

(2016) 08 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Pet. U/S 561-A No.204 of 2016 and Cr.MP No.02 of 2016

State of J&K

APPELLANT

Vs

Abdul Rehman Mir

RESPONDENT

Date of Decision : 04-08-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 132, Section 156(3), Section 156(3),
Section 156(3), Section 551
Penal Code, 1860 (IPC) — Section 302, Section 34

Citation : (2017) CriLJ 1790

Hon'ble Judges : Mr. Mohammad Yaqoob Mir, J.

Bench : Single Bench

Advocate : M/S Jahangir Iqbal Ganai, AG & M.A. Rathore, AAG, for the
Petitioners; Mr. Z.A. Qureshi, Sr. Advocate with Mr. M. Ashraf Bhat, M. Abdullah
Pandit and S.H. Thakur, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Mohammad Yaqoob Mir, J.—Aggrieved by the orders dated 18.07.2016 and 28.07.2016, passed by learned Chief Judicial Magistrate,

Srinagar, instant petition seeking quashment of the same has been filed.

2. Respondent has filed an application before the Court of Chief Judicial Magistrate, Srinagar, alleging therein that on 10th July, 2016, at about

6.45 PM Police Party head by Dy. SP Yasir Qadiri while entering into their house started smashing window panes and doors of the house. Wife of

the respondent tried to stop the said action, as a result whereof police official got infuriated and physically assaulted her. Shabir Ahmad Mir

(deceased), son of the respondent, tried to rescue his mother but the police official in the fit of rage started beating him fired two shots into the

body of the deceased on point blank range who died on spot. Alleging that the

police official has committed a cold blooded murder of his son, had requested the SHO concerned for lodging FIR but same was refused to be lodged. In support of the application, respondent has also filed an affidavit.

3. Learned Chief Judicial Magistrate has observed that the position of the application supported by an affidavit reveals commission of cognisable offence, therefore, in the light of said application and the affidavit, SSP, Srinagar, shall register the FIR and to get the case investigated by some senior officer not below the rank of Dy. SP. Copy of the order dated 18.07.2016 along with application has been forwarded to the SSP, Srinagar, for compliance. Index of the application was maintained for being taken up on 28.07.2016.

4. On 28th July, 2016, CPO on behalf of the State has appeared and stated that regarding occurrence FIR No.89/2016 under Sections 147, 148, 307, 436, 152 RPC has been registered and investigation has been entrusted to Mr. Sajad Khalid, Superintendent of Police, City South, Srinagar, which is in progress. In short has projected that registration of second FIR regarding same occurrence is impermissible.

5. Learned Magistrate after hearing both the parties, noticing position of FIR No.89/2016 and after perusing case diary has mentioned that the deceased has been cited as an accused for having been leading a procession, for dispersal of which police party used force. Application filed under Section 156(3) Cr. P. C reveals that a police officer named therein has killed an unarmed person in his house. Learned Magistrate disagreeing with the version of the CPO that no second FIR can be lodged, referred to the judgments as have been relied upon by the rival parties, has directed SSP, Srinagar, to lodge the FIR i.e. to comply with the directions of the court dated 18.07.2016 and to file the copy of FIR within 24 hours, in default to remain personally present for showing cause as to why action be not taken for non-compliance. The application was posted for further proceedings on 30.07.2018.

6. It is stated that learned Chief Judicial Magistrate vide order dated 01.08.2016 directed SSP to file statement of facts on 2nd August, 2016 so as to comply with the direction of the court dated 18.07.2016 and 28.07.2016, in default, rule will be framed against him and will be referred to

the High Court for being punished under law.

7. Learned AAG first contended with all vehemence that on 10th July, 2016, angry protesters who were also led by deceased (son of the respondent), were armed with stones and sticks, they were blocking the road. The mob was dispersed, in the process deceased got injured.

Incident report has been submitted to the Police Station, Batamaloo, same has been registered as FIR No.89/2016 and the investigation has

commenced, so regarding occurrence FIR is already lodged. The direction of the learned Chief Judicial Magistrate provide for registration of

second FIR which, in law, is impermissible. Then further added that the occurrence made mention of in application under Section 156(3) Cr. P. C

forms part of the same transaction, regarding which FIR No.89/2016 has been registered. Supporting his submission has placed reliance on the

judgments rendered by the Hon'ble Apex Court reported in (2013) 6 SCC 384, (2013) 5 SCC 148 and (2010) 12 SCC 254.

