

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.15789 of 2015

Arising Out of PS.Case No. -22 Year- 2014 Thana -SARE District- NALANDA (BIHARSHARIFF)

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1. Dinesh Chaudhary
2. Masudan Chaudhary Both sons of Nathun Chaudhary
3. Ramesh Choudhary son of Nathun Choudhary All are resident of village-
Onda Police Station Sare, District- Nalanda

.... Petitioner/s

Versus

1. The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Rabindra Prasad Singh

For the Opposite Party/s : Mr. Anuj Kr.Srivastav(App)

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL ORDER

2 01-05-2017

Heard learned counsel for the parties.

The present application has been filed for quashing the order dated 28.1.2015, passed by the learned Judicial Magistrate Ist Class, Biharsharif, Nalanda, in Sare P.S. Case No. 22 of 2014, whereby, process has been directed to be issued after cognizance being taken for the offences under sections 302/34 of the Indian Penal Code, differing with the final report, since on conclusion of investigation the petitioners were not sent up for trial.

It is submitted by the learned counsel for the petitioners that though the petitioners were named in the FIR, there is specific accusation against one of the co-accused namely;



Md. Farooq, to have caused fire arm injury on the temporal region of the father of the informant. On conclusion of investigation, the petitioners were not sent up for trial, but differing with the final form, cognizance has been taken for the offence under section 302/34 IPC, against the petitioners though only Md. Farooq and Arun Choudhary were chargesheeted on conclusion of investigation.

At the stage of passing order under section 190(1)(b) Cr.P.C., the Magistrate has only to see that the prima facie case is made out. On submission of police report under section 173(2) Cr.P.C., the Magistrate has three options, i.e., either to accept the police report or to differ with it or to direct for further investigation. In this connection, a useful reference may have to the case of Chandra Babu alias Moses Vs. State through Inspector of Police & Ors., (2015) 8 Supreme Court Cases 774. Paragraphs 16 and 17 read as follows:

“16. We have referred to the aforesaid authorities to reiterate the legal position that a Magistrate can disagree with the police report and take cognizance and issue process and summons to the accused. Thus, the Magistrate has the jurisdiction to ignore the opinion expressed by the investigating officer and independently apply his mind to the facts that have emerged from the investigation.



17. Having stated thus, we may presently proceed to deal with the facet of law where the Magistrate disagrees with the report and on applying his independent mind feels there has to be a further investigation and under that circumstance what he is precisely required to do. In this regard, we may usefully refer to a notable passage from a three-Judge Bench decision in Bhagwant Singh v. Commr. of Police[9], which is to the following effect:-

“4. Now, when the report forwarded by the officer in charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process, or (2) he may disagree with the report and drop the proceeding, or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding, or (2) he may disagree with the report and taking the view that there is sufficient ground for



proceeding further, take cognizance of the offence and issue process, or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by



him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to [pic]persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be



difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate.”

Similar view on the Magistrate’s power to differ with the police opinion has been taken by the Apex Court in the case of Minu Kumari and Anr. Vs. State of Bihar and Ors., (2006) 4 Supreme Court Cases 359. Paragraph 11 reads as follows:

“When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient



ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Carat Pvt. Ltd. v. State of Karnataka.]”



The impugned order suggests that the learned Magistrate after going thorough the case diary, came to the conclusion that prima facie case is made out, hence, it cannot be said that it is a case of non-application of judicial mind. More over, the impugned order was passed on 28.1.2015 and there is nothing on record to suggest the present stage of the case.

Hence, this court is not inclined to interfere in the matter at this stage. However, this application is disposed of with liberty to the petitioners to raise all the issues at the appropriate stage of the proceeding.

(Dinesh Kumar Singh, J)

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