
(1993) 05 CAL CK 0003
In the Calcutta High Court
Case No : Crl Rev. No. 1520 of 1992

Sudhanshu Kamal Mazumdar

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 31-05-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 155(2), 173, 190
Penal Code, 1860 (IPC) — Section 323

Citation : 98 CWN 815

Hon'ble Judges : Gitesh Ranjan Bhattacharjee, J

Bench : Single Bench

Advocate : Himangsu De, A. Jana and S.S. Mahapatra, for the Appellant; Milan Mukherjee, Gautam Das and Subir Ganguly, for the Respondent

Final Decision : Dismissed

Judgement

Gitesh Ranjan Bhattacharjee, J.—An interesting question of law has been projected in connection with this revisional application. A police officer submitted after investigation, a prosecution report against the present petitioner accused in respect of an offence punishable u/s 323 I.P.C. An offence under the said section is non-cognizable. In view of section 155(2) Cr. P.C. no police officer can investigate a non-cognizable case without the order of a competent Magistrate. Sub-section (3) of Section 155 Cr. P.C. provides that any police officer receiving such order of a competent Magistrate to investigate a non-cognizable case may exercise the same powers in respect of the investigation, except the power to arrest without warrant, as an officer-in-charge of a police station may exercise in a cognizable case. Sub-section (1) of section 155 requires that when information about the commission of a non-cognizable offence is given to the officer-in-charge of a police station such officer shall record the same and refer the informant to the Magistrate. Therefore, the picture that emerges on a reading of the sub-sections (1), (2) and (3) of Section 155 Cr. P.C. is that on receipt of an information about the commission of a non-cognizable offence the officer-in-charge of the police station is required to record the information in the

prescribed book and to refer the informant to the Magistrate, instead of taking up any investigation into the matter. There is an express prohibition that no police officer shall investigate a non-cognizable case without the order of a competent Magistrate and it is only after receiving such order of a competent Magistrate to investigate any particular non-cognizable case the police officer may exercise the same powers in respect of the investigation as is available for investigating a cognizable case except the power to arrest without warrant. It is therefore evident that the order or permission of the competent Magistrate to investigate a non-cognizable case must be obtained beforehand. In other words, there must be prior permission or order of the Magistrate so as to authorise police investigation in a non-cognizable case. Subsection (4) of Section 155 Cr. P.C. however provides that where a case relates to two or more offences of which at least one is cognizable case. Sub-section (4) of section 155 Cr. P.C. however provides that where a case relates to two or more offences of which at least one is cognizable the case shall be deemed to be a cognizable case in which event however the police will be entitled to investigate in respect of all offences, cognizable and non-cognizable, involved in the case. In our present case the police was, it seems, activated by a telephonic information received at the police station at 23.45 hours on the 4th July, 1988 and the police after investigation submitted prosecution report on 20th July, 1988 u/s 323 I.P.C. as already noted. The question that has been primarily raised in this revisional application by the petitioners accused is that the police investigated the case without any permission or order of the Magistrate although it was a non-cognizable case and as such the cognizance taken by the learned Magistrate on the basis of police report in respect of a non-cognizable offence is bad in law and as such the cognizance taken by the learned Magistrate on the basis of police report in respect of a non-cognizable offence is bad in law and as such the entire proceeding is liable to be quashed. The G.D. entry by which the police was activated does not disclose commission of any cognizable offence. In the prosecution report it is stated that a prayer was made to the learned S.D.J.M. for obtaining necessary permission to inquire into the matter. Neither the prosecution report nor the I.O. in his evidence says that any permission was in fact granted by the learned Magistrate in favour of the police to investigate the case. Making of a prayer for permission and grant of permission are entirely different matters. Mere seeking permission will not authorise the police to investigate a non-cognizable case so long permission is not actually granted by the competent Magistrate. In the prosecution report mention has been made of a copy of order-sheet dated 18th July, 1988 of the learned S.D.J.M.'s Court in connection with the concerned G.D. entry. The ordersheet, either the original or any copy thereof, is however not traceable. It is argued on behalf of the opposite parties that the said order-sheet would have shown that necessary permission had been granted by the learned Magistrate for police investigation. As I have already mentioned the prosecution report was submitted on the 20th July, 1988. Even if it is assumed that the missing order-sheet dated the 18th July, 1988 would have shown that the learned Magistrate had granted permission to

