

(2007) 02 PAT CK 0111

In the Patna High Court

Case No : Criminal Miscellaneous No. 40599 of 2006

Sri Niwas Prasad and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 02-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 193, 207, 208, 209, 319
Penal Code, 1860 (IPC) — Section 109, 120B, 302, 34

Citation : (2007) 2 BLJR 970 : (2007) CriLJ 4498

Hon'ble Judges : Ghanshyam Prasad, J

Bench : Single Bench

Advocate : S.N.P. Sinha and Akhileshwar Kr. Shrivastava, for the Appellant;
Bharat Bhushan and Gopesh Kumar, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

Ghanshyam Prasad, J.—Heard.

2. This application u/s 482 Cr.P.C. has been filed to quash the order dated 2.9.2006 passed by C.J.M., Bettiah in Bettiah Muffasil P.S. Case No. 343 of 2005 thereby and thereunder cognizance under Sections 302/120B I.P.C. has been taken against the petitioners.

3. The short facts in this case is that on 28.11.2005, informant Gulachi Devi lodged fardbeyan before Bettiah Muffasil P.S. Case against eight persons including these petitioner for murder of her husband. The police registered case under Sections 302/109/34 of the I.P.C against all the accused persons. The police after investigation submitted chargesheet against three accused persons and kept investigation pending against rest five accused persons who are petitioners. The learned C.J.M. took cognizance under Sections 302/34 I.P.C. against three accused persons. Thereafter, the case was committed to the court of Sessions. Now the case is pending before the Sessions Judge bearing Sessions Trial No. 405 of 2006 for trial against the three accused persons.

4. In the meantime, the police on 14.7.2006 filed supplementary final report against the petitioners showing them as innocent. The learned C.J.M. called for entire record of Sessions Trial from the court of Sessions Judge alongwith original case diary and on the basis of material available in the original case diary took cognizance against the petitioners also and directed for issue of warrant of arrest for their appearance.

5. The learned Counsel for the petitioners raised two legal points against the impugned order, first, whether the learned lower court was justified to take cognizance against the petitioners after submission of the supplementary final report on the basis of stale material available in original case diary and the second, whether the lower court after taking cognizance in the matter and committing the case to the court of Sessions had power to issue summon or warrant against the petitioners in a case which was pending before the Sessions Judge.

6. So far the first point is concerned, it is settled principle of law that after submission of supplementary final report, the court below cannot take cognizance on the basis of the materials collected earlier. This, matter has come up before the Division Bench of this Court reported in 1994 PLJR (2) 96. In paragraphs 9 and 10 of the judgment, it has been held as follows:

9. From a simple perusal of the above provision of law, it is crystal clear that a supplementary charge-sheet can legally be submitted provided "further investigation" in respect of an offence after the first chargesheet is submitted is held and upon such further investigation, "further evidence" is obtained. Thus a supplementary charge-sheet can be submitted in respect of additional evidence collected in course of further investigation held which could not be available in course of the investigation held earlier.

10. In the instant case, no further investigation appears to have been held and no fresh or additional evidence has been obtained which was not available during the investigation held before submission of the chargsheet No. 19, dated 17-3-1985. What has been done is reconsideration of the evidence which was already before the investigating agency prior to submitting the first chargesheet No. 19 dated 17-3-1985 after consideration of which the learned Chief Judicial Magistrate had discharged petitioner Yamuna Pathak by his order dated 6-7-1985.

7. In the present case also admittedly there is no material in supplementary final report for taking cognizance against the petitioners. On perusal of the impugned order, it also appears that the court below has taken cognizance on the basis of material available in the original case diary and not on the basis of the supplementary final report. Therefore, apparently, the impugned order regarding summoning the accused persons on the basis of stale material is not sustainable in the eye of law.

8. So far other point raised by the learned Counsel for the petitioners is concerned it also appears to have merit. Signification change has been made in

new Cr.P.C. 1973 with regard to commitment of the case to the court of Sessions. According to old Code, accused persons were committed to the court of Sessions whereas according to Section 209 Cr.P.C. of 1973, the case is committed to the court of Sessions and not accused. Section 209 Cr.P.C. runs as follows:

209. Commitment of case to Court of Session when offence is triable exclusively by it.- 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 exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

9. Therefore, the moment, the Magistrate commits the case to the court of Sessions u/s 209 Cr.P.C. he becomes functus officio for that case and hence, he cannot again take cognizance of the same offence which would include summoning of any other persons. After commitment, Section 193 Cr.P.C. comes to play its role. Therefore, the court of Sessions gets unfettered and complete jurisdiction of the court of original jurisdiction to take cognizance of the offence and summon any person whose complicity comes from the material available on record. The power conferred u/s 193 Cr.P.C. upon the Sessions Court is entirely separate and distinct from the power conferred u/s 319 Cr.P.C. which comes to play after commencement of trial, Section 193 Cr.P.C. is as follows:

193. Cognizance of offences by Courts of Session. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

10. This matter has been dealt and considered by apex court in two decisions reported in 1993 SCC 470 (Kishun Singh and Ors. v. State of Bihar) and 1995 SCC 306 (Nisar and Anr. v. State of U.P.). In decision reported in 1993, provisions of old and new Code of Criminal Procedure have been considered and in paragraph-16 of the judgment, it has been held as follows:

16. We have already indicated earlier from the ratio of this Court's decisions in the cases of Raghubans Dubey and Hareram 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. We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is (Sic) by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case u/s 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record.

11. Similar view has been expressed in another decision of the apex court which has also placed complete reliance upon above decision of 1993.

12. Thus, from the above discussions, it is quite clear that once the learned C.J.M. committed the case to the court of Sessions he became functus officio for that case and hence, he had no power to take cognizance or issue summons against the petitioners in the case or on material which was not before him. Now it is for the sessions Court to exercise power of court of original jurisdiction to take cognizance or summon any other person u/s 193 Cr.P.C.

13. Thus, having regard to the facts and circumstances of the case, this application is allowed and the impugned order is hereby quashed. However, the prosecution shall be at liberty to move the sessions Court if so advised for summoning the petitioners according to law. In that event, the court of Sessions shall pass order in accordance with law without being prejudiced by this order of quashing.