

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.4018 of 2016

Arising Out of PS.Case No. -47 Year- 2013 Thana -DESARI District- VAISHALI(HAJIPUR)

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KAMROON KHATOON, WIFE OF MD. SAMIM, RESIDENT OF VILLAGE-
JAFRABAD, P.S.-DESARI, DISTRICT- VAISHALI (BIHAR).

.... Petitioner/s

Versus

1. THE STATE OF BIHAR.
2. SONA, SON OF ATAHULLAH, RESIDENT OF VILLAGE- JAFRABAD,
P.S.- DESRI, DISTRICT- VAISHALI (BIHAR).

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Jagnnath Singh, Advocate
Mr. Rakesh Kumar, Advocate

For the Opposite Party No.1: Mr. Jharkhandi Upadhayya, APP

For the Opposite Party No.2: Mr. Yogesh Chandra Verma, Sr. Advocate with
Mr. Nafisuzzoha, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA

CAV JUDGMENT

Date: 12-09-2018

This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 29.06.2015 passed by the Sessions Judge, Vaishali at Hajipur, in Criminal Revision No.61 of 2015 by which he has set aside the order of cognizance dated 28.02.2014 passed by the Chief Judicial Magistrate, Vaishali at Hajipur, in Desari P.S. Case No.47 of 2013 taking cognizance against Opposite Party No.2 along with other accused for the offence under Section(s) 376(G)(2) and 120-B Indian Penal Code.

2. The prosecution case as alleged by the petitioner



(Informant), Kamroon Khatoon, is that on 20.03.2013, she had gone to market for purchasing vegetables and at about 06.45 PM while she was returning home after purchasing vegetables and reached near bamboo orchard of Kuldeep Singh, she saw Opposite Party No.2 along with Irshad standing there. Opposite Party No.2 told that he wanted to say something to her at which the Petitioner-Informant replied that she would not talk with any body. Thereafter, Opposite Party No.2 along with co-accused, Irshad, caught hold the hand of the Petitioner-Informant and took her in the wheat field of Chandeshwar Singh and made her to sit after pressing her mouth. Thereafter, Chandan Sahani and Vikash Kumar committed rape with her while Opposite Party No.2 was holding the hand of the Petitioner-Informant. Chandan Sahani told her not to disclose to any body, otherwise, he would kill her. The Petitioner-Informant came back to her home. After arrival of her husband, she narrated the incident to him. Husband of the Petitioner-Informant informed the police. Thereafter, police came and *fard-e-beyan* of the Petitioner-Informant was recorded.

3. The police after investigation did not sent up Opposite Party No.2 for trial and submitted charge-sheet against other accused persons as mentioned in the charge-sheet. The Chief Judicial Magistrate, Vaishali at Hajipur, by order dated 28.02.2014



after perusing the allegation in the written report and statement of the victim recorded under Section 164 Cr. P.C. as well as other materials available in the case diary has found *prima facie* case against Opposite Party No.2 also along with other accused persons against whom charge-sheet was submitted by the police and took cognizance for the offence under Section(s) 376(G)(2) and 120-B of the Indian Penal Code.

4. Opposite Party No.2 challenged the aforesaid order of the Chief Judicial Magistrate, Vaishali at Hajipur, before the Sessions Judge, Vaishali, who by order dated 29.06.2015 passed in Criminal Revision No.61 of 2015, has set aside the order dated 28.02.2014 passed by the Chief Judicial Magistrate, Vaishali at Hajipur, taking cognizance against Opposite Party No.2.

5. Heard learned counsel for the Petitioner and the State as well as counsel for the Opposite Party No.2.

6. Counsel for the Petitioner-Informant submits that the Chief Judicial Magistrate, Vaishali at Hajipur, has passed the order dated 28.02.2014 after perusing the allegation in the written report, statement of the victim recorded under Section 164 Cr.P.C. as well as materials available in the case diary. Learned Magistrate was competent enough to take cognizance against the non-sent up accused also.



7. Counsel for the Opposite Party No.2 submits that non-sent up accused can be summoned only at the stage of 319 Cr. P.C. and not at the stage of 190 and 204 Cr.P.C. The police has not sent up Opposite Party No.2 for trial and submitted charge-sheet against other accused persons. Learned Chief Judicial Magistrate, Vaishali at Hajipur, has committed illegality in passing the order dated 28.02.2014 by which cognizance has been taken against Opposite Party No.2 also. Learned Sessions Judge has rightly set aside the order taking cognizance against Opposite Party No.2 in Criminal Revision No.61 of 2015.