investigate the case obviously such permission must have been granted, if at all, on the 18th July, 1988, that is, the date on which the said order-sheet was drawn up. But it appears that police on receipt of the information about the commission of the offence on 4th July, 1988 took up the Investigation and made spot inquiries on July, 1988. Therefore it is evident that the investigation had been started by the police before obtaining the permission or order of the Magistrate in that behalf. Evidently, therefore, the police did not act in conformity with the provision of section 155 Cr. P.C. On receipt of the prosecution report the learned Magistrate however took cognizance on 18th August, 1988 and thereafter the case proceeded and the prosecution examined during trial as many as 8 witnesses including the Investigating Officer and most of the witnesses were also cross-examined on behalf of the accused petitioners. Virtually the prosecution witnesses have all been examined and the proceeding in the court below has reached the stage of examination of the accused persons u/s 313 Cr. P.C. when the proceeding has been challenged.

2. On the question of law whether the cognizance taken by the learned Magistrate on the basis of the prosecution report submitted in respect of an offence u/s 323 I.P.C. is bad, several decisions have been cited at the bar. In support of his argument that the investigation without the order of a Magistrate under the mandatory provision of section 155(2) Cr. P.C. is bad in law and therefore the entire proceeding is liable to be quashed, Mr. Dey, the learned Advocate for the petitioner has relied upon the Single Bench decisions of this Court in *Harilal Shaw vs. State of West Bengal*, 89 CWN 557, *Pannalal Manna v. State*, 1990 C.CrLR (Cal) 179 and *Abdul Halim and Another Vs. State of West Bengal*, In support of his argument that illegality is immaterial, Mr. Dey has also relied on the Division Bench decisions of the court in *Jay Shankar Jha vs. State*. 86 CWN 242 and *Utpalendu Mahato vs. State*. 94 CWN 981. It is however to be noted that in none of those decisions, the decision of the Supreme Court in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, was considered. In the said Supreme Court decision in *Rishbud* it has been held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial Mr. Dey has attracted my attention to the following observation of the Supreme Court in *Rishbud* (at page-204, *ibid*):

We are, therefore clearly, also of the opinion that where the cognizance of the case has in fact been taken and the case has in fact been taken and the case has proceeded to termination, the invalidity of the preceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

3. It is submitted by Mr. Dey that the decision of the Supreme Court in *Rishbud* is therefore applicable only where the case has proceeded to termination after trial and it does not apply where the objection is raised before termination of the proceeding after trial as has been done in the present case. On a careful reading

of the decision of the Supreme Court in Rishbud I however find it difficult to agree with Mr. Dey. Paragraph-10 of the decision in Rishbud clearly indicates that the principle enunciated in the said decision is also applicable even at an earlier stage when the defect is brought to the notice of the court during trial. Applying the ratio of the decision of the Supreme Court in Rishbud that cognizance of case on a police reprot, even though in breach of the provisions of the Code relating to investigation, cannot warrant a reversal of the order of conviction, unless the illegality in the investigation can be shown to have brought about a miscarriage of justice, a Division Bench of this Court presided over by the Hon"ble the Chief Justice has observed in Satya Narayan Pandey vs. State of West Bengal 1991 C.Cr.Lr (Cal)25 that the principle is well-settled, as enacted in section 465 Cr. P.C. that no error, omission or irregularity in any proceeding before or during the trial can, by itself, warrant a reversal or alteration of any finding, or sentence unless a failure of justice has in fact been occasioned thereby. Mr. Dey has also relied upon two Single Bench decisions of this Court in Raton Sarkar vs. The State, 1990(1) CHN 402 and Subodh Singh vs. State, 1974 CrL.L.J. 185. In none of these decisions also the Supreme Court decision in Rishbud was considered. The facts in the decision of Raton Sarkar (supra) are also distinguishable inasmuch as in the said case police report in respect of a non-cognizable offence was submitted without any investigation. Apart from the overriding effect of the decision in Rishbud followed in Satyanarayan (supra), I however need not advert to other aspects of the matter in this case because in our present case the offence involved is a non-cognizable one whereas the offence involved in the case of Rishbud was a cognizable one and also because in the present Code of Criminal Procedure, 1973 a specific provision has been made in section 2(d) regarding the status of a police report in respect of a non-cognizable offence. Section 2(d) of the Code runs thus :

(d). "Complaint" means any allegation made orally or in writing to a Magistrate with a view to his taking action under this code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant.

