

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.522 of 2017

Arising Out of PS. Case No.-141 Year-2015 Thana- IMAMGANJ District- Gaya

Arjun Prasad, Son of Gudri Mahto, resident of village- Madsari, P.S. -
Imamganj, District - Gaya.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Anil Singh-Advocate Mr.Dhirendra Kumar-Advocate Ms. Vibha Singh-Advocate
For the Opposite Party/s :		Mr. Sujit Kumar Singh-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

5 10-04-2019 Petitioner has challenged the order dated
27.07.2016 passed by the S.D.J.M., Sherghati, Gaya in
connection with Imamganj P. S. Case No.141 of 2015.

2. Because of the fact that proprietary of the order
impugned has been raised on behalf of petitioner/ informant on
account thereof, the same decided in the present format.

3. Let facts of the case be gazed in order to
properly appreciate the lis.

4. Petitioner/ informant filed written report on
16.11.2015, divulging the fact that on the same day at 6.30 A.M.
while he along with his family members was sitting at his
darwaza, his Gotia Mahendra Prasad along with his family
members including 40-50 unknown persons armed with deadly



weapon raided and began to assault as a result of which, he himself along with Santosh Kumar, Jai Ram Prasad, Ashok Kumar, Madhu Kumari, Ram Lagan Prasad became injured. Thereafter, Madhu was dragged by Sonal Kumar @ Chunnu Kumar and Nitish Kumar from his house. He claimed identification of 27 accused persons during course thereof (and named those).

5. After registration of Imamganj P. S. Case No.141 of 2015, investigation commenced. While the investigation was going on, perceiving the partial behavior of the I.O., petitioner/informant became apprehensive, whereupon filed protest petition. It is further evident that the I.O. after investigation filed chargesheet against 13 accused persons namely 1) Birendra Prasad, 2) Mahendra Prasad @ Mahendra Kumar, 3) Durga Kumar, 4) Krishna Prasad, 5) Deepak Kumar, 6) Saket Kumar, 7) Subhash Kumar, 8) Raghunandan Mahto, 9) Ram Bilash Prasad, 10) Bandhu Kumar @ Aditya Kumar, 11) Kundan Kumar, 12) Suresh Prasad and 13) Ranjit Kumar @ Ranjit Prasad while 16 accused persons namely 1) Ankit Kumar @ Chhotu, 2) Sonal Kumar, 3) Subham Kumar, 4) Nitish Kumar, 5) Rohit Kumar, 6) Sonu Kumar, 7) Gulshan Kumar, 8) Anuj Kumar, 9) Yogesh Kumar, 10) Prem Kumar, 11) Rajdeo Prasad,



12) Umesh Kumar Prasad, 13) Saarita Kumari, 14) Sunita Devi, 15) Amrita Kumari and 16) Sunita Devi have not been sent up for trial. By the order impugned, the learned lower Court have accepted the same, and summoned only, hence this petition.

6. Simple prayer has been made on behalf of petitioner/ informant that the order impugned is against the spirit of settled principle of law, on account thereof, is fit to be set aside. In support thereof, also cited *Shivshankar Singh vs. State of Bihar and another reported in (2012)1 SCC 130, Rakesh and another vs. State of U.P. and another reported 2014(4) P.L.J.R. 176 (SC), Shintu Yadav vs. the State of Bihar through District Magistrate, Gaya reported in 2017(1) P.L.J.R. 363.*

7. Learned Additional Public Prosecutor while refuting the submission made on behalf of learned counsel for the petitioner has submitted that after perusal of the order impugned, it is evident that learned lower Court after going through the materials available on the record, properly appreciated the same and then thereafter, passed the order impugned. Hence, needs no interference.

8. Irrespective of nature of order, the sole question, which has now fallen for consideration is, what should have



been the methodology adopted by the Court during course of consideration of police report, forwarding some of the accused, while exonerating the remaining, at the stage of Section 190 of the Cr.P.C.

9. In order to trace out the source and status as well as right of informant has also to be properly searched out. It is evident that right from Section 154 Cr.P.C., the legislature has curiously been enough to recognize by way of allowing a copy of the F.I.R. to be handed over to the informant, free of cost. In likewise manner, conclusion of investigation has to be intimated to the informant as per Section 173(1)(2)(II) of the Cr.P.C. It has got a bearing. If no F.I.R. is recorded by the police official, no copy will be furnished, then the informant may take another option including as provided under Section 154(3) Cr.P.C. In likewise manner, if there happens to be final report in terms of Section 169 Cr.P.C., or chargesheet in terms of Section 170 Cr.P.C., being surceased, then in that circumstances, after getting such information, may take proper step, as provided under law. And one of the event, guiding the issue is presence of protest petition, though having no presence under Cr.P.C., apart from other kinds of jaunt. So, the basic feature is to inform the informant. It's furtiveness has been seriously viewed.



10. During course of tackling the issue, the power of Court, after filing of police report in terms of Section 173 Cr.P.C. has also to be seen. This issue has much been debated under Judicial Forum and culminated in following manner after taking in consideration the different eventualities. Moreover, in majority of the cases, both the situation have been deal with juxtaposely.

