
(1977) 01 PAT CK 0002

In the Patna High Court

Case No : Criminal Revision No. 885 of 1973

Narsingh Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 05-01-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 192, 192(1), 204, 209
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 379

Citation : (1977) PLJR 445

Hon'ble Judges : Shiveshwar Prasad Sinha, J;M.P. Singh, J

Bench : Division Bench

Advocate : M. Madhup, for the Appellant; Bishwanath Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Singh, J.—This criminal revision is directed against an order dated May 21, 1973 passed by Munsif-Magistrate, 1st class, Banka issuing warrants of arrest, non-bailable, against the seven petitioners in the course of a commitment enquiry under Chapter XVIII of the Code of Criminal Procedure, 1898 (briefly, the old Code), in a case under Sections 147, 148 and 302/149, Indian Penal Code. The relevant facts for appreciating the points raised before this Court are these:

The murder of one Pradip Narain Chaudhary was committed in the night between 9/10th June 1972 at about 3 a.m. in village Khurdkol, police station Amarpur in the district of Bhagalpur. The first information report was lodged against nine persons on June 10, 1972 at 7 a.m. at Amarpur police station, being Amarpur P.S. Case no. 7(6) 72 by Ramdhani Chaudhary, the brother of the deceased. After investigation the police submitted charge-sheet on 20.1.1973 only against five persons and did not send up the petitioners and one another on the ground of falsity of the case against some due to old enmity and on the ground of insufficiency of evidence against others. The Sub-divisional Magistrate, Banka, on the same day (20.1.1973) took cognizance against the five charge-sheeted

accused and discharged the remaining eight accused persons who had not been sent up for trial and transferred the case to Mr. P. Topno, Munsif-Magistrate, 1st class, Banka, for enquiry under Chapter XVIII of the Code. On 10.5.1973 the prosecution filed a petition before the Munsif-Magistrate to take cognizance against the petitioners and to issue warrants of arrest against them. The prayer was allowed, and the learned Munsif-Magistrate, after perusing the Case Diary, held that there were material witnesses who had implicated them and that there was a prima facie case against them. He accordingly by the impugned order dated 21st May 1973 issued warrants of arrest, non-bailable as stated above. The petitioners challenged this order before S. Ali, J., who by his order dated 2nd November, 1973, referred this case to a Division Bench, because, in his opinion, the question "whether a court conducting an enquiry under Chapter XVIII of the Code of Criminal Procedure has jurisdiction to summon an accused only on the basis of the statements made in the case diary, which will be presumed to have been perused by the Magistrate when he sends up the matter for enquiry" has not been decided by any authoritative decision of the Bench.

Learned counsel appearing for the accused-petitioners has raised three points before us:--

- (i) A transferee Magistrate has no jurisdiction to issue processes in a case in which cognizance is taken on a police report, and it is only the Magistrate taking cognizance who can issue processes in such cases.
- (ii) At any rate, the transferee Magistrate cannot summon additional accused without any materials available to him.
- (iii) The committing Magistrate had no jurisdiction to issue warrants of arrest, in view of the provisions of the proviso to Section 484(2)(a), Code of Criminal Procedure, 1973 (for short, the new Code).

2. I will deal with these three points seriatim.

Point (i)

This point relates the jurisdiction of the transferee Magistrate to order process to issue in a case in which cognizance is taken on a police report. In my opinion, there is no merit in the contention. In (1) Chandra Kishore Jha etc. Vs. The State of Bihar, which also was a case in which cognizance had been taken upon a report of the police, it was held that the transferee Magistrate holding commitment enquiry could summon the accused to face the enquiry. In that case the Sub-divisional Magistrate had taken cognizance against the charge sheeted accused and had issued process to them and had discharged one Chandra Kishore Jha, who was shown in the charge-sheet in column no. 2 as an accused "not sent up". It was observed at page 660 as follows:--

It is well settled by several judgments of this Court as well as of the Supreme Court that the power of the transferee Magistrate or the Magistrate holding the commitment inquiry is in no way fettered by the Initial order summoning the

accused persons passed by the Sub-divisional Magistrate.

