

(1971) 04 BOM CK 0014
In the Bombay High Court

The State of Maharashtra

APPELLANT

Vs

Ramlakhan Jagnarayan Upadhya

RESPONDENT

Date of Decision : 12-04-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 195(1)(b)
Penal Code, 1860 (IPC) — Section 211

Citation : (1971) CriLJ 1778 : (1971) MhLj 704

Hon'ble Judges : Chandurkar, J

Bench : Single Bench

Judgement

Chandurkar, J.—This is a reference made by the Additional Sessions Judge, Khambgaon. Camp at Yeotmal. recommending "that as the Judicial Magistrate, First Class, Darwaha. had no -jurisdiction to take cognizance of the alleged offence u/s 211 of the Indian Penal Code against the accused-opponent the proceedings before the Magistrate should be quashed. An offence u/s 302 Indian Penal Code, in which relatives of one Baliram of village Mangkinhi were involved was being investigated by Police Sub Inspector Kshirsagar of Darwaha Police . Station. On 7-3-1969 Ramlakhan. the opponent, who was a police constable, gave a report at Darwaha Police Station that Baliram had approached him and had paid him Rupees 25/- and had further asked him to persuade Police Sub-Inspector Kshirsagar to help his relatives in the case which Kshirsagar was investigating. Ramlakhan had also reported that Baliram had promised that some more amount would be paid as illegal gratification to police Sub-Inspector Kshirsagar. On this report an offence was registered against Baliram, but during investigation it was found that Ramlakhan himself had obtained about Rs. 600/- from Baliram and assured him that he would tell Kshirsagar to help Baliram's relations in the investigation. The Darwaha police therefore submitted a final report to the Judicial Magistrate. First Class, Darwaha and asked for rent of "B" summary. The learned Magistrate granted "B" Summary and ordered prosecution of Ramlakhan u/s 211 of the Indian Penal Code. Thereafter Darwaha police filed Istagasha against Ramlakhan for an offence u/s 211 of - the Indian Penal Code and cognizance was

taken by the Judicial Magistrate on the basis of this Istaghasha.

2. An objection was filed by Ramlakhan that in the absence of a complaint from the Magistrate, who granted the "B" summary, the Magistrate had no jurisdiction to take cognizance of the offence. This application was, however, rejected.

3. Ramlakhan then filed a revision application before the Additional Sessions Judge. The Additional Sessions Judge relying on a decision of this Court in *Bajaji Appa.ii v. Emperor* AIR 1946 Bom. 7 held that in view of the provisions of Section 195 (1) (b) of the Criminal Procedure Code, hereinafter referred to as the Code, in the absence of any complaint by the Magistrate, who issued "B" summary, the Judicial Magistrate could not have taken cognizance of the offence u/s 211 of the Indian Penal Code. He, therefore, took the view that the proceedings before the Magistrate were without jurisdiction and should be quashed. He has accordingly made this reference.

4. The learned Additional Government Pleader opposed the reference. As the accused was not represented a counsel was appointed to appear and argue for him. Shri K. H. Deshpande, Advocate appearing for the accused supported the reference and it is contended that the reference should be accepted.

5. I have heard Shri Deshpande and the learned Additional Government Pleader at great length and I am inclined to take the view that the reference cannot be accepted on the facts of the instant case. At the outset it has to be pointed out that the decision in *Baiaii's* case. AIR 1946 Bom 7 was inapplicable to the facts of the instant case. In that case the Question was whether, where information of an offence given to the police is followed by a complaint to a Magistrate's Court based on the same allegations, a complaint of the Court itself was necessary u/s 195 (1) (b) of the Code for taking cognizance of an offence punishable u/s 211 of the Penal Code in respect of the false charge made to the police. The facts in that case were that on 13th October 1942 Bajaji gave information to the police patil of Shirdi that one Amlok Khushal was in possession of wheat stolen from his house. On investigation this complaint was found to be false and so.. on a report made u/s 173 of the Code, the Sub Divisional Magistrate granted a "B" summary and the police then sent a charge-sheet against the petitioner u/s 211 of the Penal Code, but before the police had sent a charge-sheet u/s 211 of the Penal Code Baiaii had filed a regular complaint on the same facts before the Resident Magistrate, Belapur Road, and that complaint eventually ended in the discharge of the accused. The case against Bairiki u/s 211 of the Penal Code which had been sent up by the police, but had been kept pending till then was taken up for trial and Baiaii then contended that the trial could not go on without a complaint from the Resident Magistrate, Balapur Road, u/s 195 (1) (b) of the Code. This contention was rejected and the trial was proceeded with. The learned Sessions Judge, Ahmednagar, having declined to interfere in the matter Baiaii approached the High Court by filing a revision application.

