

(2000) 04 PAT CK 0028

In the Patna High Court

Case No : Criminal Miscellaneous No. 1003 of 1993

Prem Kant Roy @ Prem Kumar Roy and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 20-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2), 190, 190(1), 193
Penal Code, 1860 (IPC) — Section 147, 148, 149, 224, 225

Citation : (2000) 4 PLJR 510 : (2000) 3 PLJR 152

Hon'ble Judges : S.K. Chattopadhyaya, J;Nagendra Rai, J

Bench : Division Bench

Advocate : Manan Kumar Mishra, Amar Prakash, K.P. Dubey and Mukesh Kumar, for the Appellant; Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—In Criminal Misc. No. 1003 of 1993, the Petitioners have challenged the order dated 5.12.1992 passed by the Special Judge, E.C. Act, Madhubani, in G.R. No. 1116 of 1990 taking cognizance under Sections 7 and 8 of the Essential Commodities Act (hereinafter referred to as the Act") for violation of the provisions of the Bihar Motor Spirit and High Speed Diesel Oil Dealers Licensing Order, 1966 (hereinafter referred to as "the Control Order").

2. In Cr. Misc. 5359 of 1995, the Petitioners have challenged the order dated 29.11.1988 passed by the Additional Chief Judicial Magistrate, Buxar, in G.R. Case No. 1387 of 1988 taking cognizance under Sections 147, 148, 149, 323, 307, 337, 355, 332, 341, 504, 224 and 225 of the Indian Penal Code (for short "I.P.C.").

3. Both the cases were placed for hearing before a learned Single Judge and during the course of hearing, it was submitted in both the cases that the orders of cognizance are vitiated on account of the investigations having been conducted by the informants of the cases themselves. The Petitioners in both the cases relied upon a judgment of a learned Single Judge of this Court in the case

of Gholtu Modi v. State of Bihar reported in 1986 CriLJ 1031 in support of their submission, wherein a learned Single Judge has taken a view that the investigation by the informant is improper. The learned Single Judge having doubted correctness of the aforesaid judgment in Gholtu Modi's case (supra) referred the matter to the Division Bench by order dated 1.10.1999 passed in Cr. Misc. No. 5359 of 1995 and by order dated 6.10.1999 passed in Cr. Misc. No. 1003 of 1993. This is how the matter has been placed before us.

4. Both the matters were heard together and as the points involved in both the cases are one and the same, the same are being disposed of by this common judgment.

5. Before proceeding to consider the points, it is relevant to state succinctly the facts of both the cases, which are relevant to the points in controversy.

Cr. Misc. No. 1003 of 1993

On 19.6.1990 at 8.30 P.M., Ganesh Paswan, Body-guard of an M.L.A. Shri Billat Paswan Bihangam, came at the Sakri Police Station and informed the Officer-in-charge Shri R.K. Sinha of the said Police Station that the aforesaid M.L.A. had called him at the Gauri Shankar Badri Narayan Petrol Pump, situated at Sakri. Thereafter, the Officer-in-charge proceeded to the said petrol pump and found the said M.L.A. Shri Billat Paswan Bihangam and another M.L.A. Shri Deo Nayayan Yadav standing at the petrol pump. Both the M.L. As informed the Officer-in-charge that the owner of the Petrol Pump Prabhas Kumar Ladia. Manager Satya Narayan Purwe and Salesman Sachindra Narayan were not supplying the petrol to them and were indulged in selling the petrol in blackmarket. They further informed that when the Bodyguard was sent to inform the Police, the owner and other employees of the Petrol Pump fled away with the relevant papers, leaving only one employee at the Petrol Pump. Thereafter, the Officer-in-charge R.K. Sinha found that the petrol and diesel were being sold in back-market to different persons, who were at the Petrol Pump and he ordered the said employee to supply petrol to the said M.L. As and on the basis of his own statement, he recorded a fardbeyan on the same date and forwarded it to the Officer-in-charge, Pandaul P.S. for instituting a case and, thereafter, Sakri P.S. Case No. 173 of 1990 dated 20.6.1990 was registered u/s 7 of the Act and investigation was entrusted to aforesaid Shri R.K. Sinha, who investigated the case and submitted charge-sheet for violation of the Control order and, thereafter, on 5.12.1992, cognizance was taken, which has been challenged in this case.

