
(1985) 03 PAT CK 0031
In the Patna High Court

Parasuram Jha and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 18-03-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 202
Penal Code, 1860 (IPC) — Section 225, 323, 379

Citation : (1986) CriLJ 1266 : (1985) PLJR 973

Hon'ble Judges : S.S. Sandhawalia, C.J.; P.S. Sahay, J

Bench : Division Bench

Judgement

S.S. Sandhawalia, C.J.—Whether a Judicial Magistrate, having postponed the issue of process and directed an investigation u/s 202 of the Code of Criminal Procedure, would thereafter be precluded from inquiring into the case himself even though he is not satisfied or is in disagreement with the investigation report, is the significant issue necessitating this reference to the Division Bench.

2. The issue aforesaid arises from facts which are not in serious dispute. The three petitioners herein seek the quashing of the cognizance of offences taken against them by the Chief Judicial Magistrate, Muzaffarpur. Respondent (opposite party) No. 2, Ramdeni Thakur, had preferred a complaint under Sections 323, 379 and 225 of the Penal Code before the Chief Judicial Magistrate, Muzaffarpur, way back on the 6th of October, 1980. The learned Chief Judicial Magistrate examined the complainant on solemn affirmation and thereafter postponed the issue of process and directed an investigation for purpose of deciding whether or not there sufficient ground for proceeding under don 202 of the Code of Criminal Procedure reinafter to be referred to as the "Code"), the is Section he by the Sub-Registrar, Sakra Registration Office. Dissatisfied with this direction, the complainant repeatedly prayed before the Magistrate for recalling the investigation from the Sub-Registrar and entrusting it to some other person. It would appear that for well-nigh two years no progress worth the name was made by the investigator, and by his order dated the 17th of June, 1982 the Magistrate finding that he had not chosen to send the report, recalled the same from him

and sent it to the Circle Officer, Moraul Block, for inquiry u/s 202, directing him to report by the 6th of August, 1982. On the 9th September, 1982 the Magistrate perused the report of the said investigator along with the evidence recorded by him and held that he was not satisfied with the said report and directed that the case be put up for an inquiry u/s 202 by the Court itself. It would appear that thereafter he examined three witnesses, namely, Doman Paswan, Gayanath Jha and Ramdeo Thakur u/s 202 himself and after hearing the complainant was satisfied that a prima facie case for the offences under Sections 323, 379 and 225 was made out against the petitioners and directed the issue of summons.

3. Now, the core of the case projected on behalf of the petitioners is that once the Magistrate orders aft investigation by another person u/s 202, he has no further jurisdiction whatsoever to himself inquire into the matter. The stand is sought to be buttressed by a hypertechnical emphasis on the use of the words "either" and "or" in Section 202, and it is contended that only two clear cut and mutually exclusive alternatives are open to the Magistrate, namely, either to inquire into the case himself or direct an investigation by a police officer or any other person. It is the case that he cannot have resort to both and having once resorted to one of the alternatives, any further resort to the other is precluded. Primary reliance for the aforesaid stand has been placed on Emperor Vs. Durga Prasad and Others, , Radha Kishun Sao Vs. S.K. Misra and Another, and Sankar Chandra Ghose Vs. Roopraj S. Bhansally, .

4 Before entering the morass of precedent, it seems both apt and refreshing to examine the matter on larger principle and later on the purpose and language of Section 202. It has been said times out of number that the criminal law is a matter of substance and not of technical form and criminal procedure must be a handmaid of justice and not an obstacle in its administration. There is no gainsaying the fact that it is the duty of the magistracy to take cognizance of offences where they are disclosed and in the mode and manner prescribed therefore by the Code. The hands of the magistracy are not to be easily tied by the fetters of technical procedure so as to prevent them from arriving at the root of the matter where an offence is disclosed and there are sufficient grounds for proceeding against the accused. Doing so, to my mind, would run against the grist of criminal justice and a " construction which is likely to lead to such result should, if possible, be avoided.

5. Section 190 provides for the cognizance of offences by Magistrates and the various modes in which it may be taken. Included therein is the power of taking cognizance upon information from any person other than a police officer and even upon his own knowledge that such an offence has been committed. These two are indeed of significance and highlight the law's earnestness or detection and punishment of crime. If cognizance can be taken on information received or upon his own knowledge, it is plain that the Magistrate should not be easily barred from reassuring himself and securing adequate materials by directing an investigation and, if necessary, by an inquiry into the case himself afresh for

deciding whether or not there is sufficient ground for proceeding, as spelt out in Section 202, in all those cases where he thinks fit to postpone the issue of process on the receipt of a complaint.