8. Learned counsel for the respondent with all eloquence submitted that there have been two occurrences:

First occurrence is when allegedly angry mob was protesting and they were dispersed. Regarding that occurrence, on the basis of report

forwarded by SG. Constable to Police Station, Batamaloo, case has been registered as FIR No.89/2016 for the commission of offences under

Sections 147, 148, 307, 436, 152 RPC. Said information in the first information report is shown to have been received at Police Station at 17.20,

means at 5.20 PM on 10th July, 2016.

The 2nd occurrence is when police party headed by Dy. SP entered into the house of the respondent at about 6.45 PM on 10th July, 2016, along

with accompanying police officials and started smashing window panes of the house, causing damage, the respondent and his wife including his son

were watching television. Wife of the respondent objected to the causing of damage due to which police party got infuriated and they started

beating her which was objected to by the son (deceased), as a result whereof Dy. SP fired two shots from his pistol and caused death of the

respondent in his house. The deceased in that condition had been taken to JVC hospital where he was declared to have been brought dead.

Photocopy of the medical certificate as produced by the learned counsel and

taken on record reveals that 22 years old son of the deceased had been brought dead at 7.00 PM. It has been recorded by the medical officer that the deceased had a firearm injury. Then it has been recorded that the exact cause of death to be ascertained by autopsy, Prima-facie cause of death is firearm injury".

9. Learned counsel would submit that the first occurrence has taken place at 5.20 PM regarding which FIR has been registered, the second

occurrence is not a part of the same transaction because the first occurrence was over when the case was registered on the basis of detailed report

as reflected in the first information report. The killing of deceased son of the respondents is a second occurrence. Learned Chief Judicial

Magistrate in the order dated 28th July, 2016, while relying upon the judgments of the Hon'ble Apex Court, rightly has not accepted the version of

the CPO that it was one occurrence or it was part of the same transaction.

10. Learned counsel would further submit that the judgments as relied upon by learned AAG fortify the genuineness of the orders passed by the

Learned Chief Judicial Magistrate.

11. In the backdrop of the rival submission and the facts, the test of "sameness" has to be applied. It is trite that registration of second FIR in

respect of same offence or incident forming part of same transaction as contained in the first FIR is not permissible but it is also settled that an

incident which does not fall within the ambit of report lodged first, then registration of second FIR is permissible.

12. In terms of Section 154 Cr. P. C, whenever a report is lodged for commission of a cognisable offence, it is the duty of police officer to register

the FIR. Second FIR is not permissible to be registered by the police officer in respect of same offence or incident forming part of the same

transaction so as to advance the inbuilt safeguard i.e. to avoid double jeopardy, to ensure fair investigation and to avoid abuse of power by the

concerned investigating agency.

13. It shall be quite advantageous to quote following portion from Para 14 of the judgment rendered by the Hon'ble Apex Court in the case of

Anju Choudhary v. State of Uttar Pradesh & anr. reported in (2013) 6 SCC 384.

On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there

can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognisable offence shall be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognisable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the policeâ!.

(Emphasis supplied)

Paras 15 and 44 are also advantageous to be quoted:

15. It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the Court to lay down one straight jacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case.

44. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the Court to take a view that they form part of the same transaction and therefore, there could be a

common FIR or subsequent FIR could not be permitted to be registered or there could be common trial.

(Emphasis added)

It shall be useful to quote Para 24 of the judgment rendered by the Hon'ble Apex Court in the case of Surinder Kaushak & Others v. State of

Uttar Pradesh & others, reported in (2013) 5 SCC 148:

24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The

concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected

cognisable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the

registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further

complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in

Upkar Singh (supra), the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same

incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible".

Again it shall be relevant to quote Para 42 of the judgment rendered by the Hon'ble Apex Court in the case of Amitbhai Anilchandra Shah v.

The Central Bureau of Investigation & anr:

42) In the case of Babubhai (supra), the very same Bench considered the permissibility of more than one FIR and the test of sameness. After

explaining FIR under Section 154 of the Code, commencement of the investigation, formation of opinion under Sections 169 or 170 of the Code,

police report under Section 173 of the Code and statements under Section 162 of the Code, this Court, has held that the Court has to examine the

facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same

incident in respect of the same occurrence or are in regard to the incidents having two or more parts of the same transaction. This Court further

held that if the answer is in affirmative, the second FIR is liable to be quashed. It was further held that in case the contrary is proved, where the

version in the second FIR is different and is in respect of the two different incidents/crimes, the second FIR is permissible. This Court further

explained that in case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim,

investigation on both the FIRs has to be conducted. It is clear from the decision that if two FIRs pertain to two different incidents/crimes, second

FIR is permissible. In the light of the factual position in the case on hand, the ratio in that decision is not helpful to the case of the CBI.