4. Police report has been defined in section 2(r) of the Code as a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173. By definition in section 2(d) a police report cannot be treated as complaint but the Explanation to section 2(d) of the Code makes it clear that a police report which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint and the police officer making such report shall be deemed to be the complainant. Now, three situations are covered by the aforesaid definition of complaint under which a police report is required to be

treated not as a police report but as a complaint.

These three situations are as follows :

1) The First Information Report discloses commission of a cognizable offence or both cognizable and non-cognizable offences and the police on the basis of their own authority investigate the case without requiring any order or permission of Magistrate, but only commission of non-cognizable offence is disclosed after such investigation and police report is submitted accordingly.

2) The information received by the police discloses commission of only non-cognizable offence and the police investigate the case after obtaining necessary permission of the Magistrate u/s 155(2) Cr. P.C. and submit report to the Magistrate in respect of non-cognizable offence after investigation, and

3) The information received by the police discloses commission of only non-cognizable offence and the police investigate the case without the permission or order of Magistrate required u/s 155(2) Cr. P.C. and submit prosecution report to the Magistrate in respect of non-cognizable offence after investigation.

5. Since in all these situations only non-cognizable offence is disclosed after investigation a police report in respect of such offence will come within the definition of "complaint" in view of the Explanation to section 2(d) of the Code. Where however a police report is submitted after investigation and such report discloses either commission of cognizable offence only or commission of both cognizable and non-cognizable offences, in that case such report will have to be treated and dealt with as a police report in accordance with law and not as a complaint. The import of the word "discloses" as used in the Explanation to section 2(d) of the Code may be compared with the import of the same word as used in sub-section (3) of the Section 154 of the Code. The said sub-section (3) provides that in case of a refusal on the part of an officer-in-charge of a police station to record information relating to the commission of a cognizable offence the aggrieved person may report the matter to the concerned Superintendent of Police who "if satisfied that such information discloses the commission of a cognizable offence" shall either investigate the case himself or direct the investigation to be made by a subordinate police officer (emphasis supplied). This brings out the distinction more clearly. There is no doubt that even for undertaking an investigation in respect of a cognizable offence the First Information Report must disclose commission of such offence. But in order to treat a police report in respect of a non-cognizable offence as a complaint the commission of such non-cognizable offence must be disclosed after investigation as provided in the Explanation to section 2(d). Therefore if in any of the above noted three situations a police report discloses after investigation the commission of non-cognizable offence only, such report will have to be treated as complaint and not as police report, irrespective of the question whether the investigation was started on the basis of information disclosing commission of cognizable offence only or both cognizable and non-cognizable offences or non-cognizable

offence only. Therefore whenever after investigation a police report is submitted in respect of non-cognizable offence only and the Magistrate takes cognizance thereon he must be deemed to have taken cognizance on a complaint under clause (a) of sub-section (1) of Section 190 Cr. P.C. and not under clause (b) thereof. It is also a cardinal principle that where an official or judicial act is undertaken without expressly referring to any particular provision of law as authorising such act, the same shall be deemed to have been undertaken in exercise of such power or function as is referable to such act under any particular provision of law applicable to the matter. In the present case, irrespective of the question whether permission was granted by the Magistrate to the police officer to investigate the case, the fact remains that the police officer after completion of investigation submitted a police report to the Magistrate in respect of a non-cognizable offence only and that being so the same was required to be treated by the learned Magistrate as a "complaint" and not as a police report in view of section 2(d) of the Code. The cognizance taken by the learned Magistrate on such police report without mentioning as to under what particular provision of law such cognizance was taken, must therefore be deemed to have been taken by the Magistrate under clause (a) of sub-section (1) of section 190 and not under clause (b) thereof.

