
(2014) 02 AP CK 0067

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 14418 of 2013

Moraboina Venkatesu

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 173(2), 173(3), 190
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2014) 2 ALD(Cri) 297 : (2015) 2 ALT(Cri) 31

Hon'ble Judges : C. Praveen Kumar, J

Bench : Single Bench

Advocate : P. Rajni Reddy, Advocate for the Appellant; M.N. Narsimha Reddy, Advocate for the Respondent

Final Decision : Dismissed

Judgement

C. Praveen Kumar, J.—Questioning the order dated 11.11.2013 passed in P.R.C. No. 15 of 2013, on the file of II Additional Judicial First Class Magistrate, Proddatur, YSR Kadapa District, wherein the petitioners who were added as A-2 to A-7, the present application u/s 482 Cr.P.C. is filed seeking quashing of the same.

2. The facts in issue are as under:

Originally a case in Crime No. 27 of 2013 of Rajupalem police station, YSR Kadapa District was registered against A-1 to A-7 for an offence punishable u/s 302 IPC. The police investigated into the matter and filed charge-sheet only against A-1, while deleting the names of A-2 to A-7 from the array of accused. The said charge-sheet was filed on 26.06.2013. While taking cognizance of the matter, the learned Magistrate took the case on file against all the seven accused and issued N.B.Ws. against A-2 to A-7. Challenging the order taking cognizance of the case against the petitioners/A-2 to A-7, the present petition is filed.

3. Relying upon the judgments of the Apex Court in Kishori Singh and others v.

State of Bihar and another, the learned counsel for the petitioners submits that the learned Magistrate could not have issued process against those persons, who have been shown as accused in the FIR but deleted from the array of accused in the charge-sheet filed by the police u/s 173 Cr.P.C..

4. On the other hand, the learned counsel for the respondent opposed the application contending that Section 190 Cr.P.C. gives ample power to the Magistrate to take cognizance of the matter even against persons, who are not charge-sheeted by the police. Relying upon the judgments of the Supreme court in *Rajinder Prasad v. Bashir and others* and *State of Orissa v. Habibullah Khan*, the learned counsel for the respondent submits that there is no illegality in the order dated 11.11.2013.

5. Before proceeding further, it may be relevant to refer to Section 190 Cr.P.C., which reads as under:

190. Cognizance of offences by Magistrate:--

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specifically 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.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

6. In *Kishori Singh v. State of Bihar* the Apex Court held as under:

"10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers u/s 319 Cr.P.C. when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge bench decision. Neither of the contingencies has arisen in the case in hand."

7. In *Ranjit Singh v. State of Punjab*, a three-Judge bench of the Apex Court dealt with the issue as to whether a Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. The Apex Court in *Ranjit Singh* case was dealing with the difference of

opinion expressed by a two-Judge bench in *Raj Kishore Prasad v. State of Bihar*, wherein the Apex Court took a view different from what has been said in *Kishun Singh v. State of Bihar*. The conclusion which was arrived at by the Apex Court in *Ranjit Singh's* case is as under:

"19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the code, that Court can deal with only the accused referred to in Section 209 of the code. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.

20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers u/s 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the Court to wait until the entire evidence is collected for exercising the said powers."

8. The Judgment of the Apex Court referred to above clearly show that after the case is committed to the Court of Sessions, there is no provision in the code except 319 enabling the Sessions Court to add, persons as accused other than those arrayed as accused in the charge-sheet.

9. The conflict of the opinions expressed by the Apex Court in *Kishori Singh's* case, *Rajinder Prasad and SWIL Limited v. State of Delhi*, came up by way of reference before the Apex Court in *Oharam Paul and others v. State of Haryana* and another, wherein the Apex Court observed as under:--

"Prima facie, we do not think that the interpretation reached in *Ranjit Singh's* case (supra), is correct. In our view, the law was correctly enunciated in *Kishun Singh's* case (supra). Since the decision in *Ranjit Singh's* case (supra), is of three-judge Bench, we direct that the matter may be placed before the Hon"ble the Chief Justice for placing the same before a Larger Bench."

