
(2010) 05 PAT CK 0027
In the Patna High Court
Case No : Cr. Misc. No. 801 of 2008

Vijay Kant Thakur and Another	Vs	APPELLANT
Stale of Bihar and Another		RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Citation : (2011) 6 RCR(Criminal) 375

Final Decision : Dismissed

Judgement

Samarendra Pratap Singh. J.

1. The Petitioners have challenged the order dated 17-8-2005 passed in Simari P.S. Case No. 125 of 2005, whereby the Chief Judicial Magistrate, Darbhanga has taken cognizance for the offence u/s 302/34 of the I.P.C. and summoned them to face trial.

2. On Chalitar Sahni made his fardbeyan in D.M.C.H., Emergency ward at 7.50 P.M. He stated that around 7 p.m. on that day, 22 named accused along with others, including these Petitioners were waiting from before at Kanshi Manihash Chowk. As soon as the informant, along with his brother Sita Ram Sahni and Inder Sahni reached Chowk, on order of Petitioner No. 1 Vijay Kant Thakur, one Nathuni Sahni hurled knife blow in the chest of Sita Ram Sahni.

3. On 27-6-2003, the police initially submitted charge sheet against two named accused persons; namely Guletan Sahni, Guddu Sahni and two unnamed accused namely Tetar Sahni and Pitambar Sahni. The investigation was kept pending against rest of the accused persons. On 7-7-2003, learned Magistrate took cognizance of offence u/s 302/34 of the Penal Code and summoned the four charge sheeted accused to face trial.

4. After conclusion of investigation, the police submitted final report in favour of the Petitioners and other remaining accused against whom trial was pending.

5. The Petitioners submit that the police did not examine any fresh witness in the

investigation after submission of first charge sheet. The police merely conducted some ancillary investigations. Nonetheless, the learned Magistrate by its order dated 17-8-2005 differing with the police report, summoned these two Petitioners along with Nathuni Sahni, the main assailant to face trial.

6. Learned Counsel appearing for the Petitioners has assailed the impugned order on the following grounds:

i) Once cognizance is taken and accused is summoned to face trial, the Magistrate would be debarred from taking cognizance and summoning further accused to face trial.

ii) Once cognizance is taken, the stage of committal starts and the Magistrate cannot add further accused in the list of accused, against whom already processess have been issued, till stage of 319 Code of Criminal Procedure is reached.

iii) Though there were identical allegations against other 17 accused persons, the Magistrate took cognizance only against these two Petitioners.

7. In support of his contention, learned Counsel has relied upon decisions in the case of Raj Kishore Prasad Vs. State of Bihar and another, and in the case of Kishori Singh and Ors. v. State of Bihar and Anr., reported in AIR 2000 SC 3725: 2001 Cri LJ 123.

8. Counsel for the informant submits that the impugned order dated 17-8-2005 summoning the Petitioners to face trial u/s 302/34 of the Penal Code is just and proper. He submits that as long as the stage of Section 190(b) is not over, there is no bar on the power of the Magistrate to summon the accused persons against whom there is sufficient material to proceed. The police had earlier submitted partial charge sheet on 27-6-2003 against four accused persons. The investigation against others were kept pending. The Magistrate as such took cognizance against four accused persons against whom charge sheet was submitted.

9. On conclusion of investigation and submissions of supplemental charge sheet, the Magistrate took cognizance against the Petitioners and one Nathuni Sahni against whom investigation was kept pending. In support of his contention, learned Counsel for informant relied upon a decision in the case of M/s. SWIL Ltd. Vs. State of Delhi and Another,

10. The prosecution case was lodged against 22 named accused persons, including Petitioners and some unknown. The police after investigation submitted partial charge sheet on 27-6-2003, whereas investigation against other persons were kept pending. The Magistrate took cognizance of offence under Sections 302/34 of the Penal Code and summoned the four charge sheeted persons to face trial. The police after completing the entire investigation, submitted final report/ supplementary charge sheet on 31-1-2004 not sending any further accused for trial. The Magistrate vide his order dated 17-8-2005 differing with

the police report summoned the Petitioners and one Nathuni Sahni, finding prima facie materials against them. The learned Magistrate accepted the supplementary report/charge sheet in respect of 17 remaining accused, not finding sufficient materials to proceed against them.

