

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.MC 2774/2011**

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Reserved on: 21st March, 2012

Decided on: 09th May, 2012

COURT ON ITS OWN MOTION

..... Petitioner

Through:

versus

STATE

..... Respondent

Through: Mr. Dayan Krishnan, Additional
Standing Counsel for the State with
Mr. Nikhil A. Menon, Advocate
Mr. Ajit Nair, Adv. for 4 accused i.e.
Rajesh, Naeem, Kamal Kishore &
Sunil.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present reference dated 2nd August, 2011 has been sent by the learned Additional Sessions Judge-II, Central District, Delhi in Sessions Case No. 33/2011, arising from FIR No. 14/2011 under Sections 307/353/382/186/427/34 IPC and 25 and 27 Arms Act registered at PS Special Cell.

2. As per the reference, on 15th July, 2011 the abovementioned case was assigned to the learned Additional Sessions Judge wherein only five accused namely Sunil, Rajesh, Naeem, Kamal and Akash were committed for trial. On perusal of the charge sheet, the learned Additional Session Judge found that besides the abovementioned five accused persons, there were allegations

against one more accused namely Bimla Devi though her name was not mentioned as an accused in the charge-sheet. The learned Additional Session Judge was rightly of the view that since Bimla Devi had not been summoned by the learned Chief Metropolitan Magistrate, the only course available to him was to summon her under Section 319 Cr.P.C., which would be at a very belated stage of the trial. In light of the decision of the Hon'ble Supreme Court in *Ranjit Singh v. State*, AIR 1998 SC 3148, the learned Additional Sessions Judge sought rectification of the illegalities committed by the learned Chief Metropolitan Magistrate in the committal order by this Court in exercise of its inherent powers and supervisory jurisdiction.

3. Briefly the case of the prosecution in the above-mentioned FIR is that on 10th March, 2011 officers of P.S. Special Cell received an input while monitoring a telephone number that dealing in illegal arms and ammunitions would be undertaken by one Rajesh and his associates at Kabir Basti, Delhi. A raid was conducted. Rajesh was found standing outside his house and on sensing the police presence, he exhorted his supporters to kill the policemen while whipping out his pistol from the belt. The police party identified Rajesh and asked him to surrender. Co-accused Sunil @ Sand shouted that nobody can take away Bhai (Rajesh). Thereafter Rajesh fired at the police

party while trying to flee away. During chase, few other persons also joined him and more gunshots were fired at the police party, stones were pelted and they were manhandled. The police also fired back. Accused Ravinder hit HC Vinod with an iron rod. Bimla Devi, mother of Rajesh pelted flower pots on the police party. Meanwhile, the local police arrived and Rajesh and Sunil were arrested along with arms and ammunition leading to registration of the abovementioned FIR. On further investigation, arms and ammunitions were recovered from the other accused Akash and after conclusion of the investigation, a charge sheet was filed against the above five persons and Bimla Devi. Though a complaint under Section 195 Cr.P.C. was filed by the ACP, however, the complaint contained the name of only four accused i.e. Sunil, Rajesh, Kamal and Naeem. In the complaint, name of Bimla Devi was not mentioned though the allegations leveled against her attracted offence under Section 186 IPC.

4. According to the learned Additional Sessions Judge, the learned Chief Metropolitan Magistrate committed three illegalities in the matter. Firstly, he took cognizance on the charge sheet and not on the complaint under Section 195 Cr.P.C., which was mandatory. Secondly, despite accused Bimla Devi was charge sheeted, she was not summoned as an accused while taking cognizance. This illegality was further aggravated as the

investigating agency filed a supplementary charge sheet against Bimla Devi along with a complaint under Section 195 Cr.P.C. The learned Committal Court took cognizance against Smt. Bimla Devi on 28th July, 2011 on supplementary charge sheet and again not on the complaint under Section 195 Cr.P.C. The third illegality, according to the learned Additional Sessions Judge, was that the supplementary charge sheet was filed without taking the opinion of the learned public prosecutor. According to the learned Additional Sessions Judge, the supplementary charge sheet filed was in utter disregard of the law of the land as supplementary charge sheet could be filed only when fresh facts come to the light warranting further investigation.

5. Since the order passed by this Court was likely to affect the rights of Rajesh, Naeem, Kamal Kishore, Sunil and Bimla Devi, notice was issued to them on 22nd December, 2011. On 20th January, 2012, Rajesh, Naeem, Kamal Kishore and Sunil were present, however, Bimla Devi was not present despite service.

6. I have heard learned counsels for the parties. While dealing with the first issue raised by the learned Additional Sessions Judge that no cognizance was taken against Smt. Bimla, it may be noted that on 28th July, 2011 a supplementary charge sheet was filed along with a complaint under

Section 195 Cr.P.C. regarding Smt. Bimla Devi and the said supplementary charge sheet was also committed by the learned Chief Metropolitan Magistrate to the Court of Sessions. The issue thus arises whether the supplementary charge sheet could have been filed against Smt. Bimla on the same set of facts and the cognizance thereon taken by the learned Committal Court resulting in committal of the supplementary charge sheet.