Cr. Misc. No. 5359 of 1995

One Rama Kant Pandey, S.I. of Nawanagar P.S., along with other Police personnel had gone to village Mahadeoganj to execute processes under Sections 82 and 83 of the Code of Criminal Procedure (for short "the Code") against the absconding accused in Nawanagar P.S. Case No. 55 of 1998 under Sections 307, 379, 323 and other sections of the I.P.C. at 9.30 A.M. When the Police party reached the

village and went to the house of the absconding accused Bishwanath Singh and Awadh Behari Singh; after seeing the Police party, the aforesaid persons wanted to flee away, but they were apprehended by the Police party and, thereafter, they proceeded to the house of other absconding accused Suresh Singh and when they reached near the house of the said accused Suresh Singh, all of a sudden Petitioner No. 1 Sidha Nath Singh, Petitioner No. 5 Gorakh Singh and Petitioner No. 4 Arun Kumar Singh, armed with deadly weapons, attacked the Police party. Thereafter, they said that they indulged in assaulting the Police party. They threw brick-bats on the Police party also. Some of the Police party received lathi injuries as well as injuries due to throwing of brick-bats. Thereafter, he prepared a written report with regard to the said happening in the village itself and sent the same to the Officer-in-charge of Nawanagar Police Station for instituting a case, on the basis of which the latter registered the said case under the aforementioned sections of the I.P.C. and having noticed that the investigation had already taken up by said Rama Kant Pandey, he directed him (Shri Pandey) to investigate the case. S.I. R.K. Pandey investigated the case and submitted charge-sheet on 9.11.1988 and, thereafter, cognizance was taken by order dated 29.11.1988 under the aforesaid sections of the I.P.C., which has been challenged in this case after about 7 years by the Petitioners.

6. In both the cases, learned Counsel for the Petitioners submitted two points, firstly that in both the cases investigation has been conducted by the informants (Police Officers) themselves and as such investigation is partial and tempted one and cognizance taken on the basis of such investigation is bad in law and secondly that the allegations and the materials collected during the course of investigation do not make out a case against the Petitioners.

7. Learned Counsel appearing for the State, on the other hand, submitted that, even though, in both the cases, the Police Officers, who have investigated the cases, were informants; but on that account, the cognizance is not vitiated. He also submitted that the allegations and the materials collected make out a prima-facie case against the Petitioners.

8. The word "investigation" has been defined under the Code, which includes all the proceedings under the Code for the collection of evidence, conduct of investigation by the Police officers or by any other person authorised by the Magistrate on his behalf. During investigation, the concerned Police officer has to proceed to the spot to ascertain the facts and circumstances of the case; to collect the evidence relating to the commission of the offence; to arrest the accused; to record the statements of the witnesses as well as of the accused and reduce the same into writing, search of places and seizure of things necessary for investigation and which are to be produced at the trial and, thereafter, to form an opinion as to whether on the materials collected, there is a case to put the accused on trial and on coming to the said conclusion to file a report u/s 173 before the court.

9. The first question to be determined is as to whether the cognizance taken

against the Petitioners is vitiated on account of the cases having been investigated by the informants themselves. Under the Code, the Police has statutory right to investigate the case and its right is unfettered unless its acts are improper, illegal or in excess of the circumscribed limit. So long as the investigation is in accordance with the provisions dealing with the investigation, the court has no power to stop it or issue direction as to the manner in which the investigation is to be carried out. The Privy Council in the case of AIR 1945 18 (Privy Council) , held as follows:

The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved u/s 491 Criminal P.C., to give directions in the nature of habeas corpus. In such case as the present one, however, the court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that Section 561A has given increased powers to the Court, which it did not possess before that section was enacted. But this is not so. The sections give no new power, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, least it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act.

10. The aforesaid view of the Privy Council has been followed in a catena of decisions by the Apex Court. It is not necessary to refer all the cases. Suffice it to say that the Apex Court in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, ; at paragraph 62 held as follows:

The investigation of a cognizable offence is the field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code and the Courts are not justified in obliterating the track of investigation when the investigating agencies are well within their legal bounds as aforementioned. Indeed, a noticeable feature of the scheme under Chapter XIV of the Code is that a Magistrate is kept in the picture at all stages of the police investigation but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted. But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provisions causing serious prejudice to the personal liberty and also property of a citizen, then the court on being approached by the person aggrieved for the redress of any grievance, as to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echeleons since human dignity is a dear value of Constitution. It needs no emphasis that no one

can demand absolute immunity even if he is wrong and claims unquestionable right and unlimited powers exercisable up to unfathomable cosmos. Any recognition of such power will be tantamount to recognition of "Divine Power" which no authority on earth can enjoy.

11. Thus, it is settled law that the power of investigation is exclusively reserved in the Police officers and their power is unfettered so long they are acting within the bound of statutory provision. However, when they are acting mala fide or have exceeded the circumscribed limits and improperly and illegally exercised the power of investigation in breach of any statutory provisions causing serious prejudice to the personal liberty and property of a citizen, then the Court on being approached by the aggrieved party may pass an appropriate order as the situation demands.

12. The Apex Court in the case of Union of India and another Vs. W.N. Chadha, held that during the investigation when the Investigating Officer is not deciding any matter except collecting the materials for ascertaining whether a prima-facie case is made out or not and a full enquiry in case of filing a report u/s 173(2) follows in a trial before the Court or Tribunal, pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the Statute does not expressly recognised. The Apex Court also held that in that case the accused has no right to say with regard to manner and method of investigation.