11. A Police Officer has unfettered power to investigate a case. A Court should not normally interfere in its investigation unless and until it is totally misdirected and biased. In course of investigation the police may submit one police report u/s 173(2) and may as well submit more than one supplemental police report/charge sheet though submission of one police report u/s 173 Code of Criminal Procedure is always desirable and in tune with the scheme and object of the Code of Criminal Procedure.

12. To sum up, a police officer investigating a case may adopt any one of the following courses depending upon the facts and circumstances of the case:

- i) It may submit a police report u/s 173(2) or one charge-sheet after completion of total investigation.
- ii) It may submit a charge sheet against one or some of the accused persons and continue the investigation against others.
- iii) After submission of police report u/s 173(2) Code of Criminal Procedure after completion of total investigation, the police still may make further investigation u/s 173(8) Code of Criminal Procedure against a person in respect of other offences and against persons who has not been charge-sheeted and sent up for trial.
- iv) On the direction of Courts, in exceptional circumstances, the police may reinvestigate the case afresh which is usually done pursuant to Courts order transferring a case from one agency to other.

13. A Magistrate would be fully justified in issuing summons to accused persons against whom evidence may appear on submission of such successive or supplementary charge sheet. In the case of M/s. SWIL Ltd. Vs. State of Delhi and Another, the Apex Court observed that the High Court had held that the Court below was totally unjustified in summoning the Petitioner when he was not shown in the column of accused person in the charge sheet. The High Court observed that such a person could be summoned u/s 319 Code of Criminal Procedure only after evidence is recorded. Setting aside the judgment of the High Court, the Apex Court at Paragraph 7 held as follows:

7. Further, in the present case there is no question of referring to the provision of Section 319 Code of Criminal Procedure. That provision would come into operation in the course of any enquiry into or trial of an offence. In the present case, neither the Magistrate was holding enquiry as contemplated u/s 2(g) Code of Criminal Procedure, nor had the trial started. He was exercising his jurisdiction u/s 190 of taking cognizance of an offence and issuing the process. There is no bar u/s 190 Code of Criminal Procedure that once the process is issued against

some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge sheet.

14. Thus it would be evident from the decision of the Apex Court that there is no bar on the power of the Magistrate to summon accused persons on different date till the stage u/s 190(b) is not over. The decision rendered in the case of Raj Kishore Prasad Vs. State of Bihar and another, and in the case of State of M.P. Vs. Bhagwan Singh and Others, would not be of any help to the Petitioner as they are clearly an authority on the proposition that a Magistrate undertaking commitment u/s 209 Code of Criminal Procedure of a case triable by Court of Sessions cannot associate or add a person as an accused. In such circumstances a person can be added as an accused only at stage of Section 319 Code of Criminal Procedure and not even at stage of Section 193 Code of Criminal Procedure. A Division Bench of this Court in case of Lal Keshri Devi and Others Vs. Smt. Duleshwari Devi, observed as follows:

4. On going through the judgment in the case of Ram Nandan Singh (supra) it is noticed that the said case was decided not on the basis of power available to the Magistrate u/s 190 Code of Criminal Procedure but on the basis of scope of power u/s 319 Code of Criminal Procedure and appropriate stage for its exercise as appearing from judgment of the Supreme Court in the case of Ranjit Singh Vs. State of Punjab, and in the case of Kishori Singh and Ors. v. State of Bihar reported in (2004) 13 SCC 11: 2001 Cri LJ 123. The judgment in the case of Kishori Singh (supra) while following three Judges decision in the case of Ranjit Singh is clearly an authority on the proposition that power u/s 319 Code of Criminal Procedure can be exercised only on the basis of evidence collected during trial but not on the proposition that at the stage of cognizance a Magistrate cannot differ with the opinion of the Police so as to proceed even against persons not charge-sheeted by the Police. No doubt, prima facie, this judgment creates an impression that the Magistrate could not have issued process against those persons who may have been named in the F.I.R. as accused persons, but not charge-sheeted as per final report filed by the police u/s 173 Code of Criminal Procedure. But on careful perusal of facts of that case it is clear that on 10-6-1997 the Magistrate took cognizance only against the charge-sheeted accused without differing with the opinion of the Police in respect of three Appellants of that case who were not charge-sheeted. Later, on 22-10-1997 the Magistrate proceeded to issue warrant even against those three Appellants. Clearly, since the stage of cognizance was over, the Magistrate had no jurisdiction left in him as per three Judges Bench judgment in the case of Ranjit Singh. The ratio flowing from the case of Kishori Singh cannot be correctly appreciated if the stage at which the Magistrate passed the impugned order is not kept in mind. Thus, there is no scope for confusion that power of the Sessions Court u/s 319, Code of Criminal Procedure. does not take away power of the Magistrate to take cognizance after differing with the opinion of the police.