Learned counsel, however relied on the case of (2) S.M. Nazim Baboo V. The State (1975 B.B.C.J. 359 D.B.), where it was held that in a case instituted upon a police report, the transferee Magistrate cannot issue process in view of Section 204 which provides that a Magistrate taking cognizance of an offence shall issue process and hence process must be issued by a magistrate who takes cognizance and not by the transferee Magistrate. It was further held that a Magistrate taking cognizance can transfer a case u/s 192 of the Code for inquiry or trial only after issuance of process to the accused in accordance with the provisions of Section 204, and if he transfers the case before issuance of process, his order is illegal and without jurisdiction. This view may require a reconsideration in an appropriate case. I may only indicate that, taking cognizance of offence, transfer of a case after taking cognizance and issue of process are each independent and separate steps by themselves. Cognizance of offence is taken when conditions requisite for initiation of proceedings u/s 190 of the Code exist. u/s 192(1), the Magistrate may after taking cognizance of an offence make over the case for inquiry or trial to any competent Magistrate subordinate to him. The section does not say that he shall make over the case after issuing process also. No limitation can, therefore, be put on the power of the Magistrate to transfer a case after taking cognizance adding additional words to the section, namely, that it shall be done "after issuance of process u/s 204". The language of Sub-section (2) of Section 192 is clear, plain and unambiguous and it must be read as it is. So a Magistrate who takes cognizance may without any further order transfer the case u/s 192 to another Magistrate, and in such cases the judicial proceedings are actually commenced before the transferee Magistrate when he issues process u/s 204. In taking such action the transferee Court exercises power by virtue of its being seized of the case.

3. In (3) Dalu Gour and Others Vs. Moheswar Mahato, Das, J. (as he then was), observed:

It is also clear that the transfer may be made as soon as the transferring Magistrate has taken cognizance of the case; he need not wait for the stage when the accused person appears as a result of the issue of process.

In a latter case, (4) Nazir Khan Vs. Munif Khan and Others, , this Court has reiterated this view in clearer terms that a Magistrate, to whom a case has been transferred, stands in the shoes of the original Magistrate and has full authority to deal with the case as if he had taken cognizance of it. Thus, the decision of this Court in S.M. Nazim Baboo (supra) may require a reconsideration.

4. However, I do not feel it necessary to refer the instant case to a Full Bench because, in my opinion, the case of S.M. Nazim Babo (supra) is distinguishable. In that case the Sub-divisional Magistrate, after taking cognizance on the basis of a police report did not at all issue any process u/s 204 to the accused persons and he had transferred the case to the Munsif-Magistrate without issuing any

process, and it was the transferee Magistrate who for the first time ordered for the issue of non-bailable warrants of arrest for the appearance of the accused persons. Under the circumstances, it was held in that case that only the Magistrate taking cognizance could issue process and he could transfer the case to another Magistrate only after Issuance of process, otherwise the order transferring the case will be illegal and without jurisdiction. In the present case, the Sub-divisional Magistrate had issued process to the charge-sheeted accused persons before transferring the case; he transferred the case after issuance of process. Hence, the order of transfer was not illegal or without jurisdiction. The facts of that case, therefore, are different. In the present case, the transferee Magistrate being legally in seisin of the whole case could, in my opinion, summon additional accused who in his opinion was found involved in the commission of the offence. In fact such has been the consistent view of this Court. In the above-mentioned case of Dalu Gour and Others Vs. Moheswar Mahato, , Das, J. (as he then was), made the following observation at page 27:

It is well settled that when a case is transferred to a Subordinate Magistrate u/s 192(1), Criminal Procedure Code, the latter has the same authority to deal with the case as regards the issuing of process and other matters connected with the enquiry or trial as is vested in the superior Magistrate from whom he receives the case on transfer....The power to issue process u/s 204, Criminal Procedure Code occurs in the next chapter dealing with the commencement of proceedings before Magistrates. Though Section 204 says that the Magistrate taking cognizance can issue process, it is now well settled (as stated above) that the Magistrate to whom the case is transferred u/s 192 has the same power which the Magistrate taking cognizance had to issue process against the accused persons.

In Nazir Khan V. Munsif Khan [1961 (2) Crl.L.J. 393 at 396], Kanhalya Singh, J. observed:

It is well-settled that the transferee Magistrate is in full seisin of the case and has the same authority to deal with it as regards issuing of process and other matters connected with the enquiry or trial as is vested in the superior Magistrate, from whom he receives the case on transfer, as if he had taken cognizance of it, and, therefore, he has the power to charge the accused with the commission of even such an offence as has not been taken cognizance of by the transferring Magistrate and also to put on trial other persons whose names do not appear as accused in the petition of complaint, directly or indirectly, where the petition of complaint or the evidence adduced in the case disclosed the offence not taken cognizance of by the transferring Magistrate and implicated the other persons.

