
(2010) 09 JH CK 0018
In the Jharkhand High Court
Case No : Cr.M.P. No. 1149 of 2009

Sandhya Rani Mehta

APPELLANT

Vs

The State of Jharkhand and Sri Phoolchand Tirkey

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 193, 200, 319
Penal Code, 1860 (IPC) — Section 120B, 304, 325, 343, 395

Citation : (2010) 09 JH CK 0018

Hon'ble Judges : D.G.R. Patnaik, J

Bench : Single Bench

Judgement

D.G.R. Patnaik, J.—Heard the learned Counsel for the Petitioner, learned Counsel for the Respondent-C.B.I. as also learned Counsel for the Opposite Party No. 2. Though after hearing the learned Counsel, I am of the opinion that this case shall have to be kept in abeyance before final decision, yet the arguments advanced by the counsel painstakingly are recorded for appreciation.

2. In the present application, the Petitioner has prayed for quashing the order dated-09.02.2009, passed by the S.D.J.M.-cum-Special Judicial Magistrate, C.B.I., Dhanbad in R.C. Case No. 1(S)/07/CBI/SCB/LKN, whereby cognizance for the offences under Sections 120B, 323, 304 and 343 of the I.P.C. was taken and the Petitioner has been summoned to face trial.

3. The primary ground on which the impugned order of cognizance has been challenged, involves a controversial question of law, whether the Magistrate, in exercise of his powers u/s 190 of the Code of Criminal Procedure while taking cognizance of the offences including Sessions triable offences, against such of the accused who were chargesheeted, can take cognizance against such other accused who were not chargesheeted?

4. For proper appreciation of the relevant issues, a brief statement of the background facts, may be noted as. follows:

A case vide B.S. City (Sector XII) P.S. Case No. 406 of 2005 was registered at the Police Station for the offence u/s 395 of the I.P.C. on 22.12.2005 against unknown persons. In course of investigation of the case, stolen articles from within the compound of the premises of one Manraj Tirkey, was recovered. The suspect, Manraj Tirkey was brought to the Police Station along with the recovered articles, for interrogation on the same day i.e. on 22.12.2005. After initial interrogation, he was allowed to go on his executing a personal bond on 23.12.2005. Later, on 28.12.2005, he was called at the Police Station for interrogation by the Investigating Officer, namely, A.S.I., Upendra Narayan Singh. On the same day, upon his complaining of stomach pain, the suspect, Manraj Tirkey was admitted to the Hospital by the Police. In course of his medical treatment, the suspect Manraj Tirkey died three days later. A Report regarding the death of the suspect was lodged and the same was registered as U.D. Case No. 1 of 2006 at the Police Station.

The father of the deceased, namely, the present Opposite Party No. 2 filed a complaint against the Police alleging that his son, Manraj Tirkey was subjected to third degree methods in course of investigation at the Police Station and he had sustained serious injuries, which eventually proved fatal, leading to his death. The matter was initially enquired into by the C.I.D. The Enquiry Report, dated-13.06.2006 submitted by the C.I.D. did not contain any imputations against the Police.

Later a Public Interest Litigation vide W.P. (PIL) No. 1654 of 2006 was filed by one Mukti Tirkey and by order dated-22.12.2006, the High Court had directed the C.B.I. to take over the investigation. The C.B.I. registered an F.I.R. on 25.01.2007. After concluding the investigation, the C.B.I. submitted chargesheet on 16.10.2008. The Petitioner's name was mentioned in Column 2 of the chargesheet, suggesting that she was not sent up for trial.

A Protest Petition was filed though not by the informant, Phool Chand Tirkey but by one Mukti Tirkey. The C.B.I. submitted a rejoinder to the Protest Petition, stating that the chargesheet as submitted by the Investigating Office was on the basis of the materials collected during investigation and the same is correct and in accordance with law and therefore, the Protest Petition be rejected.