(emphasis supplied)

10. At this stage it would be useful to refer to another judgment of the Apex Court delivered by a Bench of three Judges in *M/s. India Carat Private Limited v. State of Karnataka* and another, wherein the Court after referring to the provisions of the Code and the judgment of the Apex Court in *Abhinandan Jha v. Dinesh Mishra and H.S. Bains v. State*, held as under:

"The position is now well settled that upon receipt of police report u/s 173(2) Cr.P.C., a Magistrate is entitled to take cognizance of the offence u/s 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statement of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of the process to the accused. Section 190(1)(b) Cr.P.C. does not lay down that a Magistrate can take

cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out against the accused. The Magistrate can ignore the conclusions arrived at by the Investigating Officer and independently apply his mind to the facts emerged in the investigation and take cognizance of the case, if he thinks fit, in exercise of powers u/s 190(1)(b) of the Code."

11. The Apex Court in *Uma Shankar Singh v. State of Bihar and another*, while dealing with the powers of the Magistrate u/s 190(1)(b) of the Code held as follows;

"The Magistrate is not bound to accept the final report filed by the Investigating agencies u/s 173(2) of the Code and is entitled to issue process against an accused even though exonerated by the said authorities without holding any separate enquiry on the basis of the police report itself. The learned Judges proceeded to state that even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers u/s 190(1)(b) Cr.P.C..

12. In the said case, the Apex Court after observing to the pendency of a reference on the issue before a larger bench observed as follows:

".....it is not necessary to wait for the outcome of the result of the reference made to a Larger Bench in *Dharam Pal's case* (supra). The reference is with regard to the Magistrate's power of enquiry if he disagreed with the final report submitted by the investigating authorities. The facts of this case are different and are covered by the decision of this Court in *India Cara (P) Ltd.* following the line of cases from *Abhinandan Jha v. Disnesh Mishra* (supra), onwards."

13. Issue identical to the case on hand came up for consideration before the Apex Court in *Moti Lal Songara v. Prem Prakash @ Pappu and another*. In the said case, the Apex Court was dealing with the situation where the police after completing the investigation filed a charge-sheet only against one Shyam Lal S/o. Venaram. Thereafter the informant filed an application before the learned Magistrate asseverating that another person by name Prem Prakash who attacked the son of the informant with knife was deliberately not made as an accused. After analyzing the material on record, the learned Magistrate took cognizance of the case against Prem Prakash @ Pappu for the offences punishable under Sections 323, 324, 307 and 379 IPC. The said order was questioned by way of revision before the Sessions Court who after referring to the judgments of the Rajasthan High Court opined that when the offences are triable by the Court of Sessions, the Magistrate could not take cognizance on the basis of protest petition and accordingly set-aside the order. The said order was challenged in appeal by way of Criminal Revision No. 327 of 2011 wherein the learned single judge accepted the plea of the accused and quashed the charges framed against him. Challenging the same, the informant has preferred an appeal to the Supreme Court. After referring to all the authorities on the subject

the Apex Court held that the order taking cognizance cannot be found fault with.

14. On 18.07.2013 a Constitutional bench of the Apex court in *Dharam Pal v. State of Haryana* considered the conflict of opinion expressed in the *Kishori Singh, Rajinder Prasad, Swil Limited, Kishun Singh and Ranjith Singh*. One of the arguments advanced in the said case was that on receipt of a police report, in a case triable by a Court of Sessions, the learned Magistrate has no other function but to commit the case for trial to the court of Session, who could only resort to Section 319 of the Code to array any other person as an accused. Answering the said argument, the Apex Court held as under:

"The view expressed in *Kishun Singh*'s case, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities u/s 173(3) of the Code and to proceed against the accused persons de hors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed u/s 173(3) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

In our view, the Magistrate has a role to play while committing the case to the Court of Sessions upon taking cognizance on the police report submitted before him u/s 173(2) Cr.P.C.. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No. 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter."