8. Counsel for the Opposite Party No.2 has relied on the judgment of our own High Court in the case of *Hiralal Gupta Vs. The State of Bihar* reported in 2007(2) PLJR 150 and in the case of *Ram Nandan Singh Vs. State of Bihar* reported in 2007(2) PLJR 825.

9. On the other hand, counsel for the Petitioner-Informant has submitted that cognizance against non charge-sheeted persons can be taken by the Magistrate after differing from the opinion of the police. Counsel for the Petitioner-Informant has relied on the judgment of Division Bench of our own High Court in the case of *Janeshwar Singh vs. State of Bihar* reported in 2008(3) PLJR 28.



10. Having heard counsel for the parties and on perusal of the impugned order(s) as well as allegation in the *fard-e-beyan*, it appears that Petitioner-Informant (prosecutrix) has taken name of Opposite Party No.2 in the *fard-e-beyan* leveling allegation that he caught hold her hand along with other accused, Irshad, and took her to wheat field and forcibly got her seated after shutting her mouth. Thereafter, Chandan Sahani and Vikash Kumar committed rape with her while this petitioner along with Irshad caught hold her hand. From the order dated 28.02.2014 passed by the Chief Judicial Magistrate, Vaishali at Hajipur, it appears that victim girl in her statement recorded under Section 164 Cr. P.C. has also taken name of Opposite Party No.2 levelling specific allegation against him as mentioned in the *fard-e-beyan*. Statement of the victim recorded under Section 164 Cr. P. C. has been annexed as Annexure-2.

11. The Hon'ble Supreme Court in the case of ***Dinesh Dalmia Vs. CBI*** reported in (2008) 1 SCC (Cri) 36 has held that “....even when investigation remains pending against some persons and offence is shown not to have been made out against some persons as per the charge-sheet, depending on the nature of the charge-sheet/police report cognizance may be taken against such persons as well for which Magistrate has power under Section 190 of Cr.P.C.”



12. The Hon'ble Supreme Court in another decision in the case of *Minu Kumari Vs. The State of Bihar* reported in (2006) 4 SCC 359 has held that *there is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police and the power to take cognizance contrary to opinion of the police is available under Section 190(1) (c) of Cr. P.C.*

13. The Division Bench of our own High Court after relying on the aforesaid judgments of Hon'ble Supreme Court had held in the case of *Janeshwar Singh vs. State of Bihar reported in 2008(3) PLJR 28* that at the stage of cognizance Magistrate can differ from opinion of the police and proceed against even those accused who may not have been charge-sheeted by the police.

14. Therefore, this Court is not convinced with the argument made by the counsel for the Opposite Party No.2 that learned Magistrate without considering the fact that non-sent up accused can be summoned only at the stage of 319 Cr. P.C. and not at the stage of 190 and 204 Cr.P.C. has taken cognizance against the Opposite Party No.2.

15. There is clear decision of Hon'ble Supreme Court as well as our own High Court as mentioned above that the Magistrate at the stage of cognizance could differ from the opinion of the police and proceed against even those accused, who may not



have been charge-sheeted in the case.

16. This Court in the instant case on the basis of allegation in the written report and statement of victim recorded under Section 164 Cr. P.C. (Anneuxre-2) finds that learned Magistrate after properly looking into the materials available in the case diary as well as allegation in the written report has found *prima facie* case against Opposite Party No.2 also along with other accused persons for the offence under Section(s) 376(G)(2) and 120-B Indian Penal Code.

17. The learned Revisional Court has committed illegality in setting aside the aforesaid order on the pretext that prosecution may file a petition under Section 319 Cr.P.C. before the Trial Court to add the Opposite Party No.2 as an accused in the said Sessions Trial on the basis of evidence during trial of the case.

18. Therefore, impugned order dated 29.06.2015 passed by the Sessions Judge, Vaishali at Hajipur, in Criminal Revision No.61 of 2015, is hereby quashed.

19. The order of cognizance dated 28.02.2014 passed by the Chief Judicial Magistrate, Vaishali at Hajipur, in Desari P.S. Case No.47 of 2013 taking cognizance against Opposite Party No.2 along with other accused persons for the offence under Section(s) 376(G)(2) and 120-B Indian Penal Code is hereby affirmed.



20. This application is, accordingly, **allowed**.

(Sanjay Priya, J)

J.Alam/-

AFR/NAFR	AFR
CAV DATE	03-07-2018
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