From the aforesaid observation it is clear that what is transferred is the entire case and not the case of particular accused in respect of a particular offence, as specified in the original order of the Sub-divisional Magistrate while taking cognizance. It is thus clear that when a court becomes seized of the case relating to a criminal transaction, it becomes seized of the entire case and he obtains

jurisdiction over all the offences and over all the persons involved in the transaction. The transferee Magistrate becomes vested with full seisin of the case and he stands in the shoes of the original Magistrate and has full authority to deal with the case, as if he had taken cognizance of it. In (5) *Kamla Prasad Singh Vs. The State*, , the following observation occurs:

...a Magistrate to whom any case is transferred u/s 192 does not take cognizance under any clause of Section 190 at all, but he does so in exercise of a power which vests in every court having seisin of the case and is not confined to a Magistrate empowered to proceed u/s 190.

In (6) *Province of Bihar Vs. Bhim Bera and Others*, , it was held that once cognizance of the case had been properly taken by a Magistrate and the case had been transferred to another Magistrate u/s 192, then the latter Magistrate has full seisin of the case and he is at liberty to summon any further persons as accused. If he finds evidence against them. The whole case must be taken to have been transferred, that is, the case as against not merely the persons actually summoned but also as against all others whom the transferee Magistrate might consider to be implicated in the offence. This decision was followed in (7) *Raghubansh Dubey Vs. The State of Bihar*, . It may be stated here that the view taken in the case of *Raghubansh Dubey Vs. The State of Bihar*, was approved by the Supreme Court in the case of (8) *Raghubans Dubey Vs. State of Bihar*, , where it was held that the summoning of additional accused was part of the proceeding initiated by the Magistrate taking cognizance of an offence. It was also held that the transferee Magistrate was entitled to summon additional accused against whom he considered that there was good evidence. So far as the case of (9) *Rajindra Nath Mahato Vs. T. Ganguly, Dy. Superintendent and Another*, is concerned, it did not decide the point involved in the present case. That was a case in which cognizance had been taken upon a complaint and the issue of process was by a Magistrate who had neither taken cognizance nor was one to whom the case had been transferred; and for that reason it was held by the Supreme Court that the High Court had correctly quashed the issue of process. For the reasons aforesaid. I hold that, on the facts and in the circumstances of the present case, the committing Magistrate had jurisdiction to issue processes against the petitioners.

5. Point no. (ii).

The second contention raised on behalf of the petitioners is that a transferee Magistrate cannot summon additional accused without fresh materials; and reliance was placed on the following observation in *Chandra Kishore Jha V. The State of Bihar* (1975 BBCJ 656 at 660):

If some material is produced during the course of the trial or inquiry under Chapter XVIII against the accused who has not been summoned, it is open to the trying Magistrate or the Magistrate holding the inquiry to summon such accused.

The proposition of law that an accused should be summoned only when some

material against him is produced, is indubitable. The materials may be already on the record or may be fresh. The question in the instant case, however, is--Can an accused be summoned, when materials, though available, had escaped the attention of the original summoning Magistrate but were noticed by the transferee Magistrate? I think, the answer is clear that if materials be available on the record, which have escaped the attention of the original Magistrate, the transferee Magistrate, on noticing the materials, can summon the accused.

The relevant portion of the order dated January 20, 1973, of the Sub-divisional Magistrate at the time of taking cognizance runs as under:

Charge-sheet u/s 147/148/149/302/379/411 I.P.C. received against five accused persons noted in Col. 3 of the C.S.

Eight accused persons named in Col. 2 of the C.S. have not been sent up for trial hence they are discharged.

Cognizance taken & the case is transferred to the file of Sri P. Topno, Magistrate 1st Class for enquiry under Chapter XVIII Cr. P.C.

To 29.1.73.

On a perusal of the aforesaid order of the Sub-divisional Magistrate, it is quite clear that the only material which he has considered is the charge-sheet. He has not considered the statements of witnesses in the case Diary. Had he considered them, his aforesaid order would have indicated it. Whether or not a material on the record has been considered is a fact which cannot be presumed. It is a fact which must be apparent from the order. The order does not at all show any consideration of the materials other than the charge-sheet. This is the only material considered by him on the basis of which cognizance has been taken against five of the thirteen accused persons. The learned Sub-divisional Magistrate discharged the other eight.

I may, in passing, observe that there cannot be any question of discharge of the other eight accused persons at this stage, when they were not sent up upon the charge-sheet submitted by the police: vide the case of Raghubans Dubey, AIR 1967 Supreme Court 1167.

