s. India Corat Pvt. Ltd. vs. State of Karnataka and others* [(1989) 2 SCC 132].

15. Similar view has been taken subsequently also in a case of *Rajinder Prasad vs. Bashir and others* (supra) wherein it has been held as under :

"a Magistrate has jurisdiction to take cognizance of offence against such person also who have not been arrested by the police as accused person, if it appears from the evidence collected by the police that they were prima facie guilty of the offence alleged to have been committed. Section 209 refers back to Section 190 as is evident from the words 'instituted on a police report' used in Section 190(1) (b) of the Code. The cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to conclusion that apart from the persons sent by the police some other persons were also involved, it is duty to proceed against those persons as well".

16. Here, it would be pertinent to record that if the Magistrate does differ from the finding given in the police report, then he is required to assign reason for differing with the opinion of the police which proposition has been laid down in a case of Nupur Talwar vs. Central Bureau of Investigation [(2012) 2 SCC 188].

17. Here in the instant case as has been noted above, the Magistrate by differing with the opinion of the police has taken cognizance of the offence against the petitioner who had not been sent up for trial and thereby he seems to have committed wrong in view of the decisions referred to above."

9. On these grounds, learned senior counsel for the petitioners submits that the cognizance order is bad in law.

10. Mr. Md. Faruque Ansari, learned counsel for opposite party no.2 submits that the concerned court has applied its mind and has gone through the case diary and thereafter it has taken the cognizance. There is no illegality in the impugned order.

11. Mr. Shiv Shankar Kumar, learned A.P.P. for the State submits that there is no illegality in the impugned order.

12. The Court has perused the cognizance order dated 07.01.2014. The concerned court has only recorded that there is sufficient material to take cognizance under Section 304B/34 of the Indian Penal Code. There is no satisfaction of the learned Magistrate and there is no reason of differing the charge-sheet specially when the charge-sheet has been submitted under Section 304A of the Indian Penal Code against petitioner no.1 only. There is no doubt that the learned Magistrate is well in his jurisdiction to differ with the charge-sheet and take the cognizance, but in a case where the charge-sheet has been submitted and the Magistrate is differing with the charge-sheet, he is required to record the reasons of difference with the charge-sheet, which has not been done in the case in hand. There is no disclosure of ingredients of Section 304B of the Indian Penal Code in the cognizance order. The Hon'ble Supreme Court in the case of Nupur Talwar v. Central Bureau of Investigation & another reported in (2012) 11 SCC 465 has dealt with the issue of taking cognizance by the Magistrate. In the aforesaid case, the Central Bureau of Investigation after investigation has initially filed closure report of the investigation. The Magistrate differing with the report of the police had found prima facie evidence to proceed against the accused person. The said matter was travelled up to the Hon'ble Supreme Court and the Hon'ble Supreme Court has held that since the Magistrate has provided the reasons of differing with the charge-sheet, there is no illegality in the impugned order and the Magistrate's order was affirmed by the Hon'ble Supreme Court, which has not been done in the case in hand. There is no reason of differing with the charge-sheet submitted by the police. The cognizance order is not in accordance with law. Accordingly, the cognizance order dated 07.01.2014 passed by the learned Judicial Magistrate, Palamau in connection with Pandu P.S. Case No.28 of 2013, corresponding to G.R. Case No.

1381 of 2013 is, hereby, quashed. The matter is remanded back to the learned Judicial Magistrate, Palamau to re-examine the matter and pass a fresh order, in terms of the law laid down by the Hon'ble Supreme Court as well as by this Court.

13. With the above observations and directions, this criminal miscellaneous petition stands disposed of.