However, on the basis of the chargesheet and after accepting the Protest Petition and the rejoinder thereto filed by the C.B.I. on record and after perusing the contents of the case diary, the learned Magistrate took cognizance of the offences under Sections 325, 343, 304 and 120B of the I.P.C. not only against the six accused persons, who were recommended for trial in the chargesheet but also against the present Petitioner though she was not recommended for trial.

5. As observed above, the Petitioner has challenged the impugned order of cognizance taken against her on the ground that since the Petitioner was not sent up for trial by the investigating agency and considering the fact that the offences for which cognizance was taken, was triable by the Court of Sessions,

the Magistrate has no jurisdiction to take cognizance of the offence against such persons, who were not recommended for trial and that the only scope for summoning such accused persons who were not recommended for trial, is under the provisions of Section 319 of the Code of Criminal Procedure available to the trial court conducting trial against those accused persons who were recommended for trial. To buttress his arguments, learned Counsel arguing for the Petitioner would place heavy reliance on the judgment of the Supreme Court in the case of *Kishori Singh and Ors. v. The State of Bihar and Anr.* AIR 2000 SC 3725.

Learned Counsel for the Petitioner would further point out that the Protest Petition, which was not filed by the informant of the case but by some other person, ought not to have been entertained by the learned Magistrate. Even otherwise, if the Magistrate had intended to conduct an enquiry on the basis of any Protest Petition filed by the informant, it was incumbent upon the Magistrate to examine the protester/complainant and his witnesses, if any, and then to take any decision, but even this procedure could not have been adopted by the learned Magistrate, in view of the fact that cognizance was taken for the offences, triable exclusively by the Court of Sessions and the Magistrate has no scope for conducting any enquiry under the procedural law.

Learned Counsel explains that though *Kishori Singh's* judgment was considered by a Three Judges' Bench of the Supreme Court in the case of *Dharam Pal and Ors. v. State of Haryana and Anr.* (2004) 13 SCC 9 and the Bench in *Dharam Pal's* case had observed that there was conflict in the opinion of the Two Judges' Bench in *Kishori Singh's* case (Supra) and in the case of *Rajinder Prasad Vs. Bashir and Others*, and in the case of *M/s. SWIL Ltd. Vs. State of Delhi and Another*, and had therefore, referred the matter to be decided by a larger Bench of Five Judges, but the controversial issues observed by the Apex Court in *Dharam Pal's* case (Supra) related to the powers of the Sessions court u/s 193 of the Cr. P.C. vis-a-vis Section 319 of the Code of Criminal Procedure and not in respect of the powers of the Magistrate u/s 190 of the Code of Criminal Procedure as decided in *Kishori Singh's* case (Supra) and therefore, the ratio decided by the Apex Court in *Kishori Singh's* case (Supra) would be binding and applying the ratio, the impugned order of cognizance passed by the Magistrate against the Petitioner, has to be struck down.

6. Per contra, the stand taken by the Opposite Party/State including Opposite Party No. 2, is that the judgment of the Supreme Court in *Kishori Singh's* case (Supra) relied upon by the Petitioner, does not lay down the correct proposition of law and this is evident from the fact that even the Supreme court in its later judgment in the case of *Dharam Pal and Ors. v. State of Haryana and Anr.* (2004) 13 SCC 9, had doubted its decision in the case of *Kishori Singh* (Supra) and had referred the controversial issue to be decided by a larger Bench of the Apex Court.

Learned Counsel for the Opposite Party No. 2 would explain that in *Dharam Pal's*

case (Supra), the Supreme Court had observed that there was conflict of opinion in the decision of the Two-Judge's Bench in the case of Kishori Singh v. State of Bihar (2004) 13 SCC 11 and in the cases of Rajinder Prasad Vs. Bashir and Others, and in the case of M/s. SWIL Ltd. Vs. State of Delhi and Another, . The matter has thus been now referred to a larger Bench of five Judges of the Supreme Court and a decision on the controversial issues, raised in Dharam Pal's case (Supra) is yet to be taken by the larger Bench.