6. Referring to these facts it was observed that it was not disputed before the High Court that Baiii's complaint before the Police Patil of Shirdi and that before the Resident Magistrate of Belapur Road related to the same incident and the identical offence and the High Court further observed:

We are therefore, clearly of opinion that where an alleged false complaint is first made to the police and then to a Court, a complaint u/s 211. Penal Code, subseauen"tlv filed is a complaint of an offence alleged to have been committed in. or in relation to a proceeding in Court and cannot be taken cognizance of except on the complaint of the Court.

The decision in Baiii's case. AIR 1946 Bom 7 on the basis of which the reference is made by the learned Additional Sessions Judge shows that it clearly related to a case, where, after a report was made to the police, a regular complaint on the same facts was made to the Magistrate and it was, therefore, held that in respect of such a false complaint cognizance of an offence u/s 211 of the Penal Code cannot be taken except on a complaint by a Magistrate in view of the provisions of Section 195 (1) (b) of the Code.

7. Such, however, are not the facts in the instant case. It is, however, vehemently contended by the learned Counsel appearing on behalf of the accused that the order passed by the Magistrate, who granted "B" summary is a judicial order and the prosecution instituted against the accused for the offence u/s 211 of the Indian Penal Code relates to a false charge made in a proceeding which has ended before the Magistrate, and therefore, cognizance of the offence could not be taken by the Magistrate except on a written complaint made by the Magistrate himself. Strong reliance is placed on the decision of the Supreme Court in M.L. Sethi Vs. R.P. Kapur and Another, . The Supreme Court in this case, after referring to the provisions of Section 195 (1) (b) of the Code, observed that Section 195 (1) (b) was a limitation on the power of the Court to take cognizance u/s 190 with respect to an offence punishable u/s 211 of the Indian Penal Code" and that it is. at the stage when a Magistrate is taking cognizance " u/s 190 that he must examine the facts of the complaint before him and determine whether his power of taking cognizance u/s 190 has or has not been taken away by Clause (b) of Sub-section (1) of Section 195 of the Code. Referring to the three situations possible with reference to the proceedings as contemplated by Section 195 (1) (b). the Supreme Court in para 13 of the judgment observed:

When examining the Question whether there is any proceeding in any Court, there are three situations that can be envisaged. One is that there may be no proceeding in any Court at all. The second is that a proceeding in a Court may actually be pending at the point of time when cognizance is sought to be taken of the offence u/s 211. IPC The third is that, though there may be no proceeding pending in any Court in which or in relation to which the offence u/s 211. IPC could have been committed, there may have been a proceeding which had already concluded and the offence u/s 211 may be alleged to have been committed in. or in relation to. that proceeding. It seems to us that in both the

latter two circumstances envisaged above, the bar to taking, cognizance u/s 195 (I) (h) would come into operation. If there be a proceeding actually pending in any Court and the offence u/s 211. IPC is alleged to have been committed in relation to that proceeding, Section 195 (1) (b) would clearly apply. Even if there be a case where there was, at one stage, a proceeding in any Court which may have concluded by the time the question of applying the provisions of Section 195 (1) (b) arises, the bar under that provision would apply if it is alleged that the offence u/s 211. IPC was committed in or in relation to. that proceeding. The fact that the proceeding had concluded would be immaterial because Section 195 (I) (b) does not require that the proceeding in any Court must actually be pending at the time when the question of applying this bar arises.