6. The Magistrate taking cognizance on complaint is required u/s 200 Cr. P.C. to examine the complainant and his witnesses present, if any. The proviso (a) to Section 200 Cr. P.C. however dispenses with the necessity of examining the complainant and his witnesses at that stage if the complaint has been made by a public servant acting in the discharge of his official duties. In the situations (1) and (2) recorded earlier where the police officer investigates a case relating to information of cognizable offence alone or cognizable and non-cognizable offences together or, with the permission of Magistrate u/s 155(2) Cr. P.C. investigates a case relating to information of commission of non-cognizable offence only, such officer obviously acts in the discharge of his official duties in investigating such case. Obviously in submitting police report after investigation in respect of non-cognizable offence or offences alone as may be disclosed by investigation in such cases the concerned investigating police officer acts in discharge of his official duties and in such cases the Magistrate taking cognizance on such police report as complaint need not examine the complainant police officer and the witnesses u/s 200 Cr. P.C. But even in such cases the Magistrate taking cognizance will have to take recourse to the procedure prescribed for dealing with a complaint and not to the procedure prescribed for dealing with a police report. Also in the situation no. 3 described earlier where the police officer on receipt of an information relating to commission of non-cognizable offence only makes an inquiry or investigation into the case without obtaining any order or permission of the Magistrate u/s 155(2) and submits a prosecution report before the Magistrate, the magistrate is indeed required to treat such police report as complaint and deal with the same accordingly in accordance with law. However in such case it cannot be said that the police officer in undertaking an

investigation into a non-cognizable offence without the permission or order of Magistrate and in submitting the prosecution report before the Magistrate in respect of only non-cognizable offence on the basis of such unauthorised investigation acted in discharge of his official duties. In such case, the Magistrate, therefore, cannot dispense with the necessity of examining the complainant and his witnesses at the stage referred to in Section 200 Cr. P.C. and in such case the Magistrate has to examine the complainant police officer who submits the police report and the witnesses if present, at that stage. This distinction as to how a police report has to be dealt with as a complaint, at the initial stage, between the cases where the preceding investigation is not unauthorised and where such investigation is unauthorised, although followed in both cases by a report of the police officer disclosing commission of non-cognizable offence only, should be borne in mind by the Magistrates in dealing with such police report as complaint in view of the definition given in Section 2(d) Cr. P.C.

7. In the present case, since the trial of the non-cognizable offence u/s 323 I.P.C. is required to be held by following the summons procedure and since for a summons procedure case the procedure is rather the same with very little difference for a police report case and a complaint case, the learned Magistrate in proceeding with the trial of the case followed the procedure which is applicable to the case although the case was started on the basis of a complaint submitted by a police officer in the form of police report in respect of a non-cognizable offence. But where the learned Magistrate erred is that he did not examine the complainant police officer and the witnesses, if any, u/s 200 Cr. P.C. which he should have done because the police officer submitting prosecution report in this case after investigation without obtaining prior permission of the Magistrate u/s 155(2) Cr. P.C. cannot be said to have acted in discharge of his official duties in making the complaint and therefore the exemption under the proviso (a) to section 200 of the Code was not available to him. This irregularity arising out of the non-examination of the complainant police officer and the witnesses, if any, u/s 200 Cr. P.C. however is curable u/s 465 Cr. P.C. unless such irregularity has occasioned a failure of justice. In the present case the complainant police officer and the witnesses have been examined in the trial and the petitioner accused also cross-examined them and I find no reason to hold that non-examination of the complainant police officer and the witnesses earlier u/s 200 Cr. P.C. has occasioned any failure of justice. Sub-section (2) of Section 465 provides that in determining whether any error, omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In the present case the objection in respect of the irregularity was not taken at an earlier stage when it could or should have been taken. Prosecution have already examined their witnesses numbering as many as 8 and the stage is now set for examining the accused persons u/s 313 Cr. P.C. Having regard to the facts and circumstances I am of the opinion that no failure of

justice has been occasioned in this case by reason of the irregularity mentioned above and therefore there is no reason for this Court to interfere with the proceeding in the court below at this stage. The revisional application is accordingly dismissed with this direction that the learned Magistrate will dispose of the case in accordance with law as expeditiously as possible and without undue delay. The Lower Court records be sent down immediately.