

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.3621 of 2018

Arising Out of PS. Case No.-23 Year-2017 Thana- Jamalpur District- Munger

=====

Mangal Mukesh Prabhakar @ Tinku, Son of Late Mundrika Das Dhusia,
Resident of Mohalla- Chhoti Keshopur, Faridpur Road, Police Station-
Jamalpur, District- Munger.

... .. Appellant/s

Versus

1. The State of Bihar Through Superintendent of Police, Munger.
2. Mukesh Kumar, Son of not known, S.H.O. Faridpur O.P. (Jamalpur P.S.),
District- Munger.

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ratnakar Ambastha, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 26-11-2018

I.A. No.2846 of 2018

Heard learned counsel for the appellant and learned
counsel for the State.

2. Considering the submissions made by the
learned counsel for the appellant, the delay of sixteen weeks
caused in filing the appeal is condoned.

3. I.A. No.2846 of 2018 stands allowed.



Cr. Appeal (SJ) No.3621 of 2018

4. Heard learned counsel for the appellant and learned counsel for the State.

5. This appeal under Section 89 of the Bihar Prohibition and Excise Act, 2016 (for short 'Excise Act, 2016) is directed against the order dated 23.03.2018 passed by the Special Judge (Excise) Munger in Jamalpur P.S. Case No.23 of 2017 registered under Section 30(a) of the Excise Act, 2016 whereby the application filed by the appellant seeking discharge from the case under Section 227 of the Code of Criminal Procedure (for short 'Cr.P.C.') has been rejected.

6. The sole ground on which the application for discharge was filed before the court below was that Assistant Sub Inspector of Police, who had investigated the case and submitted report under Section 173(2) of the Cr.P.C. was not authorized to investigate the case.

7. Mr Rajiv Roy, learned counsel appearing for the appellant submitted that in view of Section 78(2) of the Excise Act, 2016, a police officer below the rank of Sub Inspector was not authorized to investigate the case. He contended that since the investigation was itself vitiated, the appellant could not have been charged and put on trial.



8. On the other hand, learned counsel for the State submitted that there is no illegality in the order impugned. He contended that from perusal of the FIR, which was based on self statement of the S.H.O. Faridpur O.P. (Jamalpur P.S.), it would be evident that huge quantity of illicit liquor was recovered from the house of the appellant. The S.H.O., after institution of the FIR, handed over the investigation to the Assistant Sub Inspector of Police, who found the allegation to be true in course of investigation. He contended that there is nothing in Section 78 of the Excise Act, 2016, which would indicate that an officer below the rank of Sub Inspector of Police is not authorized to investigate any offence punishable under the Excise Act, 2016. He has further contended that in view of sub section (2) of Section 156 of the Cr.P.C. also the investigation conducted by the Assistant Sub Inspector of Police cannot be challenged at any stage on the ground that such officer was not empowered to investigate the case.

9. I have heard learned counsel for the parties and perused the record.

10. The allegation made in the FIR do attract ingredients of the offence punishable under Section 30(a) of the Excise Act, 2016. True it is that the investigation has been carried



out by an Assistant Sub Inspector of Police, but the question is as to whether such investigation vitiates the entire proceedings.

11. In order to examine the issue raised before the Court, at this juncture, it would be relevant to re-produce Section 78 of the Excise Act, 2016.

“Section 78. Power to investigate.- (1) Any excise officer may investigate any offence punishable under this Act.

(2) Any police officer, not below the rank of Sub Inspector may investigate any offence punishable under this Act.”

12. It would, thus, be evident that Section 78 (2) of the Excise Act, 2016 authorizes any police officer, not below the rank of Sub Inspector to investigate any offence punishable under the Excise Act, 2016. It does not prohibit any police officer below the rank of Sub Inspector to investigate any offence in express words. However, an analogy may be drawn that a police officer below the rank of Sub Inspector is not authorized to investigate any offence punishable under the Excise Act, 2016.

13. The question, however, is as to whether the investigation carried out by a police officer below the rank of Sub Inspector in the instant case has vitiated the case of the prosecution or not.



14. The illegality committed in course of investigation does not affect competence and the jurisdiction of the court for trial is well settled as appears from the ratio laid down in **Prabhu vs. Emperor, A.I.R. 1944 PC 73** and **Lumbhardar Zutshi vs. The King, A.I.R. 1950 PC 26**.

15. In **H.N. Rishbud vs. State of Delhi, A.I.R. (42) 1955 SC 196**, the question considered by the Supreme Court was whether after the court took cognizance, trial can be held to be vitiated merely on the ground that investigation was invalid. Answering in the negative, the Supreme Court held that if the plea of invalid of the investigation is taken at sufficiently early stage, the court instead of taking cognizance conduct investigation by competent investigating officer. But after cognizance is taken the trial cannot be quashed for invalidating of investigation. The observations made by the Supreme Court in the said judgment are as under:

“In our opinion, therefore, when such a breach is brought to the notice of the court at an early stage of the trial the court will have to consider the nature and extent of the violation and pass appropriate orders for such re-investigation as may be called for, wholly or partly, and by such officer as it



considers appropriate with reference to the requirements of Section 5-A of the Act...”

16. In the said judgment in paragraph 9, the Supreme Court observed:

“The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality, vitiating the proceedings or a mere irregularity arises. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in section 190 of the Code of Criminal Procedure as the



material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings'. The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation section 537 of the Code of Criminal Procedure which is in the following terms is attracted:



"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice".

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in Prabhu v. Emperor, A.I.R. 1944 PC 73 (C) and Lumbhardar Zutshi v. The King, A.I.R. 1950 PC 26(D).

These no doubt relate to the illegality of arrest in the course of



investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.”

17. Thus, what can be culled out from the above decision of the Supreme Court is that invalidity or irregularity in investigation will not vitiate prosecution or trial unless it is shown that miscarriage of justice has been caused.

18. In the instant case, nothing has been brought to the notice of the court on the basis of which it can even remotely be inferred that the defect in investigation, if any, has caused any prejudice to the accused.

19. In that view of the matter, I see no illegality in the order impugned whereby the court below has dismissed



the application of the appellant filed for discharge from the case.

20. Accordingly, the appeal is dismissed.

(Ashwani Kumar Singh, J)

Md. S./-Sanjeev

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	30.11.2018
Transmission Date	30.11.2018