Reliance is then placed on certain observations made by the Court in the same case in paragraph 31 of the judgment in which a reference was made to a decision of this Court in *State v. Murlidhar Govardhan*. AIR 1960 Bom. 240 in which it has been held that when a , Magistrate . passes an order on the proceedings u/s 173. Criminal Procedure Code, that order is a judicial order made by him. The Supreme Court has observed with reference to the facts before it;

For purposes of considering the effect of these cases in the case before us, it is not at all necessary to express any opinion on the correctness of the view that" the order passed u/s 173. Cr.PC by the Magistrate is a judicial order when he either discharges the bond under Sub-section (3) of Section 173. or takes cognizance u/s 190 (1) (b), Cr.PC Even it be accepted that the final orders to be made by the Magistrate are judicial orders, the only conclusion that follows is that at the last stage, on receipt of the report u/s 173. the Magistrate has to act in his judicial capacity. Until that stage is reached, there is no intervention by the Magistrate in his judicial capacity or as a Court. Consequently, until some occasion arises for a Magistrate to make a judicial order in connection with an investigation of a cognizable offence by the police no question can arise of the Magistrate having the power of filing a complaint under" Section 195 (1) (b), Cr.PC" On the basis of these observations quoted above it is vehemently argued for the accused that the instant case is covered by the last category of cases referred to by the Supreme Court earlier, namely. that a proceeding was at one time pending before the Magistrate and has been disposed of though it was not actually pending at the time when prosecution u/s 211 of the Indian Penal Code was launched and since the order passed on the report made to the Magistrate u/ s 173 of the Code was a judicial order, the false complaint made to the police by the accused must be read as one relating to the proceedings which had been disposed of by the Magistrate, and therefore, unless a complaint was made u/s 195 (1) (b) of the Code by the Magistrate cognizance of the offence u/s 211 of the Indian Penal Code could not be taken by the Magistrate.

8. It is. however, argued on behalf of the State by the learned Additional Government Pleader that unless cognizance of an offence is in fact taken by the

Magistrate there could not be said to be any proceedings before the Magistrate and since in the instant case no cognizance was taken by the Magistrate, but only "B" summary was issued, a complaint by the Magistrate u/s 195 (1) (b) was not necessary. It has not been seriously disputed before me on behalf of the State that the order passed by the Magistrate was passed in his judicial capacity as a Magistrate, The question, however, is whether merely because on a report submitted u/s 173 of the Code a Magistrate comes to apply his judicial mind and accepts the said report, a statement made by a person laying a false charge in a report made to the police on the basis of which the investigation was commenced,, the statement becomes one in relation to a proceeding before the Magistrate or whether the statement continues to be one in relation to a proceeding in investigation.

9. The nature and the scope of the jurisdiction of a Magistrate when a report is made to him u/s 173 of the Code and the investigating authority teaches a conclusion that there is not enough material or evidence to prosecute the accused came up for consideration before the Supreme Court in *Abhinandan Jha and Others Vs. Dinesh Mishra*, . This decision expressly overruled the view taken by this Court in AIR 1960 Bom 240 (cit. supra) where it had been held that the Magistrate had jurisdiction to direct the police to file a charge-sheet when a report u/s 173 of the Code was submitted to the Magistrate and the Investigating authority had asked for a summary that there was not enough material or evidence to prosecute the accused. In para 12 of the judgment the Supreme Court observed:

Though it may be that a report submitted by the police may have to be dealt with judicially, by a Magistrate. and although the Magistrate may have certain supervisor powers, nevertheless, we are not inclined to agree with the further view that from these considerations alone it can be said that when the police submit a report that no case has been made out for sending up an accused for trial, it is open to the Magistrate to direct the police to file a charge sheet. But, we may make it clear, that this is not to say that the Magistrate is absolutely powerless, because, as will be indicated later, it is open to him to take cognizance of an offence and proceed, according to law.

Referring to the provisions of Section 190 (1) (c) of the Code the Supreme Court observed in para 17 of the judgment:

There is no express power, so far as we can see. which gives jurisdiction to pass an order of the nature under attack nor can any such powers be implied. There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police.... It is open to the Magistrate to take cognizance of the offence, u/s 190 (1) (c). on the ground that, after having due regard to the final report and the police records placed before him. he has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The

entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the Officer-in-charge of the police station and that opinion determines. Whether the.... report. is to be u/s 170. being a "charge-sheet", or u/s 169. "a final report It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of. the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate....

(Underlining is mine)

The Supreme Court further observed in paragraph 18 of the judgment:

We have already pointed out that the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected a case is made out to place the accused before the Magistrate for trial, and the submission of either a charge-sheet, or a final report is. dependent on the nature of the opinion, so formed. The formation of the said opinion, by the police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority.

