
(1995) 09 OHC CK 0009

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1318 of 1992

Rajkishore Mohapatra and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 25-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190(1), 482

Citation : (1996) CriLJ 684 : (1995) 2 OLR 578

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : S. Ratho, for the Appellant; Addl. Standing Counsel and S.K. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The short question that falls for determination in this case is whether the Magistrate after passing the order taking cognizance of the offence and issuing process to the accused persons named in the charge-sheet filed by the police has any provide to issue process to other accused persons not named in the charge-sheet to face trial.

2. In this application filed u/s 482 of the Code of Criminal Procedure (for short, "Cr PC"), the petitioners have prayed for quashing the order passed by the learned Sub-Divisional Judicial Magistrate, Kurd on 9-5-1983 in G.R. Case No. 344 of 1987, which was confirmed by the learned First Additional Sessions Judge, Puri, by his order dated 7-5-1992 in Criminal Revision No. 99 of 1988. In the order, the learned Magistrate, on a finding that there exists a prima facie case for the offences punishable under Sections 143/144/436/29 and 500 of the Indian Penal Code against the petitioners, directed process to be issued against them. The G.R. Case was initiated on the first information report lodged by the informant (PW 2) in Tangi police station on 16-5-1987 naming the petitioners and others as accused persons. The Officer-in-charge of Tangi police station after investigation submitted charge-sheet on 7-3-1988 naming certain other persons

as accused persons sent up for trial and showing the names of the petitioners in Col. 2 of the charge-sheet as accused persons not sent up for trial. On receipt of the charge-sheet, the learned Magistrate by order dated 17-3-1988 took cognizance and issued process to the accused persons sent up for trial. No process was issued to the petitioners. Subsequently on 25-4-1988 the informant (PW 2) filed an application to issue process to the petitioners who had not been sent up by the police for trial, alleging that on the materials available on record, a prima facie case of the offences was established against them. Objection to the said petition was filed on behalf of the petitioners. On consideration of the matter, the learned Magistrate passed the order dated 9-5-1988 directing process to be issued to the petitioners to face trial of the offences noticed earlier. The revision petition filed by the petitioners against the said order was dismissed by the learned Additional Sessions Judge.

3. The thrust of the submissions of Miss S. Ratho, learned counsel for the petitioners, is that the learned Magistrate had no power to summon the petitioners to face trial at that stage of the case. Elucidating the point, she submitted that in the report submitted by the investigating officer u/s 173, CrPC (the charge-sheet), the petitioners had not been named as accused persons sent up for trial. On accepting the report, the learned Magistrate took cognizance of the offence and issued process to the accused persons sent up for trial. Thereafter, the learned Magistrate had no power to issue summons to the petitioners to stand trial in the case on the self-same materials. According to Miss Ratho, this question could be considered only at the stage of framing of charge u/s 228, CrPC or during trial as provided u/s 319 thereof.

4. Shri S. K. Patnaik, learned counsel appearing for opp. party No. 2, on the other hand, submitted that after taking cognizance of the offence, the learned Magistrate had the power to decide, for himself the accused who should face trial and in this regard she was not bound to accept the report submitted by 119 investigating officer u/s 17, CrPC. In exercise of that power, according to Shri Patnaik, the learned Magistrate has issued summons to the petitioners on being satisfied about existence of prima facie case against them.

5. On the contentions raised on behalf of the parties, the question formulated earlier arises for consideration. The Supreme Court in the case of Raghubans Dubey Vs. State of Bihar,) has held that once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders, once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of the offence. Referring to its earlier decision in the case of Pravin Chandra Mody v. State of Andhra Pradesh AIR 1965 SC 185), the Court observe that if a Magistrate takes cognizance u/s 190(1)(a) on the basis of a complaint of facts, he would take cognizance and a

proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails u/s 190(1)(b) in *Hareram Satpathy Vs. Tikaram Agarwala and Others*,), the apex Court ruled that where the Magistrate after taking cognizance of the offence and perusal of the record and having been satisfied that there were prima facie grounds for issuing process against certain persons not mentioned in the police report, issued process against them, the Magistrate could not be said to have exceeded the power vested in him under the law. In the same decision, considering the scope of High Court's power to interfere with an order in exercise of inherent jurisdiction u/s 482, CrPC, the Court observed that as the Magistrate is restricted to finding out whether there is a prima facie case or not for proceeding against the accused and cannot enter into a detailed discussion of the merits or demerits of the case and the scope of the revisional jurisdiction is very limited, the High Court cannot launch on a detailed and meticulous examination of the case on merits and set aside the order of that Magistrate directing issue of process against certain persons. In the case of *Kishun Singh and Ors. v. State of Bihar* 1993 (I) OLR (SC) 318, the Supreme Court considered a case where the names of the two appellants were not included in the charge-sheet as in the opinion of the investigating officer their involvement in the commission of the crime was not established. A final report to that effect was submitted to the Chief Judicial Magistrate on which no orders were passed. The concerned Magistrate committed the persons named in the report to the Court of Session u/s 209 Cr PC to stand trial. When the matter came up before the learned Sessions Judge, an application was presented u/s 319, Cr PC praying that the materials on record annexed to the report u/s 173, CrPC revealed involvement of the two appellants also and hence they should be summoned and arraigned before the Court as accused persons along with the eighteen already named in the charge-sheet. The Sessions Judge exercised the discretion vested in him u/s 319 by impleading the appellants as co-accused along with the eighteen others. The criminal revision application filed by the appellants before the High Court was rejected. Thereafter, the appellants moved the Supreme Court by special leave under Article 136 of the Constitution of India. The Court rejected the contention raised on behalf of the appellants that the Sessions Judge had no jurisdiction u/s 319 to take cognizance and implead the appellants as co-accused solely on the basis of materials collected in course of investigation and appended to the report forwarded u/s 173. While discussing the question, the Court observed that it is essential to bear in mind the fact that cognizance is in regard to the offence and not the offender. Referring to the case of *Raghubans Dubey* (supra), which was followed in the case of *Hareram Satpathy* (supra), the Court observed that once the Court takes cognizance of the offence (not the offender), it becomes the Court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the Court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. Regarding the scope of Section 319(1),

the Court held that the section does not apply to all situations and cannot be interpreted to be repository of all power for summoning such person or persons to stand trial along with others arraigned before the Court. In that connection, the Court observed that Section 319 deals with only one situation, namely, the complicity coming to light from the evidence taken and recorded in the course of an inquiry or trial. This may happen not merely in cases where despite the name of a person figuring in the course of investigation the investigating agency does not send him up for trial but even incases where the complicity of such a person comes to light for the first time in the course of evidence recorded at the inquiry or trial.

6. From the principles enunciated by the apex Court in the decided cases noted above, it is clear to me that the Magistrate had the power to issue summons to the petitioners who had not been arraigned as accused persons sent up for trial in the report submitted by the investigating officer u/s 173, CrPC and this power could be exercised by her at any stage after taking cognizance of the offence on consideration of the materials available with her, which includes the report of the investigating officer and the documents annexed to it (police papers). In that view of the matter no exception can be taken to the order passed by the learned Magistrate on 9-5-1988 and the learned Additional Sessions Judge rightly did not interfere with the said order.

7. In the result, the application filed by the petitioners u/s 482, CrPC being devoid of merit is dismissed.