13. The same view has been reiterated by the Apex Court in the case of Central Bureau of Investigation and another Vs. Rajesh Gandhi and another, , wherein it has been held that the decision to investigate or decision on agency which should investigate the case, does not attract the principles of natural justice.

14. Thus, the Police, during investigation, has only to collect the material to find out as to whether the accused should be put on trial or not and this function of the Police is purely administrative one and it is for the court to decide as to whether the case should proceed or not against the accused or in case it proceeds then to arrive at a final conclusion about the guilt and innocence of the accused.

15. The illegality committed in course of an investigation does not affect the competence of the court to take cognizance and its jurisdiction for trial. This question was considered by the Apex Court in the case of H.N. Rishbud and Inder Singh Vs. The State of Delhi, . There the question for consideration was as to whether the defect or illegality in the investigation will vitiate the cognizance or trial. In that case, the investigation was conducted by an officer, other than a designated Police Officer as provided under the provisions of the Prevention of Corruption Act. Dealing with the said matter, the Apex Court held as follows:

The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in

respect of cognizance cases. But it does not necessarily follow that an invalid investigation nullify the cognizance of trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or Procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however, serious, has no direct bearing on the competence or the Procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance. Section 190 Code of Criminal Procedure is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. Sections 193 and 195 to 199.

These latter sections regulate the competence of the court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is, therefore, a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1) (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding and antecedent to the trial. To such a situation Section 537 Code of Criminal Procedure which is in the following terms is attracted:

Subject to the provisions hereinbefore contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and jurisdiction of the court for trial is well-settled as appears from the cases in AIR 1944 73 (Privy Council) and Lumbhardar Zutshi v. The King AIR 1950 PC 26 (D).

These no doubt relate to the illegality of arrest in the course of investigation

while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the court. We are, therefore, clearly, also of the opinion that where the cognizance of the case has, in fact, been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

16. The same view has been reiterated by the Apex Court in the case of *State of Uttar Pradesh v. Bhagwant Kishore Joshi* reported in (1994) S.C.R. 71, wherein it was also held that unless the illegality or infirmity in investigation has caused serious prejudice to the accused, the same will not vitiate the order of cognizance or the trial.

17. In the case of *Gholtu Modi (supra)*, it appears that the case was under Sections 399 and 402 of the I.P.C. and the informant Police Officer investigated the case. The learned Single Judge disbelieved the prosecution case and at one place observed that the informant should not have taken investigation in his own hand as he may not be impartial. It was not held by the learned Single Judge that on that ground the cognizance or trial is vitiated. Similarly, this question was also considered by the Allahabad High Court in the case of *Gopal Krishna Vs. State*, wherein it was held that it is improper on the part of the informant to take an investigation of the case. However, the same will not vitiate the trial. Again in the case of *Bhagwan Dayal Piarey Lal Vs. The State*, it was held that the practice of investigation being conducted by the same officer, who happens to be an ocular witness is looked with disfavour and his evidence has got to be looked with great caution. In the case of *Bhagwan Singh v. State of Rajasthan* reported in AIR 1976 S.C. 895, this question also fell for consideration and there the Held Constable, who was alleged to have been offered bribe, lodged a first information report and he himself investigated the case. The Apex Court held that the said infirmity was bound to reflect on the credibility of the prosecution case.

18. Thus, it cannot be held that if the Police officer being the informant, in the case has investigated it, the same would vitiate cognizance and trial. The fact that the Police Officer-informant is himself investigating the case, is no ground to hold that he will not hold a fair investigation. There are many Special Acts where a complaint is made by the person, who finds violation of the statutory provisions but on that ground the cognizance or trial is not held to be invalid in the eye of law. This, it cannot be held that the cognizance or trial will be vitiated only on account of the informant being an Investigating Officer unless it is proved that prejudice has been caused to the accused. However, I may clarify that if it is shown in a particular case that the informant has any personal or pecuniary interest or he is biased or acting in a mala fide manner, then the court may in appropriate cases when the matter is brought to its notice at the earliest, pass

an appropriate order entrusting the investigation to some other agency. But if the matter has not been challenged earlier at any time and the cognizance has been taken and trial has proceeded then in that case the prosecution cannot be quashed on the ground of the aforesaid infirmity unless it is shown that prejudice has been caused to the accused.

19. Thus, the first ground urged on behalf of the Petitioners is without any substance.

20. Coming to the second point, I

find that there are allegations that the Petitioners of Cr. Misc. No. 1003 of 1993, were indulged in black-marketing. They are alleged to have violated the provisions of the Control Order. Their assertion that they have not violated the Control Order cannot be gone into at this stage as the same is to be considered at the time of trial.

21. So far as the case of the Petitioners in Cr. Misc. No. 5359 of 1995 is concerned, there are allegations against them of having rescued the apprehended accused and assaulted the police party and as such there are materials to make out a prima-facie case against them. The correctness of the same cannot be judged at this stage.

22. In the result, there is no merit in both these applications and, accordingly, the same are dismissed.

S.K. Chattopadhyaya, J.

23. I agree.