Reference may also be made to further observations in paragraph 19 of the judgment where it has been stated:

The functions of the Magistrate and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law. he cannot certainly infringe (sic. impinge?) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view.

This decision of the Supreme Court clearly indicates that though the jurisdiction which Magistrate exercises while issuing a "B" summary or accepting a final report u/s 170 is a judicial one and that the order passed by him can be classified as a judicial order, the report does not cease to be a_ final report of the Investigating authority. It was on the basis of the report made by the accused that the investigation had commenced and that investigation terminated with the report made u/s 173 of the Code, The report was accepted by the Magistrate though it was open to him, as observed by the Supreme Court in *Abhinandan Jha and Others Vs. Dinesh Mishra*, not to accept it but take cognizance of the offence itself or -direct a further enquiry to be made. None of these two things, however, happened and when the Magistrate accepted the report he put his seal on the opinion submitted to him by the Investigating authority that the material collected in the course of investigation if- not sufficient to "sustain a charge made by the accused a Earliest Baliram. or that the accusation had been found to be false. The statement made by the accused, therefore, clearly formed a part of

investigation proceedings and could not be said to have been made either in or in relation to a proceeding before the Magistrate. The nature of that statement is not changed from one made in the course of investigation to one made in or in relation to the proceedings before the Magistrate "merely because the Magistrate comes to apply his judicial mind to the question whether the report made by the Investigating authority who alone had the jurisdiction to decide whether such a report should be made or not, should be accepted or not.

10. The view which I have taken is also supported by an earlier decision of this Court in *Ukha Mahadu v. Emperor*. AIR 1928 Eom 22. In this case the facts were similar to the one in the instant case. The accused had made a complaint to the police that one Bai Saru had been murdered by her mother-in-law and had been thrown into a well by two persons. On investigation the complaint was found to be false and the police obtained a "B" summary form from a Magistrate. The Assistant Superintendent of Police sanctioned the prosecution of the accused and a complaint was lodged against the accused to a Magistrate who committed him for trial before the Sessions Court for the offence u/s 211, Indian Penal Code. After the committal order was passed the accused repeated to the Magistrate the complaint made by him to the police accusing the mother-in-law and three other persons of murder. The Magistrate eventually committed these four persons for trial in the Sessions Court on a charge of murder. The case regarding the offence of murder was tried first and the trial ended in an acquittal. The second case again, the accused was then taken up and it was objected to on the ground that no proceedings in regard to the falsity of the first complaint could be taken without the sanction of the Magistrate as the earlier complaint to the police had merged in the subsequent complaint to the Magistrate. The Sessions Judge having accepted the contention recommended to the High Court that the committal order should be quashed. It was held by a Division Bench that the committal order, when it was passed, was perfectly valid because at that time there had been no complaint made to the Magistrate which could supersede the complaint made to the police. It was further held by the Court that it was not open to the accused in this case to make the committal order invalid by merely making a subsequent complaint to the Magistrate. What was found in that case, therefore, was that when a complaint with regard to the offence u/s 211, Indian Penal Code, was made no proceeding before the Magistrate was pending and merely because subsequently a proceeding became pending in Court that did not vitiate the earlier proceedings u/s 211 of the Indian Penal Code. This decision was noticed in *Baiaii's* case by the Division Bench and the Division Bench found that the view which it was taking in *Baiaii's* case AIR 1946 Bom 7 is not in any way in conflict with the view taken by the earlier Division Bench. Referring to this case the Division Bench in *Baiaii's* case observed:

This view does not in any way conflict with the decision in 29 Bom LR 1590 = AIR 1928 Bom 22 where the case against the informant u/s 211, Penal Code, had been committed to the Sessions before he filed a complaint to the Court. After referring to the rulings of the Calcutta and Patna High Courts. Fawcett J.

observed:

This is in consonance with the principle laid down in 11 Pat. 155 " Subhag Ahir Vs. Emperor, that where a Magistrate takes cognizance of an offence u/s 211. Penal Code, nothing that happens subsequently can bring into operation the provisions of Section 195 (1) (b) so as to deprive him of his jurisdiction to proceed with the complaint of that offence and dispose of it according to law.