Learned Counsel explains that the conflict of opinion, as expressed in Dharam Pal's case (Supra) also relates to the controversy as to whether the Magistrate can differ with the Police Report in respect of cases involving offences triable both by a Magistrate as well as by a Court of Sessions? and whether the Magistrate has the power to take cognizance of the offences triable by the Court of Sessions even against an accused who has not been chargesheeted by the Investigating Officer. Learned Counsel submits further that upon considering the aforesaid aspects of the controversy, a Bench of this Court while considering the similar issues, raised before it in Cr. M.P. No. 779 of 2004 and Cr. M.P. No. 662 of 2004, has kept the final decision in both the cases in abeyance, pending-final decision of the larger Bench of the Supreme Court.

Submitting further arguments, learned Counsel for the Opposite Party No. 2 would add that the judgment in Kishori Singh's case (Supra) appears to be per incuriam because the scope and power of the Magistrate u/s 190 of the Code of Criminal Procedure has been elaborately defined and explained by a Three Judges' Bench of the Supreme Court in the case of Raghubansh Dubey Vs. State of Bihar, , holding therein that the Magistrate has absolute powers u/s 190 of the Code of Criminal Procedure to take cognizance of the offences against such of the accused also, who have not been recommended for trial in the chargesheet, irrespective of the fact that the offences are sessions triable. The Two Judges' Bench judgment, passed in Kishori Singh's case (Supra) has held contrary view to that expressed by the Three Judges Bench judgment, passed in the case of Raghubansh Dubey (Supra), since the same was not placed nor considered by the Apex Court in Kishori Singh's case (Supra). Learned Counsel submits that under such circumstances, the judgment in Kishori Singh's case (Supra) has to be considered as per incuriam and the ratio decided earlier by a larger Bench in the case of Raghubansh Dubey (Supra) has to be followed.

Learned Counsel adds that the ratio decided in Raghubansh Dubey's case (Supra) was followed by a Three Judges' Bench of this Court in the case of Kuli Singh v. State of Bihar 1978 PLJR 500. The same ratio was again applied by the Supreme Court in the case of Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others, while considering the scope of the Magistrate's power u/s 190 of the Code of Criminal Procedure and later, in the case of Chittaranjan Mirdha Vs. Dulal Ghosh and Another, . In a more recent judgment delivered in the case of Gulab Yadav v. State of Bihar 2010 (1) ECC 199, the Patna High Court has also, after considering the judgments of the Supreme Court in the case

of Kishori Singh (Supra) and Dharam Pal's case (Supra) and the judgments in the case of Ganga Dhar Janardhana Mahatre (Supra) and Kuli Singh's case (Supra), has held that the Magistrate has full power and jurisdiction to take cognizance even in Sessions triable offences against such of the accused persons against whom chargesheet has not been submitted.

7. Learned Counsel for the Petitioner on the other hand, in his attempt to controvert the arguments of the learned Counsel for the Opposite Party No. 2 and to distinguish the judgments passed by the Supreme Court in Raghubansh Dubey's case (Supra) from the facts of the present case, would argue that the facts in Raghubansh Dubey's case (Supra) would indicate that the offence was of the year 1959 and at that time, the provisions or the old Code of Criminal Procedure were applicable. While submitting chargesheet in the case, the Investigating Officer did not recommend the accused Raghubansh Dubey for trial and accepting the chargesheet, the Sub-Divisional Magistrate had discharged the accused Raghubansh Dubey. The case, upon cognizance being taken against the chargesheeted accused, was transferred for enquiry to another Magistrate under the provision of Chapter XVIII of the Code of Criminal Procedure (old). The Enquiring Magistrate, after examining two prosecution's witnesses during the enquiry stage, issued summons against Raghubansh Dubey also, directing him to appear and face trial. Such order of the Magistrate was challenged and the controversy was eventually referred to the Supreme Court. Learned Counsel explains that in Raghubansh Dubey's case (Supra), there was no issue before the Supreme Court as to whether the Magistrate, by differing with the opinion of the Investigating Officer, can take cognizance and issue summons to the accused who was not sent up for trial in the Police Report. Likewise, the provisions as contained u/s 190 of the Code of Criminal Procedure (new) vis-a-vis the provisions as contained in Section 193 of the Code of Criminal Procedure (new) have also not been taken into consideration and furthermore, the provisions u/s 319 of the Code of Criminal Procedure relating to the powers of the trial court for issuance of summons against the additional accused, was also not taken into consideration.