11. In ***Raghubans Dubey vs. State of Bihar*** reported in ***A.I.R. 1967 SC 1167***, it has been held:-

“9. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in 1965-1 SCR 269: (AIR 1965 SC 1185) [Pravin Chandra Mody v. State Of Andhra Pradesh](#) the term "complaint" would include allegations made against persons unknown. If a Magistrate takes -cognizance under [s. 190\(1\)\(a\)](#) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted ,even though persons who had committed the offence were not 'known at that time. The same position prevails, in our view, under s. 190(1)(b).”

12. In ***Bhagwant Singh vs. Commissioner of Police and another*** reported in ***(1985)2 SCC 537***, it has been held:-

“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 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](#) 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.”

13. In ***Gangadhar Janardan Mhatre vs. State of Maharashtra and others reported in (2004) 7 SCC 768***, it has been held:-



"6. There is no provision in the Code to file a protest petition by the informant who lodged the first information report. But this has been the practice. Absence of a provision in the Code relating to filing of a protest petition has been considered. This Court was Bhagwant Singh v. Commissioner of Police and Another, AIR (1985) SC 1285, stressed on the desirability of intimation being given to the information when a report under Section 173(2) is under consideration. The Court held as follows :

"....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 submission, to 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 offences 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 be heard at the time of consideration of the report....."

7. Therefore, there is no shadow of doubt that the informant



*is entitled to a notice and an opportunity to be heard at the time of consideration of the report. This Court further hold that the position is different so far as an injured * person or a relative of the deceased, who is not an informant, is concerned. They are not entitled to any notice. This Court felt that the question relating to issue of notice and grant of opportunity as afore- described was of general importance and directed that copies of the judgment be sent to the High Courts in all the States so that the High Courts in their turn may circulate the same among the Magistrates within their respective jurisdictions.*

8. *In Abhinandan Jha and Another v. Dinesh Mishra*, AIR(1968) SC 117, this Court while considering the provisions of Sections 156(3), 169, 178 and 190 of the Code held that there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial. The functions of the Magistracy and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take



cognizance notwithstanding formation of the opinion by the police which is the final stage in the investigation has been provided for in [Section 190\(l\)\(c\)](#).

9. 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 (i) 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\(l\)\(b\)](#) 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\(l\)\(b\)](#) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officers 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\(l\)\(b\)](#) 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\(l\)\(a\)](#) though it is open to him to act under [Section 200](#) or [Section 202](#) also. (See M/s. India Sarat Pvt. Ltd. \. State of Karnataka and Another, AIR (1989) SC 885. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant



(supra) the right is conferred on the informant and none else.”

14. In ***Minu Kumari and another vs. State of Bihar and others reported in (2006)4 SCC 359***, it has been held:-

“11. 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 and another](#) (AIR 1989 SC 885)].

12. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops



the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. This Court in [Bhagwant Singh v. Commnr. of Police](#) (1985 (2) SCC 537) held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in [the Code](#) for issue of a notice in that regard.

13. We may add here that the expressions 'charge-sheet' or 'final report' are not used in [the Code](#), but it is understood in Police Manuals of several States containing the Rules and the Regulations to be a report by the police filed under [Section 170](#) of the Code, described as a "charge-sheet". In case of reports sent under [Section 169](#), i.e., where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report or summary. [Section 173](#) in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under [Section 173](#) of the Code, though there is nothing in [Section](#)



173 specifically providing for such a notice.

14. As decided by this Court in *Bhagwant Singh's case* (*supra*), the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows:-

"....the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report..."

15. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh's case* (*supra*) the right is conferred on the informant and none else."

15. The same view has also been followed in *Jitendra Kumar Agarwalla vs. the State of Bihar and another* reported in 2000 CRI.L.J. 2730, *Sanjay Bansal and another vs. Jawaharlal Vats and others* reported in (2007) 13 SCC 71 as well as in *Chittaranjan Mirdha vs. Dulal Ghosh and another* reported (2009) 3 SCC (CRI.) 303.

16. Recently the Division Bench has occasioned to discuss the issue in *Shintu Yadav vs. the State of Bihar*



through District Magistrate, Gaya reported in 2017 (1) P.L.J.R. 363, and answered in affirmative after discussing some of the earlier judgments, as referred herein above, though the prayer made for release under habeas corpus having intermittence cropping up due to staling of application at the stage of Section 167 Cr.P.C., 209 Cr.P.C., 309 Cr.P.C., adversely affecting over judicial remand, so pleaded.

17. Thus, it is apparent that while accepting the finding recorded by the Investigating Officer, more particularly concerning the 16 accused persons, who were not sent up for trial, the informant/ petitioner ought to have been noticed and subsequently thereof, the learned Magistrate was well within his domain to pass appropriate order, in accordance with law. Because of the fact that the order impugned divulges a flaw on that very score, consequent thereupon, is set aside. Petition is allowed.

(Aditya Kumar Trivedi, J)

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