6. Much ado has been made about the use of the words "either" and "or" in Section 202 in this context. A plain reading of the same would make it clear that the law herein has specifically given three options to the Magistrate. He may straightway take cognizance or, if he thinks fit, postpone the issue of process and inquire into the case himself or direct an investigation to be made by a police officer or any other person whom he thinks fit to entrust the same. Are these alternatives necessarily exclusionary? I do not think so. Where alternative choices have to be given, invariably the language employed has to be in the usual form that the person being given such discretion may either resort to one or the other. It does not necessarily follow that he then cannot either resort to both or intermix the same. Alternatives, when given, may well be inclusionary, if one may employ this term. The power so vested may include the exercise of both rather than necessarily exclude one from the other. Therefore, the rationale of the judgments which jump to the conclusion that because the words "either" and "or" have been used in Section 202, the alternative ipso facto is exclusionary, appears to me, with the deepest deference, as not support by logic. The mere employment of these two words cannot in anyway be conclusive. I am unaware of any other legal terminology being employed where the alternative exercise of discretion is vested by the statute in an authority with power to resort to either or both. It has been rightly said in *Manohardas Babaji and Others Vs. Khandu Dutta and Another*, :

The clause "direct an enquiry or investigation" does not mean one enquiry or one investigation only and it would be wrong to interpret it as limiting to one such enquiry or investigation. Indeed, this enquiry and investigation is "for the purpose of ascertaining the truth or falsehood of the complaint" and it is reasonably clear from the section itself that the legislature never intended to restrict the Magistrate's power or right to one enquiry only.

7. The matter can be equally examined from another angle. The learned Counsel for the petitioners himself took the stand very fairly that the Magistrate is not bound by the report of the investigator which he had earlier ordered and has the power to differ from the same. This is well settled on analogy by the authoritative decision in *Abhinandan Jha and Others Vs. Dinesh Mishra*, and directly by a Division Bench of this Court in *Ramprabesh Rai and Others Vs. Bishun Mandal*, . Once it is held that the Magistrate is in no way bound by the report of the person to whom he had earlier entrusted the investigation, it would follow that for his own satisfaction he may seek or collect materials by inquiring into the case himself or for differing from or disagreeing with such report. It would seem anomalous that though he could straightway differ from the view taken by the investigator yet he cannot do anything to procure the necessary materials for buttressing or satisfying his conscience for such disagreement. To

bar him from collecting such material or inquiring into the case himself would, in a way, be negating such a power because in the judicial field one cannot act arbitrarily but must do so on a sound foundational basis. Indeed, to my mind, such further inquiry into the case by the Magistrate would become necessary where the investigator has failed to do his duty and there are no materials worth the name on the record which would entitle the Magistrate to either take cognizance or decline to do so when he is differing from or disagreeing with the former. Consequently, if the Magistrate has power to differ from or disagree with the report of the investigator he should inevitably have the power and jurisdiction to procure the evidence or the material for such difference or disagreement. If the latter power is barred then this disagreement with the report of the investigator may well be open to the slant of arbitrariness or capriciousness.

8. Anomalies that would flow from the hypertechnical stand being canvassed on behalf of the petitioners are, indeed, made manifest by the facts of the present case itself. It would seem that the Sub-Registrar, Sakra, to whom the investigation was first entrusted, did not lift his little finger and rendered no report whatsoever despite the passage of two years. If it were to be held that having once entrusted the investigation to another, the Magistrate thereafter is precluded to inquire into the matter himself, the result would be that the mere negligence or recalcitrance of such investigator would hamstring the vital issues of the cognizance of an offence. Equally where the investigator renders a report which is blatantly unsatisfactory, should the Magistrate's hands be tied for his inefficiency or negligence? Take a case where the investigator does not examine the most material witnesses despite the insistence of the complainant or perversely says that no case is made out. Would the Magistrate be barred from inquiring into the matter himself, if necessary and examining the material witnesses wrongly excluded by the investigator? As I said earlier, the basic responsibility and, indeed, the duty of taking cognizance is vested in the Magistrate and the investigator is only a means or a step in aid for either taking such cognizance or declining to do so. On principle, it does not seem correct that the Magistrate should be denuded the power of overriding his own creature or delegate and be barred from inquiring into the case himself.

9. The view I am inclined to take is buttressed by the observations of the final Court in Mohammad Ataullah Vs. Ram Saran Mahto, . Therein the report rendered by the Executive Officer, who had been entrusted with the investigation, was extremely perfunctory and without any material for his opinion that a prima facie case was made out against some of the accused persons. Their Lordships quashed the taking of cognizance in the absence of adequate foundational material with the following observations :

As already pointed out by us the Executive Officer, Samastipur Municipality, in his report, merely expressed his opinion but mentioned no detail of the investigation made by him and referred to no witness examined by him or any document

perused by him. Therefore, when the Chief Judicial Magistrate took cognizance of the case and ordered issue of process against the accused there was no additional material before him except what was already there when he ordered an investigation u/s 202 Criminal Procedure Code. Obviously the learned Chief Judicial Magistrate, without any reference to any further material took cognizance of the case and ordered the issue of process to the accused merely on the basis of the opinion expressed by the Executive Officer, Samastipur Municipality. That he was not right in doing. The order of the learned Chief Judicial Magistrate dated July 25, 1974, taking cognizance of the case and issuing process to the accused is therefore quashed. The learned Chief Judicial Magistrate may now deal with the complaint in accordance with law. The appeal is allowed in the manner indicated.