15. In the case of Raj Kishore Prasad (supra), the issue was whether a Magistrate undertaking commitment u/s 209, Code of Criminal Procedure. of a case triable by a Court of Sessions can associate another person as an accused. The Apex Court held that the Magistrate at the stage of Section 209, Code of Criminal Procedure. is forbidden to apply his mind to the merit of the matter and determine whether an accused is to be added or subtracted as committal of case u/s 207 to 209, Code of Criminal Procedure. is not an enquiry as visualized u/s 2(g) or 319, Code of Criminal Procedure. The functions performed by a Magistrate at that stage is merely an preliminary and ministerial in nature.

16. The Petitioner has also placed reliance upon a case of Kishori Singh and Anr. v. State of Bihar, reported in AIR 2000 SC 3725: 2001 Cri LJ 123. In the aforesaid case after conclusion of the investigation the police submitted charge-sheet against some of the named accused persons. The Magistrate by order dated 10-6-1997 took cognizance against charge-sheeted accused u/s 302/34 of the Penal Code. Thereafter on same material on 22-10-1997 on prayer of prosecution, the Magistrate also summoned the Appellant Kishori Singh who was not charge-sheeted to face trial. In these circumstances, the Apex Court held that the Magistrate could not summon the additional person as an accused till the stage of Section 319, Code of Criminal Procedure. reached, as stage of cognizance was over on 10-6-1997, as by that time, no investigation was pending.

17. The aforesaid principle would not be applicable in the instant case, as in the above mentioned cases namely Raj Kishore Prasad (supra) and Kishori Singh (supra) the investigation had concluded and it was not pending against any accused person. In the aforesaid case the stage u/s 190(1)(b) read with Section 204, Code of Criminal Procedure. was over and the case was merely to be committed to the Court of sessions. In the case in hand, the factual position is different. Here, the stage u/s 190(1)(b) or of summoning the accused u/s 204, Code of Criminal Procedure. was not over, as the police investigation was pending against some of the accused persons. Initially only partial charge-sheet was filed on 27-6-2003 and investigations against majority of the accused persons remained pending. Thus, on 7-7-2003 cognizance was taken and summons were issued to those accused against whom investigation had concluded and charge-sheet was submitted on 27-6-2003. Later on, when investigation concluded against others in 2005, the Magistrate on 17-8-2005 took cognizance and summoned the accused against whom the Court found prima facie materials to proceed with. It is inconsequential that a final supplementary report was submitted against other accused persons. It is well settled that a Magistrate can differ with police opinion, even in sessions triable cases, if it finds that there is sufficient material to proceed even against persons not sent up for trial. The above position of law is well settled right from the decision in the case of Raghubans Dubey Vs. State of Bihar, our own Full Bench decision in the case of Kuli Singh v. State of Bihar, reported in 1978 BLJR 377 and Minu Kumari and Another Vs. The State of Bihar and Others,

18. Once investigation is full and complete against all accused and cognizance is taken, a stage of committal u/s 200 to 207, Code of Criminal Procedure. comes into play in sessions triable cases and then no accused can be added or subtracted by a Magistrate, as stage of taking cognizance and summoning accused persons u/s 190, Code of Criminal Procedure. and Section 204, Code of Criminal Procedure. are over. A stage of committal of a case qua accused persons generally begins only when investigation finally concludes or at least concludes against such accused whose case is being committed to Court of sessions u/s 209, Code of Criminal Procedure or transferred to another Magistrate for trial u/s 192, Code of Criminal Procedure The stage of taking cognizance upon a police report u/s 190(1)(b) was not yet over on 7-7-2003, as investigation had not concluded and come to an end against other accused. Equally, the stage of summoning the accused u/s 204, Code of Criminal Procedure too was not over till 17-8-2005, when the Magistrate on conclusion of pending investigation took cognizance against the Petitioners and one Nathuni Sahni and summoned them to face trial.