(Emphasis added)

14. For applying the test of ""sameness"" in the light of the law as laid down by the Hon'ble Apex Court, what is required to be ascertained is as to

whether the incident of death of the son of the respondent is part of the same incident regarding which FIR No.89/2016 has been registered. In this

behalf it is quite relevant to precisely notice the incident report based on which FIR No.89/2016 has been registered by Police Station, Batamaloo.

In the said incident report dated 10.07.2016 it has been mentioned that a violent mob led by four persons including deceased Shabir Ahmad Mir

blocked the movement of traffic towards internal Tengpora. They tried to set ablaze outpost of 73 Bn. CRPF and pelted stones heavily on CRPF,

SSB and police deployment on spot. For maintaining peace and tranquility and to prevent them from attacking CRPF outpost, security forces on

spot used tear smoke shells and pump action pellets to disperse the mob. During dispersal of mob, one miscreant Shabir Ahmad Mir (deceased

son of the respondent) sustained injury and has been taken to hospital for treatment by his other co-stone pelters. During investigation it appeared

that the said injured had succumbed to injuries in JVC. Police party rushed to JVC to take custody of the dead body but the agitating mob

prevented the police. In FIR No.89/2016 incident report is shown to have been received in Police Station on 10.07.2016 at 17.20 (means 5.20

PM).

15. It shall also be relevant to notice, precisely, as to what has been alleged by the respondent in his application filed before the Chief Judicial

Magistrate. He has specifically alleged in the application that on 10th July, 2016 at about 6.45 PM, he along with family members was watching

TV. Meanwhile, police party headed by Yasir Qadiri forcibly entered into the house

and started smashing window panes and doors of the house.

Wife of the respondent tried to stop the police officials but they got infuriated and physically assaulted her. Shabir Ahmad Mir, son of the

respondent, tried to rescue his mother but the said police officer started beating him and thereafter took out his pistol and fired two shots into the

body of the deceased on point blank range, as such, Dy. SP has committed cold blooded murder of his son. SHO concerned was approached for

registration of the case which he refused. In the said circumstances, respondent in the application had prayed that Police Station, Batamaloo, be

directed to register the case.

16. The question of one occurrence and then second occurrence to say form part of the same transaction, in the stated set of circumstances, at this

stage, is totally unimaginable. Regarding first occurrence in respect of which incident report had been submitted by the Police Constable to the

Police Station case has been registered as FIR No.89/2016. Date of receipt of incident report is shown as 10.07.2016 and the time is shown as

17.20 (means 5.20 PM) which would mean, that said occurrence had come to an end. The second occurrence, according to the averments

averred in the application filed by the respondent, has taken place at 6.45 PM, that too in the house of the respondent, as referred to above. How

the second occurrence could be said to be the part of first occurrence is totally bereft of any logic. Least said is better to avoid any prejudice to

either of the parties.

17. As per incident report filed before the Police Station at 17.20 (5.20 PM), deceased was injured during dispersal of mob but according to the

application filed by the respondent, police party headed by Dy. SP entered into their house at 6.45 PM on 10.07.2016, means on the same date it

was second occurrence. The position of occurrence having taken place at 6.45 PM is apparently supported by the copy of Emergency Ticket

issued by SKIMS Medical College, Bemina and the copy of medical certificate regarding cause of death shown to have been issued by the

Causality Medical officer, SKIMS Bemina, wherein it is clearly recorded that Shabir Ahmad was brought dead at 7.00 PM and, prima-facie,

cause of death is firearm injury. In the incident report based on which FIR No.89/2016 has been registered it has been mentioned that Shabir

Ahmad is known to have suffered injuries and then had been taken to JVC (SKIMS Medical College Hospital, Bemina) where he succumbed to

injuries which position, at this stage, is repelled by the medical certificate wherein he is shown to have been brought dead to the hospital at

7.00PM. The distance from Tengpora to JVC hospital Bemina can be covered within less than ten minutes. Apparently allegation of the

respondent that the occurrence took place at 6.45 PM at Tengpora appears to be genuine in view of the medical certificate and the admission

(Emergency) ticket issued.