It seems to follow from the above that in a case where the investigator fails in doing his duty, the Magistrate must collect additional material for either proceeding or declining to take cognizance. Their Lordships' observation that the Chief Judicial Magistrate should deal with the complaint in accordance with law in the context could mean little else than a direction that he should inquire into the case himself for proceeding further.

10. I am not oblivious to the larger aspect that taking cognizance of offences or declining to do so should be done with reasonable promptitude. Delay is becoming the bane of criminal justice in our country. It is true that a fresh inquiry into the case after the report of the investigator may somewhat prolong the issue of taking cognizance. But this consideration cannot be conclusive and be made a bar on the Magistrate's basic power and, indeed, the duty of taking cognizance of an offence and deciding whether or not there is sufficient ground for proceeding on the basis of the complaint. Therefore, it must be held that though resort to different investigators or an inquiry afresh should ordinarily be avoided in the interest of prompt justice yet this should not lead to a denial thereof or barring the Magistrate, who is entitled to take cognizance, from going to the root of the matter by resorting to all the choices made available to him by Section 202.

11. Inevitably one must now turn to precedent. Three streams of thought seem to underlie the conflict of judicial opinion therein. The view has been taken that having entrusted the investigation to another person, the Magistrate cannot thereafter himself inquire into the case. On the other hand, it has been observed that such an inquiry into the case by him, though not illegal, would nevertheless be irregular. Lastly there is the categoric stand that the Magistrate is in no way barred from inquiring into the case himself if he disagrees with or differs from the report of the person earlier entrusted with the investigation.

12. The cleavage of judicial opinion seems to be well exhibited from judgments in the Calcutta High Court itself. It would appear that in an unreported decision of the said Court in Revision Case No. 157 of 1961 and 223 of 1961 certain observations were made on the basis of the facts of the particular case that an

inquiry afresh by the Magistrate would be uncalled for. This unreported decision was, however, distinguished and interpreted to mean as not implying any blanket bar on the right of the Magistrate to inquire into the case himself, if necessary, by A.K. Das, J. in *Manohardas Babaji and Others Vs. Khandu Dutta and Another*, . This view was thereafter followed in *Kshitish Chandra Shome and Others Vs. The State*, and *Sunil Majhi Vs. The State*, by learned single Judges of the Court after a full consideration of the matter. Later, a Division Bench also in *Prafulla Pradhan v. State of West Bengal* 1976 80 CWN 287 arrived at a similar view with the following categorical observations :

In view of the language of Section 202 Cr. P.C. we are of the view that even after directing the officer-in-charge of the local police station to make an inquiry and report the hands of the learned Magistrate would not be tied if he proposed to hold a further inquiry into the matter himself.... But if he holds a further inquiry by himself for determining whether to issue process or not it will be within his competence and his powers under the Code of Criminal Procedure.

However, in the later decision of the Division Bench of the Calcutta High Court itself in *Sankar Chandra Ghose Vs. Roopraj S. Bhansally*, the aforesaid judgment and its ratio was not at all brought to the notice of the Bench and in its absence they chose to follow the earlier Criminal Revision No. 157 of 1961 and primarily on that ground expressed a view contrary to *Manohardas Babaji and Others Vs. Khandu Dutta and Another*, and *Sunil Majhi Vs. The State*, . There thus appears to be a continuing conflict of judicial opinion in the Calcutta High Court. With the greatest respect, for the reasons already recorded, I would prefer the line of reasoning taken by the Division Bench in (1976) 80 C WN 287 (supra) and the earlier three considered single Bench decisions.

13. In fairness to the learned Counsel for the petitioners, reference must be made to *Emperor Vs. Durga Prasad and Others*, and *Radha Kishun Sao Vs. S.K. Misra and Another*, . The former is, however, hardly a judgment because therein Lindsay, J., merely accepted a reference made by the Sessions Judge in his referring order which turned primarily on facts. It appears that the matter was not agitated at all before the High Court itself and the reference was accepted unopposed by a 5 line order. In *Radha Kishun Sao Vs. S.K. Misra and Another*, the learned single Judge held that an inquiry afresh by the Magistrate would not be without jurisdiction but would be irregular. For the reasons already recorded in the earlier part of the judgment in detail, I am unable to find a taint of any irregularity either in such a situation and, indeed, as has already been noticed, such inquiry by the Magistrate into the matter himself may in certain cases become necessary. With the deepest deference, this judgment on this specific point has, therefore, to be overruled.

14. To conclude, the answer to the question posed at the very outset is rendered in the negative. It is held that u/s 202 of the Code the Magistrate is not precluded from inquiring into the matter himself if he is dissatisfied or is in disagreement with the report of the investigator. However, in the interest of

speedy justice resort should be made to this power only in cases where it is indeed rendered necessary.

15. Now, applying the law laid above, it seems plain that the learned Chief Judicial Magistrate, Muzaffarpur, was categorically of the view that the report of the Anchaladhikari was not at all satisfactory and it, therefore, became necessary for him to inquire into the matter himself. Consequently, he examined three more witnesses and on the basis of the record has issued process. No meaningful quarrel with this procedure can possibly be raised. The application is without merit and is hereby dismissed.

P.S. Sahay, J.

16. I agree.