8. I have heard the learned Counsel for the parties and I have also gone through the materials available on record and also the judgments cited by the learned Counsel for the parties.

From the citations, referred to by the learned Counsel for the parties, it appears that on the issue as to whether in exercise of its powers u/s 190 of the Cr. P.C., while taking cognizance of the Sessions triable offences, the Magistrate can also issue process against those persons who are though named as accused in the F.I.R. but not chargesheeted, one of the earliest decisions of the Supreme Court is in the case of Raj Kishore Prasad Vs. State of Bihar and another, and the later judgment is in the case of Ranjit Singh Vs. State of Punjab, . A two Judges' Bench of the Supreme Court in the case of Kishori Singh (Supra) had followed the ratio decided in the case of Raj Kishore Prasad (Supra) and Ranjit Singh

(Supra) and had held that under the provisions of Section 190 of the Code of Criminal Procedure the Magistrate cannot issue process against those who may have been named in the F.I.R., but not chargesheeted.

The same issue came up for consideration before a Bench of Three Judges of the Apex Court in the case of Dharam Pal (Supra). Upon considering the opinions expressed by the Court earlier in Ranjit Singh's case and in Kishori Singh's case (Supra) and later, in the case of Rajinder Prasad (Supra) and also in SWIL Limited's case (Supra), the Bench had observed that there were conflicting opinions expressed in the above-referred cases and had therefore, referred the issues to be decided by a larger Bench. As informed, the matter has been referred to a larger Bench of Five Judges and a decision is yet to be taken by the Court on the controversial issue.

The Judgment, referred to by the learned Counsel for the Opposite Party No. 2 in the case of Ganga Dhar Janardhana Mahatre (Supra), referred to by the learned Counsel for the Opposite Party No. 2 would not apply to the facts of the case or to the controversial issue involved in the present case, in as much as, in Ganga Dhar Janardhana Mahatre's case (Supra), though information was lodged with the Police regarding commission of the offence but no action was taken by the Police and in such context, the Court had observed that the complainant is given powers u/s 190 read with Section 200 of the Code of Criminal Procedure to law a complaint before the Magistrate concerned and then the Magistrate is required to enquire into the complaint provided in Chapter XV of the Code of Criminal Procedure.

9. In the light of the above facts and circumstances, it cannot therefore, be said that the ratio decided in Kishori Singh's case (Supra) upon which the learned Counsel for the Petitioner has placed heavy reliance, lays down the law finally. The final decision is yet to come from the larger Bench of the Supreme Court to which the matter was referred by the Three Judges' Bench in Dharam Pal's case (Supra).

10. Considering the aforesaid facts and circumstances, it would be appropriate that the final decision in the present case be kept in abeyance till the decision on the controversial issues is taken by the larger Bench of the Supreme Court.

11. Let this case be posted after disposal of the matter placed before the larger Bench of the Supreme Court.

12. However, considering the fact that the controversial issues, raised in the present application can be decided only after the decision taken by the larger Bench of the Apex Court, till the pendency of this application, the further proceedings against the Petitioner pending before the court of the learned S.D.J.M.-cum-Special Judicial Magistrate, C.B.I., Dhanbad in R.C. Case No. 1 (S)/07/CBI/SCB/LKN shall remain stayed.