15. From the Judgments of the Apex court referred to above, it is clear that the learned Magistrate can ignore the conclusions arrived at by the Investigating agency and independently apply his mind to the facts emerging from the investigation and take cognizance of the case in exercise" of his power u/s 190(1) (b) Cr.P.C.. As observed earlier, the Constitutional Bench of the Apex Court has categorically held that the Magistrate shall proceed to try the said persons if a case is made out against the persons, who were not charge-sheeted and if the case is triable by the Court of Sessions he may commit the case to the Court of Session to proceed further with the matter. In view of the Judgments of the Apex Court, the argument of the learned counsel for the petitioners that the petitioners can be added as accused only at the stage of 319 Cr.P.C., cannot be accepted.

16. The second ground raised by the learned counsel for the petitioner is that there was no application of mind by the learned Magistrate while taking cognizance of the matter against A-2 to A-7.

17. It may be necessary to refer to few facts, to decide the said issue:--

The deceased was having 80 sheep and L.Ws.1 and 2 were having 100 sheep. About three months prior, one Kunchapu Subbarayudu who was the cousin of the deceased and A-1 altercated with each other at Denepalli with regard to repayment of debt amount. The deceased intervened and pacified the matter. A-1 rebelled against the deceased and as such he is alleged to have bore grudge against the deceased. On 15.03.2013 morning both the groups went to graze their sheep and returned back. While so, the personal dog of the deceased was found missing. The deceased along with others went in search of the missing dog. At about 8.00 a.m. the deceased along with L.W.6 came near the sheep flock of A-1 and asked L.W.6 to give match box. But the deceased went ahead by 15 feet. Taking advantage of the same, A-1 armed with an axe hit the deceased on the rear side of head and neck as a result of which the deceased fell down. In respect of the said incident a case in Crime No. 27 of 2013 came to be registered for the offences punishable under Sections 147, 148 and 302 read with 149 IPC. After completing the investigation, the police filed a charge-sheet only against A-1 by deleting the names of A-2 to A-7. The 161 Cr.P.C. statements of the witnesses filed along with the charge-sheet would prima facie establish the role of the petitioners in the said crime.

18. On 11.11.2013 the learned Magistrate took cognizance of the matter against all the accused. A perusal of the order passed by the Magistrate would show that Magistrate did not mechanically took cognizance of the matter but applied his mind to the facts in issue. He could have passed more reasoned and detailed order while taking cognizance of the matter. However, the statements of witnesses more particularly L.Ws.1 to 3 which are placed before this Court would indicate the presence and participation of A-2 to A-7 in the commission of the offence. L.W.1 Kunchapu Uthaiiah and L.W.2 Kunchapu Srikanth, who are younger brothers of the deceased categorically state that while they were following their elder brother-Venkataramana, the accused 1 to 3 armed with axes attacked their brother and hacked him with axes. When L.Ws.1 and 2 tried to intervene A-4 to A-7 obstructed and threatened them with dire consequences. Thus statements of L.Ws.1 and 2 would reveal that A-1 to A-3 hacked the deceased on the neck and head and killed him, while A-4 to A-7 obstructed and threatened them with dire consequences. Truth or otherwise of these allegations cannot be gone into at this stage of the case. Viewed from any angle, this Court is of the view that there are no merits in the petition and the same is liable to be dismissed.

19. Accordingly, the criminal petition filed for quashing the order dated 11.11.2013 passed by the II Additional Judicial First Class Magistrate, Proddatur, YSR Kadapa District, in P.R.C. No. 15 of 2013, is dismissed.

20. As a sequel thereto, Miscellaneous Petitions pending if any in this criminal petition, shall stand dismissed.