

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.115 of 2009

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Ram Prasad Sahani, son of Charitra Sahani, resident of village-
Parsauni, P.S.-Pupri, District-Sitamarhi.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Ashok Kumar Jha, Adv.

For the State : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 30-10-2018

Appellant, Ram Prasad Sahani has been found guilty for an offence punishable under Section 182 IPC and sentenced to undergo S.I. for one month, under Section 211 IPC and sentenced to undergo S.I. for four months along with a fine appertaining to Rs.500/- in default thereof to undergo S.I. for seven days, additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 23.01.2009 and order of sentence dated 24.01.2009 passed by Additional Sessions Judge, FTC-VI, Sitamarhi in Sessions Trial No.86 of 2007/15 of 2017.

2. At an initial stage, appellant/accused filed Complaint Petition No.128/2004 for an offence punishable under Section 364 of the IPC against Nagendra Thakur and others for kidnapping his son which was sent to the concerned Police Station for registration and investigation, as provided under Section 156(3) of the Cr.P.C. whereupon, Pupri P.S. Case No.60/2004 was lodged followed with an investigation. It is further evident that after concluding investigation, final report was submitted in



accordance with Section 173 of the Cr.P.C. divulging the case to be false simultaneously, a prosecution report was filed by the Investigating Officer of the case for prosecuting the appellant/accused/appellant Ram Prasad Sahani for an offence punishable under Section under Section 182/211 of the IPC on 24.01.2005. It is further evident from the record that earlier to filing of the police report, protest petition was already filed on behalf of appellant/accused on 01.07.2004. The most surprising feature, as is evident from the order dated 02.02.2005 is that, after hearing the learned counsel for the appellant/accused/informant, the learned Magistrate took cognizance of an offence punishable under Section 182, 211 of the IPC side by side also registered Complaint Case No.28/2005 over the protest petition and further, observed that till the hearing as well as final order to be passed over Complaint Case No.28/2005 issuance of summon is stayed without giving any kind of finding relating to final report.

3. From the record, it also transpires that after conclusion of inquiry under Section 202 of the Cr.P.C., the complaint was dismissed under Section 203 Cr.P.C. against which criminal revision number 110/2006 was filed and the same was also rejected vide order dated 02.09.2006. Then thereafter, the matter proceeded, commitment was done and after trial, appellant/accused has been convicted in a manner, as indicated hereinabove.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of



the Cr.P.C. is that of complete denial. It has also been submitted that police going in collusion with the accused persons of the Pupri P.S. Case No.60/2004 after maneuvering the whole things irrespective of the fact that son of the appellant/accused was kidnapped witnesses have supported the same, filed final report as well as prosecution report. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether seven PWs namely, Chandeshwar Sharma PW.1, Prahallad Sharma PW.2, Bhubneshwar Das PW.3, Ram Autar Sahni PW.4, Rijnan Mahto PW.5, Kailash Paswan PW.6, Nagendra Thakur PW.7 as well as also exhibited Carbon Copy of Complaint Petition-Ext.1, Prosecution Report-Ext.2, Carbon copy of charge sheet of Pupri P.S. Case No.43/2004.

6. After going through the record, some sort of intricacy has been perceived whereupon, the learned counsel for the appellant as well as learned Additional Public Prosecutor have been requested to enlightened the court. Those are, after submission of police report as not true along with prosecution report, during consideration of the same as is evident vide order dated 02.02.2005, the learned Magistrate had not accepted the final report. When the learned magistrate had not accepted the police report then in that circumstance, how he took cognizance of an offence punishable under Section 182, 211 of the IPC as the matter remained open is a circumstance that has to be explained. More particularly, in the background of the fact that protest petition was pending since before.



7. The next one as is evident, the Pupri P.S. Case No.60/2004 was registered for an offence punishable under Section 364 of the IPC. The police concluding investigation, submitted its report for prosecuting the informant under Section 182 IPC, 211 of the IPC. Section 182 prescribes maximum sentence of six months while 211 of the IPC prescribes maximum sentence of seven years (where the offence so alleged contains punishment for more than seven years), triable by a court of magistrate then, in that circumstance, how the commitment was done and whether, the trial before the court of session was contrary to the procedure prescribed under code.

8. Pendency of protest petition since before submission of final report, is a circumstance which has much been discussed under legal arena. In **Chandra Shekhar Chaudhary and others vs. Raj Kishore Jha and another** reported in **1982 BLJ 627 (DB)**, it has been held:

“5. What will be the procedure if the police submits final form and there is a protest petition filed by the informant during the pendency of the investigation which is kept Pending and has ordered to be considered after the final form is received, that is the point to be decided in this case. In other words, can the Magistrate, after accepting the final report and discharging the accused persons, has the power to deal with the protest petition, hold enquiry, examine witnesses and then issue process against the accused persons or even direct an enquiry by any other person or investigation by the police. The answer must be in the affirmative. The concept, which in my opinion creates all the confusion that when the complaint is filed and is sent to the police for investigation under section 156 of the Code or a protest petition is filed during the pendency of the police investigation and is kept pending because the Magistrate refused to act on the petition and, therefore, that petition disappears is totally incorrect. In my considered opinion it does not amount to total



effacement of the complaint and the Magistrate will be perfectly justified to act under sections 200, 203 and 204 of the Code. I am completely supported by the decision of the Supreme Court in the case of H.S. Bains v. The State (Union Territory of Chandigarh) (AIR 1980 Supreme Court 1883) where on receipt of the complaint the Magistrate sent it to the police under section 156 sub clause (3) and on receipt of the final report differed from the same and took cognizance. Their Lordships have held as follows:

“The mere fact that he had earlier ordered an investigation under Sec. 154 and received a report under Sec. 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Sec. 156(3) and receives a police report under Sec. 173(1), may, thereafter, do one of three things:

(1) he may decide that there is no sufficient ground for proceeding further and drop action;

(2) he may take cognizance of the offence under Sec. 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;

(3) he may take cognizance of the offence under Sec. 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Sec. 200. If he adopts the third alternative, he may hold or direct an inquiry under Sec. 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.