Now, when the case came on transfer to the committing Magistrate, he considered the statements of witnesses in the Case Diary against the petitioners and came to the conclusion that the petitioners should also be summoned in the case. The learned committing Magistrate has referred to several paragraphs of the Case Diary while considering the question as to whether the petitioners were involved in the case and whether there was evidence against them. Whether the materials involving the petitioners in the offence were good materials or no materials has not been argued before this Court. In my opinion, the statements made by witnesses as recorded in the Case Diary were materials, on the basis of which the committing Magistrate could summon the petitioners as additional accused persons in the case.

6. Point no. (iii)

The third contention raised on behalf of the accused-petitioners is that the impugned order dated May 21, 1973, passed by the Magistrate holding the commitment inquiry, though valid and good at the time when it was passed, should be held to be null and void after coming into force of the new Code. Learned counsel contended that after coming into force of the new Code, commitment enquiry is governed by the new Code and not by the old Code. He has referred to the proviso to Section 484(2)(a). It is, therefore, necessary to consider the scope of this proviso. It runs as below:--

Provided that every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

On a perusal of the aforesaid proviso, there can be no doubt that every inquiry under Chapter XVIII of the old Code which is pending at the commencement of the new Code shall be dealt with and disposed of in accordance with the provisions of the new Code. [See the cases of (10) Ram Bharos Mahto V. Ram Lachhan Mahto, ILR (1975) 54 Patna 67; and (11) Gobardhan Mahto V. Mossamat Bari ILR (1975) 54 Patna 384]. The old Code had been repealed by Section 484 of the new Code. So far as the pending commitment enquiry is concerned, it has to be disposed of under the new Code. Obviously Section 209 of the new Code will apply to such a case. That section recites that when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable by the Court of Session, he shall commit the case to the Court of Session. It was submitted on behalf of the petitioners that the present commitment inquiry under chapter XVIII of the old Code was pending on the 1st of April 1974 when the new Code came into existence, and so in view of the proviso aforesaid the Magistrate had simply to commit the accused persons to the Court of Session for trial. His argument is that the whole of the commitment enquiry from the very date of its commencement will be governed by the new Code, and not only from the date of the coming into force of the new Code. He says that it is not permissible to hold that part of the commitment inquiry shall be governed by the old Code and part of it by the new Code. He cited the case of (12) Paranjothi Udayar V. State, 1975 Madras Law Journal 389 at 395, in which N. Krishnaswamy Reddy, J., made the following observation:

The proviso clearly states that at whatever stage the inquiry was pending at the commencement of the Code under Chapter XVIII, it must be dealt with and disposed of as if such inquiry commenced after the new Code came into force. In other words, if once the new Code is made to apply to any proceeding such proceeding must be dealt with Irrespective of the stage of such proceeding as if such proceeding was instituted after the new Code came into force, and deal and dispose it of under the provisions of the new Code. If the proviso is interpreted otherwise, it will lead to anomaly. If it is construed that the inquiry under the old

Code will be valid up to the stage till the new Code came into force and that thereafter the new Code will apply, it would mean that in the same inquiry, both the old Code and the new Code apply at two different stages. This cannot be the object of the Legislature. Either the old Code will apply in toto as provided in clause (2) of Section 484 or the new Code will apply in toto in respect of Chapter XVIII as provided under the Proviso to clause (2)(a) of Section 484. There cannot be any via media.....the new Code will apply in toto and that the enquiry under Chapter XVIII of the old Code, pending at the commencement of the new Code is completely wiped out and the provisions of the new Code will apply as if the enquiry started after the new Code came into force.

I agree with the aforesaid observation. I am also of the same view that the whole of the commitment inquiry and not part of it is governed by the new Code. But, still the question is as to whether the order of summoning additional accused dated 21.5.1973 can be held to be null and void. In my opinion, the answer must be in the negative. I am of the view that the summoning of additional accused is not a part of commitment inquiry. As held in *Raghubans Dubey Vs. State of Bihar*, , the summoning of additional accused is part of the proceedings initiated by the Magistrate taking cognizance of an offence. What has been abolished by the new Code in this behalf is the inquiry and not the power of the Magistrate to put additional accused on trial against whom he finds good evidence. I hold that the summoning of additional accused is not a part of the inquiry. In this view of the matter, it must be held that the impugned order dated 21.5.1973 passed by the committing Magistrate is valid and it has not become null and void even after coming into force of the new Code. The point thus has no force.

On a consideration of the submissions raised on behalf of the parties and giving due weight to them, my concluded opinion is that this revision petition has no merit and it must be dismissed. It is accordingly dismissed.

Shiveshwar Prasad Sinha, J.

I agree.