19. Thus, the contention of Counsel for the Petitioner that once the Court has summoned some of the accused persons on submission of partial charge-sheet, it cannot summon other accused persons against whom investigation has been kept pending, even though sufficient materials may appear against them in the supplemental final report or charge-sheet, is fit to be rejected. In case the Petitioner's submissions are accepted, it will lead to anomalous consequences, as an accused against whom evidence may appear in the supplementary charge-sheet cannot be summoned at all, thus allowing him to go scot free.

20. A similar issue came up for consideration before the Hon"ble Apex Court in the case of Ram Lal Narang Vs. State (Delhi Administration), . In the aforesaid case charge-sheet was submitted against Ram Lal Narang and others on 19-7-1996 and cognizance was taken accordingly on 20-7-1996 against them. The police, however, filed a supplemental charge-sheet against one H.L. Mehra. The Apex Court observed that on filing of such supplementary charge-sheet it would be well within power of Magistrate to take cognizance. It would be useful to quote the relevant extract of para 21 of the aforesaid judgment, which is as follows:

21. Anyone acquainted with the day-today working of the criminal Courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplement report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualize a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of the agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private

individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry or trial. If the case of which he had previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case...

(Emphasis added)

21. The aforesaid view was reaffirmed in the case of *Hasanbhai Valibhai Qureshi v. State of Gujarat*, reported in 2004 (3) PLJR (SC) 287.

22. It is generally noticed that in some cases where there are more than one accused, some of them are apprehended with ease, whereas others remain at large. The police submits partial charge-sheet in respect of these accused to deny them benefit of compulsive bail u/s 167(2), Code of Criminal Procedure. As the investigation against others including accused who are evading arrest is not yet complete, the police keeps investigation against them pending. The Court may take cognizance against the accused against whom charge-sheet has been submitted and may await summoning accused against whom investigation is kept pending. The Magistrate may or may not take cognizance against other accused against whom investigation has been kept pending, if there are some materials on record in first charge-sheet against them. The Magistrate generally defers taking cognizance and summoning such accused till investigation against them is complete. One may refer to the case of *State of Maharashtra v. Sharad Vinayak Dongre*, reported in AIR 1996 SC 231.

23. Thus if the Petitioner's submission is to be accepted then the accused who are at large and against whom supplemental investigation is pending, cannot be summoned to face trial even if sufficient material comes in course of investigation. Such interpretation of law could have disastrous effect and would provide escape route to the culprits.

24. In the instant case, the stage of taking cognizance upon a police report u/s 190(1)(b) was not yet over before 17-8-2005, as investigation had not come to an end against other accused. Equally, the stage of summoning the accused u/s 204, Code of Criminal Procedure too was not over till 17-8-2005, when the Magistrate on conclusion of pending investigation took cognizance against the Petitioners and one Nathuni Sahni and summoned them to face trial.

25. Learned Counsel for the Petitioners next submits that the material against Petitioner No. 2 and other accused persons against whom cognizance has not

been taken are similar and as such the order of Magistrate is bad in law.

26. Controverting the submissions of the Petitioners, the State counsel submits that investigation reveals specific overt act against Petitioner No. 2, whereas no such allegations have been made against rest of the accused persons, who were not summoned to face trial by learned Magistrate. In any view of the matter, the case of the Petitioners is to stand on their own legs. Thus, I hold that the submission of the Petitioners are devoid of merit and is rejected.

27. In back drop of the aforesaid discussion, I do not find any illegality in the impugned order dated 17-8-2005 passed by the Chief Judicial Magistrate, Darbhanga taking cognizance and summoning the Petitioners to face trial u/s 302/34 of the Penal Code. This application is accordingly dismissed.

Application dismissed.