In the case of Tula Ram v. Kishore Singh (AIR 1977 Supreme Court 2401) the complaint was sent to the police for investigation under section 156 sub-clause(3) and on receipt of the final report the Magistrate issued notice to the complainant and thereafter recorded his statement and the statement of other witnesses and issued processes which was challenged and it was held that the Magistrate was perfectly justified in doing so. The relevant portion from the judgment may be usefully quoted:

Where a Magistrate chooses to take cognizance, he can adopt any of the following conditions.

a) He can peruse the complaint and if



satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so, he must comply with the requirements of section 200 and record the evidence of the complainant or his witnesses.

b)The Magistrate can postpone the issue of process and direct an inquiry by himself.

c)The Magistrate can postpone the issue of process and direct an inquiry by any other person or an investigation by the police,

In case the Magistrate after considering the statement of the complainant and the witnesses as a result of investigation and the inquiry ordered is not satisfied that there are sufficient grounds for proceeding, he can dismiss the complaint.

Where a Magistrate orders investigation by the police before taking cognizance u/s 156(3) of the Code and receives the report thereupon, he can act on the report and discharge the accused or straightaway issue process against the Accused or apply his mind to the complaint filed before him and take action u/s. 190 as described above.

6. xxx xxx xxx

7. xxx xxx xxx

8. Thus, on a careful consideration of the points, which have been raised in this application, and after hearing the learned counsel for the parties and after carefully going through the decisions cited at the Bar it must be held:(1) when the complaint is sent to the police under section 156(3) and in the meantime a protest petition is filed or in course of police investigation a protest petition is filed and is kept pending, the magistrate after disposing of the case on receipt of the police report, is fully competent or deal with the complaint. It is not at all necessary to keep the matter pending on receipt of the police report and pass the order on the protest petition and the police report together for the reasons mentioned above;(2) if the protest petition in the nature of complaint is filed after the final form is accepted then it must be some fresh materials or it must be shown that the previous order was passed on incomplete record or a misunderstanding on the nature of the complaint or it was



manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, be brought on the record of the previous proceeding as held in the case of *Pranathan Nath Talukdar v. Saroj Ranjan* (AIR 1962 Supreme Court 876). There is no merit in this application and it is, accordingly, dismissed. The trial may, however, be expedited.”

9. Same view has also been taken in another Division Bench decision of the court in ***Munilal Thakur & others etc. vs. Nawal Kishore Thakur and another etc.*** reported in 1985 Cr.L.J. 437 wherein it has been held:

“8. To conclude, the answer to the question posted at the outset is rendered in the affirmative and it is held that a Magistrate, even after accepting the final report, can still take cognizance of the offence upon a complaint or a protest petition on same or similar allegations of fact.”

10. Aforesaid view has been taken in the background of settled proposition of law as held by the Apex Court in *H.S. Bains vs. State (Union Territory at Chandigarh)* reported in AIR 1980 SC 1883, wherein it has been held that three options are available before the magistrate whenever final report is submitted (a) may accept the same and discharge the accused (b) may differ therefrom and took cognizance (c) may direct further investigation. It is first stage, during course of which the protest petition finds due recognition. After acceptance of police report, magistrate will treat the protest petition as complaint and proceed in accordance with law so prescribed therefor. That means to say, the magistrate if wants to accede with the police report then first of all, he has to accept the final report and then has to proceed with the protest petition converting it as a complaint petition. When the magistrate



after acceptance of the police report proceed with the protest petition treating it as a complaint petition then in such circumstance, the prosecution report has got no independent identity rather it happens to be an ancillary event having brought up at the end of Investigating Officer after completing an investigation, hence got annulled otherwise, it will be a mockery of a judicial process, as at the same time the court is sailing with the complaint petition (protest petition) simultaneously, the complainant is forced to face trial for the same occurrence not as a counterblast rather, on account of false representation as projected by the police. That being so, once protest being transformed as a complaint petition, is proceeded with, simultaneously the complaint/informant could not be proceeded with in terms of Section 182/211 of the IPC.

11. Reverting back to the present case as disclosed hereinabove the learned magistrate had not accepted the police report submitted by the Investigating Officer. That means to say whatever finding has been placed by the police, has not been concerned. That means to say, the accused has not been discharged. That means to say, the chapter remained available for consideration, when the learned Magistrate failed to accept, that the finding with regard to Section 182, 211 IPC did not arise. Furthermore, the first part of order divulges that the Magistrate had taken cognizance of an offence punishable under Section 182/211 of the IPC and later on, converted the protest petition as a complaint directing that issuance of process against the petitioner should be kept in abeyance till the conclusion of the protest petition, appears to be illegal in the background of the fact



that magistrate has got no inherent power like High Court whereupon, even if cognizance is taken on protest petition, would not have been able to recall the same. Furthermore, it has got influence over the conduction of inquiry as, the order of cognizance under Section 182,211 of the IPC was hanging barricading the subsequent event. Therefore, right from the nascent stage, the proceeding suffered from inherent lacuna and on the basis thereof, the further proceeding could not be held to be in accordance with law.

12. Now coming to other aspect, it is apparent that the offences happen to be triable by the court of magistrate would have attracted procedure prescribed for warrant triable cases and further, appealable before the court of the session. By such activity, the same has been frustrated.

13. The cumulative effect did not justify the finding recorded by the learned lower court consequent thereupon, same is set aside, appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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