18. In the application respondent has specifically named the assailants whereas in the incident report lodged by the Police, allegation is that a

violent mob was led by four persons including the deceased. In that report deceased has been cited as an accused whereas in the application filed

by the respondent, Dy. SP and his party has been alleged to have committed the murder.

19. Applying the test of "sameness" at this stage it can be safely said that the two incidents are of different times with involvement of different

persons. There is no commonality between the two, the two occurrences emerge from two different circumstances. At this stage there is no

question of treating them as one occurrence or treating the second occurrence as part of the first transaction. In my view I am fortified by Para 44

of the judgment rendered in Anju Choudhary's case and also by Para 24 of the judgment rendered in Surinder Kaushak's case as quoted above in

Para 13.

20. Learned AAG next contended that learned Chief Judicial Magistrate by order impugned has directed SSP to register case when in terms of

Section 156(3) Cr. P. C, direction should have been issued to the SHO of concerned Police Station. The argument is totally misplaced because

Section 551 Cr. P. C provides that police officers superior in rank to an officer-in-charge of a police station may exercise the same powers,

throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

21. Learned AAG next contended that in terms of Section 156(3) Cr. P. C, Magistrate must have the power and jurisdiction to order

investigation. In this context would contend that the alleged accused are the

police officials (public servants), they are entitled to protection under Section 197 Cr. P. C. Again this argument is misplaced. The wording employed in Section 197 Cr. P. C is that the Court has not to take cognizance of an offence alleged to have been committed by public servant while acting or purporting to act in discharge of his official duties except with previous sanction. When Magistrate exercises power under Section 156(3) Cr. P. C, the cognizance is not required to be taken. It must appear from the order that the Magistrate has applied the judicial mind. In this connection Para 23 of the judgment rendered in the case of Priyanka Srivastava and another v. State of Uttar Pradesh and others, reported in (2015) 6 SCC 287 is relevant to be quoted:

23. In Dilawar Singh v. State of Delhi, this Court ruled thus(SCC p.647, para 18):

18â?|...'11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognisable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognisable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

(Emphasis added)

22. Again learned AAG would submit that under Section 156(3) Cr. P.C, Magistrate could not order registration of the case in view of protection available under Section 132 Cr. P. C. The argument is in wilderness. Chapter IX of the Code deals with unlawful assemblies. Sections 127 to 131 provides as to how command can be issued for dispersal of the mob or any unlawful assembly causing disturbance to the public peace. The first

occurrence wherein it was mentioned that a violent mob attacked CRPF etc. and blocked the road. For their dispersal security forces used tear

smoke shells. The protection under Section 132 Cr. P. C is available to the public servant in the course of those events. The second occurrence is

not connected with dispersal of the mob or a part of that action as noted above. Allegedly while entering into the house, smashing window panes,

beating woman, killing her son by no stretch of imagination, at this stage, can be said to be within the ambit of Chapter IX of the Code of Criminal

Procedure.

23. The respondent while seeking invocation of jurisdiction of the learned Magistrate under Section 156(3) Cr. P. C has filed an application

supported by a duly sworn affidavit which is found to be in-keeping with law laid down by the Hon'ble Apex Court in the case of Priyanka

Srivastava and another v. State of Uttar Pradesh and others (supra).

24. The scope for exercising power under Section 561-A Cr. P. C is well defined. The Court in the broader perspective has to ensure that there is

no failure/miscarriage of justice and also to prevent abuse of process of any court. The power has always to be exercised very sparingly and

cautiously.

25. In the background of the facts, circumstances and the law as noticed above, learned Chief Judicial Magistrate has exercised the power well

within the confines of law. Both the orders dated 18.07.2016 and 28.07.2016 are in conformity and in consonance with law, do not suffer from

any illegality. Same will not result in causing any injustice nor is found, in any manner, to be abuse of process of the court. Both the orders are up-

held. A word of caution, in the event of any default in implementing the said order, learned Chief Judicial Magistrate shall proceed in accordance

with law and if required shall adhere to the procedure governing contempt proceedings. Petition being devoid of merit is, accordingly, dismissed

along with connected Cr.MP.

26. Copy of the order be sent to the learned Chief Judicial Magistrate, Srinagar, for information.