7. The Hon'ble Supreme Court in *Ram Lal Narang v. State (Delhi Administration)*, 1979 (2) SCC 322 following the decision in *H.N. Rishbud v. The State of Delhi*, AIR 1955 SC 196 reiterated that defective investigation coming to light during the course of the trial may be cured by further investigation, if the circumstances so warrant. It was held -

“17. In *H.N. Rishbud v. The State of Delhi*, this Court contemplated the possibility of further investigation even after a Court had taken cognizance of the case. While noticing that a police report resulting from an investigation was provided in Section 190 Criminal Procedure Code as the material on which cognizance was taken, it was pointed out that it could not be maintained that a valid and legal police report was the foundation of the jurisdiction of the Court to take cognizance. It was held that where cognizance of the case had, in fact, been taken and the case had proceeded to termination, the invalidity of the precedent investigation did not vitiate the result unless miscarriage of justice had been caused thereby. It was said that a defect or illegality in investigation, however serious, had no direct bearing on the competence of the procedure relating to cognizance or trial. However, it was observed:

It does not follow that the invalidity of the investigation is to be completely ignored by a Court during trial. When the breach of

such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for.

This decision is a clear authority for the view that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it.”

8. This position has been reiterated by the Hon’ble Supreme Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors.*, 2004 (5) SCC 347. Further the Hon’ble Supreme Court in *Rama Chaudhary vs. State of Bihar*, 2009 (6) SCC 346 clarified ‘further investigation’ to mean addition, more or supplement. Thus, the further investigation and a supplementary charge sheet in the form of Section 173 (8) Cr.P.C. could cure the defects of earlier charge sheet. A supplementary charge sheet can be filed only if fresh or further facts come to knowledge of the investigating officer. On the same set of facts, supplementary charge sheet cannot be filed. However, a defect in the charge sheet can be cured by filing a supplementary charge sheet. In the present case, in the first charge sheet though the allegations against Bimla were stated, however, her name was not sent as an accused. As even in the absence of the accused being named, on the basis of allegations, the learned Chief Metropolitan Magistrate was required to apply its mind to the

facts stated in the charge sheet and summon the accused Bimla, the order of cognizance passed by the learned Chief Metropolitan Magistrate certainly suffers from lack of application of mind. However, there was one defect in the charge sheet and the complaint that Bimla was not named. Thus, a fresh supplementary charge sheet sending her as an accused could be filed. Thus, the order of the learned Chief Metropolitan Magistrate issuing summons to Bimla on the supplementary charge sheet is not required to be set aside. Further the conduct of the learned Chief Metropolitan Magistrate in calling a fresh supplementary charge sheet and summoning Bimla despite the fact that the learned Additional Sessions Judge referred the matter to this Court for correcting the illegality committed, amounts to judicial impropriety.

9. As regards the offence under Section 186 IPC, it may be noted that a complaint under Section 195 Cr.P.C. was filed by the investigating agency along with the charge sheet however, the said complaint related only to Sunil, Rajesh, Kamal and Naeem. The learned CMM however, did not take cognizance on the complaint but on the charge sheet. Further even along with the supplementary charge sheet, a complaint under Section 195 Cr.P.C. was filed against Smt. Bimla Devi, however the learned Chief Metropolitan Magistrate again failed to take cognizance on the complaint under Section 195 Cr.P.C. for offence under Section 186 IPC and took cognizance on the

supplementary charge sheet filed. In the absence of cognizance on the complaint under Section 195 Cr.P.C., the accused cannot be proceeded for offence under Section 186 Cr.P.C. being an illegality as held by the Hon'ble Supreme Court in *C. Muniappan and others vs. State of Tamil Nadu, 2010* (9) SCC 567. Their Lordships held:

“33. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.P.C. are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.

10. Since no cognizance on the complaints under Section 195 Cr.P.C. has been taken by the learned Committal Court for offence under Section 186 IPC despite the complaints under Section 195 Cr.P.C. being on record, the cognizance for offence under Section 186 IPC against Sunil, Rajesh, Naeem, Kamal Kishore and Bimla Devi is set aside.

11. The present is a situation unlike the one where there is no complaint at all and in view of the fact that the complaint under Section 195 Cr.P.C. was filed, it would be a curable defect. Thus, I direct the Committal Magistrate to reconsider the order of cognizance for offence under Section 186 IPC on the complaints under Section 195 Cr.P.C., rectify the same, directing Sunil,

Rajesh, Kamal, Aakash and Bimla Devi to stand trial before the Court of Sessions in case arising out of FIR No. 14/2011 registered at PS Special Cell for offence under Section 186 IPC as well. Learned Additional Sessions Judge is directed to send back the file to the learned Chief Metropolitan Magistrate for the above purpose.

12. Thirdly coming to the aspect of the learned Additional Sessions Judge observing that the filing of the supplementary charge sheet by the investigating agency without the opinion of the prosecuting agency displayed insubordination and disregard to the Hon'ble Supreme Court, it may be noted that in *R. Sarla vs. T.S. Velu*, 2000 (4) SCC 459 and *Popular Muthiah vs. State represented by Inspector of Police*, 2007 (6) SCC 296, it was held that the prosecutor has no role in influencing the final opinion of the Investigating Officer, while filing a charge sheet. Thus, there is no illegality in taking cognizance on a supplementary charge sheet filed without the opinion of the public prosecutor.

13. The reference is answered accordingly. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

MAY 09, 2012

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