

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.11805 of 2016

Arising Out of PS. Case No.-50 Year-2013 Thana- PARASBIGHA District- Jehanabad

1. Anil Yadav
2. Sujit Yadav
Both Sons of Naresh Yadav, resident of village - Pandui, P.S. Parsa Bigha,
District - Jehanabad

... .. Petitioner/s

Versus

The State Of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Awadhesh Prasad Sinha, Advocate Mr. Kumar Mritunjay Narain, Advocate
For the Opposite Party/s	:	Mr. Shyam Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT
Date : 08-08-2019

Heard learned counsel for the petitioners and
learned Additional Public Prosecutor for the State.

2. The backdrop of filing of this application, under
Section 482 Cr.P.C., is that the petitioners along with others
were named as accused in Parasbigha P.S. Case No.50 of 2013
registered under Sections 147/148/149/302/504 of the Indian
Penal Code and Sections 3/4 of the Prevention of Witch (Daain)
Practices Act, 1999.

3. According to First Information Report, registered
on the fardbeyan of Dinesh Yadav, on 16.07.2013, at about
11:30 PM, the FIR named accused including the petitioners



armed with lathi, danda came to the house of the informant and with intent to commit murder of Sitapati Devi, the mother of the informant, they attacked her. The accused were alleging that Sitapati Devi, plays witchcraft and her witchcraft had made the buffalo of the accused ill.

4. After investigation, the police submitted first charge sheet under Section 173 Cr.P.C. on 25.11.2013. A copy of the same is at Annexure-2. In the charge sheet co-accused Mantu Yadav @ Jitendra Yadav and Nanhak Yadav @ Nanhku Yadav were sent up for trial and investigation against other named accused persons was kept pending. The learned Chief Judicial Magistrate, Jehanabad, took cognizance against the sent up accused on 02.12.2013 vide order at Annexure-3. The Court further recorded that record of co-accused Naresh Yadav, Anil Yadav and Sujit Yadav (two of the aforesaid are petitioners herein) be separated as investigation against them is pending.

5. After completion of further investigation, the police submitted report, under Section 173 Cr.P.C., on 31.12.2013, a copy at Annexure-4 and in that report the petitioners were shown as not sent up for trial.

6. By the impugned order dated 31.01.2014, the learned Chief Judicial Magistrate, Jehanabad, took cognizance



against Naresh Yadav as well as against the petitioners and transferred the case for commitment to the Court of Mr. B.M. Tripathi, Judicial Magistrate, 1st Class, Jehanabad. Since co-accused Naresh Yadav was in custody, hence, production warrant was issued for his production in Court on 07.02.2014 and for appearance of the petitioners.

7. Learned counsel for the petitioners submits that the second cognizance order is bad in law, which is settled by a catena of judicial pronouncement. Moreover, there was no further material collected against the petitioners in the further investigation of the case. Hence, the cognizance order was based on no material. Learned counsel does not dispute that the witnesses had supported allegation against the petitioners which was evident from the initial investigation report, i.e., case-diary. However, contention is that if the Magistrate did not take cognizance against the petitioners on the first occasion on the basis of material available, the second cognizance order was bad in law. Reliance has been placed on the judgment of this Court in the case of **Balram Yadav V. The State of Bihar** reported in **2004(3) PLJR 697** and in the case of **Umesh Roy Vs. The State of Bihar & Anr.** reported in **2005(3) PLJR 753**.

8. Learned counsel for the State contends that



though technically second cognizance order is not sustainable. However, once cognizance was taken in the case and the case was yet to be committed to the Court of Sessions, the stage was of inquiry and the Magistrate was competent to summon any accused who could not be summoned in pursuance of the first cognizance order and against whom there was material in the case-diary. If the learned Magistrate has summoned the petitioners on the basis of material collected during investigation, the summoning order cannot be faulted as causing failure of justice and abuse of the process of the Court. Hence, interference in exercise of extra-ordinary power under Section 482 Cr.P.C. may not be resorted to.

9. The law is well settled that cognizance is taken of the offence and not of the offender. It has been held by a learned Single Judge of this Court in **Balram Yadav case** (supra) that second cognizance order was bad in law. The impugned order may be divided into two parts. The first part whereby cognizance was taken and the second part whereby petitioners were summoned. The first part was certainly bad in law. Now the question is whether summoning of some of the accused who were not summoned at the time of cognizance is permissible under the law or it is expressly or by necessary



implication prohibited under the law.

