

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.4740 of 2017

Arising Out of PS. Case No.-70 Year-2014 Thana- NAYA RAM NAGAR District- Munger

Anil Kumar Jha son of Makrand Jha, resident of village-Kuan Garhi, P.S.-
Sangrampur, District-Munger.

... .. Petitioner/s

Versus

1. State Of Bihar and Anr
2. Anita Devi, w/o Late Arvind Kumar Mishra, resident of village-Farda Jagannathpur Tola, Ward No. 5, P.S.- Naya Ramnagar Safiasarai O.P., District - Munger.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Subodh Kumar Jha, Mr. Pranav Kumar Jha, Advocates
For the Opposite Party/s	:	Smt. Pronati Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

2 21-06-2019 Heard learned counsel for the petitioner as well as
learned APP.

2. Informant, Anita Devi who happens to be the wife of deceased, Arvind Kumar Mishra filed a written report on 20.04.2014 alleging *inter alia* that Bhupendra Narayan Mishra, Bushi Kumar @ Abhijit Kumar Abhinav, Madhu Devi, Anil Kumar Jha and Mithu Kumar made indiscriminate firing causing instantaneous death of her husband. After registration of Naya Ram Nagar (Safia Sarai) PS Case No. 72/2014, investigation commenced and after concluding the same, at first instance, charge-sheet has been submitted against two accused keeping the investigation pending against others, whereupon,



vide order dated 16.07.2014, cognizance of an offence punishable under Section 302 IPC along with other allied Sections were taken and those two accused were put on trial. Supplementary charge-sheet has been submitted at the end of I.O. against accused, Bushi Kumar @ Abhijit Kumar Abhinav and Mithu Kumar @ Hemant Kumar while petitioner, Anil Kumar Jha was not sent up. However, the learned Magistrate differing therefrom summoned the petitioner including others vide order dated 12.12.2014, which initially, been subject to challenge.

3. Later on, by I.A. No. 2665/2018, prayer having been refused by the learned Sessions Judge, Munger purported to be under Section 227 CrPC, vide order dated 31.01.2018 relating to Sessions Trial No. 352/2017 and so, the said order has also been put under challenge.

4. Though the order of cognizance has merged with the order of refusing to discharge, however, learned counsel for the petitioner refered the case of Ram ***Nandan Singh @ Ram Nandan Yadav v. State of Bihar*** as reported in ***2007(2) BBCJ 330*** and submitted that in the aforesaid case, the petitioner Ram Nandan Singh was not sent up for trial and the learned Magistrate summoned the petitioner whereupon, the matter was



taken to the High Court and after discussing the relevant provisions, judicial pronouncements, the order of cognizance has been quashed giving an option that in case sufficient material is found collected during course of trial, then in that event, the trial court will be at liberty to summon the petitioner in accordance with Section 319 of the CrPC.

5. It has also been submitted that in the aforesaid background, the subsequent event, that means to say, rejection of prayer of the petitioner purported to be under Section 227 of the CrPC also happens to be illegal. Consequent thereupon, the successive orders are fit to be set aside.

6. Learned APP opposed the same.

7. The Hon'ble Apex Court in *Abhinandan Jha v. Dinesh Mishra* as reported in *AIR 1968 SC 117*, has held that at the time of consideration of materials at the stage of 190 CrPC, Magistrate has got three options either to accept, or to reject or to direct for further investigation. The matter has again came up before Full Bench of Patna in the case of *Kali Singh v. State of Bihar* reported in *AIR 1979, Patna 1*, wherein again the same view has been reiterated and since thereafter, by catena of decisions, it has been settled at rest that the Magistrate is not at all to act in mechanical manner/discharging its power rather



while at the stage of 190 CrPC, he has to apply its judicial mind and during course thereof, may accept the finding recorded by the investigating authority, may not agree with the finding and the third option to direct for further investigation. Recently, in ***Bikash Ranjan Rout v. State through the Secretary (Home), Govt. of NCT of Delhi, New Delhi*** reported in ***2019(2) BBCJ 586(SC)***, the same view has been reiterated which are as follows:-

“6.1 While considering the aforesaid issue/question, few decisions of this Court on the procedure to be followed by the learned Magistrate when the investigating officer submits the report Under Section 173(2) of the Code of Criminal Procedure and what are the powers of the learned Magistrate and/or what are the options available to the learned Magistrate at a time when the investigating officer after concluding the investigation submits the report/challan/charge-sheet before the learned Magistrate, are required to be referred to and considered.

6.2. In the celebrated judgment of this Court in the case of Bhagwant Singh (supra) which has been subsequently followed consistently, this Court had the occasion to consider the procedure to be followed by the learned Magistrate and/or the options which are available to the learned Magistrate at the time when the report/challan/charge-sheet is filed by the investigating officer before him. In that judgment, this Court in para 4 has observed and held as under:



“ 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 and 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.

8. After going through the judgment referred at the end of the learned counsel, it is evident that the aforesaid view has completely been given a go-by and so, in the facts and circumstances of the case, is not applicable.

9. Now coming to the stage of the framing of charge, mode of consideration of material has already been settled by the Apex Court in the case of in *Amit Kapoor v. Ramesh Chander* as reported in (2012)9 SCC 460, it has been held:-

“17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the ‘record of the case’ and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non



for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.”

10. From the successive orders, it is evident that the successive courts have found materials against the petitioner to be proceeded against them. Consequent thereupon, the instant petition along with I.A. No. 2665/2018 sans merit and is, accordingly, dismissed.

(Aditya Kumar Trivedi, J)

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