11. The Nagpur High Court has also taken the same view in Emperor v. Birdichand Chunnilal. AIR 1948 Nae 244 in which Pollock J. has held that the mere fact that a report was made u/s 173, Criminal Procedure Code, did,not mean that there were any proceedings in a Court. In that case one B had made a complaint to the Station House Officer of an offence u/s 392, Penal Code. This information was found to be false and a report u/s 173. Criminal Procedure Code. was made to the Additional District Magistrate. Subsequently a complaint against B u/s 211, Penal Code. was filed and this was objected to on the ground that the Court had no jurisdiction to trv the case in the, absence of a complaint by the Additional District Magistrate and it was held that as there were no proceedings in any Court Section 195 (1) (b) was no bar to the prosecution of the case.

12. The learned Counsel appearing on behalf of the accused also relied n a decision of the Andhra Pradesh High Court in Pedda Subha Reddv v. State AIR 1969 AP 2811. The facts of that case were clearly distinguishable. It was held in that case that where on a false complaint the accused was arrested but was released by the Magistrate on a report by the Police u/s 173 and later the accused filed a complaint u/s 211 of Penal Code- against the complainant, the complaint of the Accused cannot be taken cognizance of u/s 195 (1) (b) because the Magistrate acted in a judicial capacity in releasing the accused and hence, the complaint by the accused was in relation to a proceeding in a Court for which a complaint by Magistrate was necessary- It appears from this decision that the fact that a judicial order releasing a person on bail was made by the Magistrate has weighed with the Division Bench in holding that there was a judicial proceedings pending before the Magistrate.

13. The learned Counsel appearing on behalf of the accused also referred me to a decision of a Division Bench of this Court "in J. D. Bovwalla v. Sorab Rustomii Engineer AIR 1941 Bom 294. The facts in that case were that on the receipt of a complaint the Police started investigation and arrested a person and released him on bail, and subsequently applied to the Court to have the bail enlarged, and order to that effect was made. The police then investigated further into the matter and eventually made b report to the Magistrate saving that, as no offence has been disclosed against the person, he be discharged and his bail bond cancelled. On this the Magistrate passed an order discharging him. Subsequently the accused who was discharged filed a case u/s 211 against the original complainant and an objection was raised that the complaint made against the original complainant could not be taken cognizance of because it was the Magistrate who should have lodged the complaint u/s 195 (1) (b) of the Code.

The Question before the High Court was whether the making of the alleged false charge was committed in. or in relation to. a proceeding in Court. It was contended on behalf of the complainant before the High Court that the order extending the bail and discharging the accused and further cancelling his bail bond was an administrative order and not a judicial order. The learned Chief Justice observed: .

I am quite unable to accept that argument. Indeed, it is a novelty to me to hear it suggested that there is any authority which can make an administrative order discharging an arrested person from judicial custody. This man had been arrested, and released on bail, and. in my opinion, the only authority which could release him from custody. or from begin on bail, was Magistrate or Judge acting judicially, and I have no doubt whatever that the learned Magistrate acted and intended to act, as a Magistrate in a judicial capacity.

It was later observed in the iudgment:

Although the Code does not expressly so provide, I have no doubt that a Magistrate can act upon the report of a police-officer, as to the result of" a police inquiry undertaken under the Code in accordance with the powers conferred upon the police, and can discharge an accused person without further inquiry. But in such a case the order of the Magistrate is a judicial order which would be open to review by this Court.

In my opinion, therefore, the alleged false charge in this case was made" in or in relation to a proceeding in Court. It Resulted in the man begin actually arrested and brought before the Magistrate and dealt with by the Magistrate. Therefore, the complaint must be that of the Magistrate, and as there is no such complaint, the proceedings must be quashed.

(underlining is mine)

These observations will also show that the facts which weighed with the learned Chief Justice in taking the view in that case that a complaint in that case by the Magistrate was necessary was that the accused had been arrested and brought before the Magistrate and was dealt with by the Magistrate. The accused had been released on bail by the Magistrate and then his bail bond was cancelled and since the decision relied upon appears to have been based on the particular facts of that case it cannot be of any assistance to the learned Counsel for the applicant.

14. The result, therefore, is that the reference is rejected. The Magistrate was right in taking cognizance of the offence against accused Ramlakhan and he shall now proceed with the trial of the accused according to law.