10. For coming to the conclusion, the schemes of the code of criminal procedure in this regard requires to be looked into. Under Section 190 Cr.P.C., the Magistrate is empowered to take cognizance of any offence upon receiving a complaint of facts which constitute such offence; upon a police report of such facts; and upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

11. In this case the cognizance order at Annexure-3 was passed on police report submitted under Section 173 Cr.P.C. Section 190 Cr.P.C. does not speak about summoning of the accused after cognizance. Section 191 deals with transfer on application of the accused. Section 192 deals with making over of cases to Magistrates. Section 193 relates to cognizance of offences by Courts of Sessions. Section 194 deals with power of Additional and Assistant Sessions Judges to try cases made over to them. Section 195 relates to prosecution for contempt of lawful authority of public servants etc. Section 195A provides for procedure with regard to cases of threatening etc. Section 196 Cr.P.C. provides for prosecution for offences against the State and for criminal conspiracy to commit such offence.



Section 197 deals with requirement of sanction for prosecution of public servants. Section 198 relates to prosecution for offences against marriage. Section 199 relates to procedure for prosecution for defamation. Thereafter, Chapter XV relates to procedure in the matter of complaints to Magistrate and Chapter XVI which starts with Section 204 Cr.P.C. relates to commencement of proceedings before Magistrates.

12. Section 204 Cr.P.C. is relevant for this purpose.

Hence, the same is being reproduced below:

“204. Issue of process.-(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant



issued under sub- section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.”

13. A bare perusal of Section 204 Cr.P.C. would reveal that it does not specifically bars summoning of some of the co-accused who could not be summoned at the time of cognizance provided there is material against them collected during investigation for summoning. The present case was triable by a Court of Session. Hence, the stage of supply of police papers under Section 207 Cr.P.C. would reach only after appearance of the accused.

14. Since the law does not require summoning of the accused soon after the cognizance, the impugned order to the extant whereby the petitioners were summoned to face trial or receive police paper under Section 207 Cr.P.C., cannot be faulted with. In **Balram Yadav's case** (supra) the accused who had challenged the order of second cognizance and summoning was not named in the FIR. The petitioner wherein was not



named in the first charge sheet and in the second supplementary charge sheet petitioner was sent up for trial and second cognizance order was passed. In that circumstance, the Court held that the second cognizance order was bad as not permissible in law as there was no fresh material discovered during the investigation.

15. The aforesaid case is distinguishable in the sense that in the present case the petitioner is named in the FIR. Allegation of murderous assault is there against the petitioners also. During investigation several eyewitnesses supported that the petitioners were also involved in the occurrence of murderous assault. Hence, there was sufficient material against the petitioners to be summoned soon after first cognizance order was passed. However, if the Magistrate deffered summoning against the petitioners by specifically recording that investigation against them is pending, it cannot be said that the Magistrate was not justified in looking into the material collected during first investigation against the petitioners and he was saddled to look into the subsequent material only.

16. In **Umesh Roy's case** a Bench of this Court clearly held that after submission of final form or charge sheet by the police, the Magistrate may either direct for further



investigation under the relevant provisions or he may differ with the opinion of the police and take cognizance and issue summons against all or some of the accused persons depending upon the materials collected.

17. Even in a case where charge sheet have been submitted against some of the accused persons and some of the accused though not named in the FIR are sent up for trial. It is up to the Magistrate to differ with the same and proceed according to law. In the present case, the petitioners are named in the FIR. There are materials against them collected during investigation supporting the allegation levelled against them in the FIR. However, they could not be summoned at the time of cognizance for only reason that investigation against them was pending. After completion of investigation against them they were not sent up by the police. Thereafter, the learned Chief Judicial Magistrate exercised its discretion and differed with the police report and directed summoning of the petitioners. The case was not committed to the Court of Session as yet nor the police papers were supplied to some of the accused so that to reach the stage of commitment. Hence, the order of summoning cannot be faulted with.

18. Therefore, I am of the view that no failure of



justice is going to be caused if the impugned order is allowed to stand.

19. In the result, this application is dismissed as devoid of any merit.

(Birendra Kumar, J)

Mkr./-

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