

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.2934 of 2017

Arising Out of PS. Case No.-378 Year-2012 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

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Nitesh Kumar Singh S/o Late Mahendra Prasad Singh, R/o Village Lohara,
P.O.- Dumari, P.S.- Barahiya, Dist- Lakhisarai.

... .. Petitioner/s

Versus

1. The State Of Bihar and Ors
2. Ajay Yadav, S/o Late Gopi Prasad Yadav, R/o Village Babu Tola, P.S.-
Banka, Distt- Banka.
3. Sanjay Kumar Singh Clerk, Son of Name not known, R/o Nalkup Vibhag,
Combined Building, Kechari Campus, Bhagalpur Pin- 812001.

... .. Opposite Party/s

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Appearance :

For the Petitioner : Mr. Mahesh Prasad-II, Advocate
For the Opposite Party : Mr. Md. Ashlam Ansari, APP.
For the Opposite Parties No. 2 & 3: Mr. Bakshi S.R.P. Sinha, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL ORDER

6 23-07-2019 Heard Mr. Mahesh Prasad-II, learned advocate

for the petitioner and Mr. Bakshi S.R.P. Sinha, learned

senior advocate for opposite parties no. 2 and 3.

The petitioner has challenged the order dated
30.06.2016 passed by the learned Chief Judicial
Magistrate, Bhagalpur in connection with Kotwali P.S.
Case No. 378 of 2012 whereby the court below has
refused to take cognizance against opposite parties no. 2
and 3 under Sections 302/34 of the Indian Penal Code



on the basis of materials available on record.

It appears that after investigation of the case in hand, charge sheet was submitted against other accused persons and the investigation with respect to opposite parties no. 2 and 3 were kept pending. On receipt of the charge sheet with respect to persons who were sent up for trial, cognizance was taken. Later supplementary report under Section 173 of the Code of Criminal Procedure was filed, not sending up the opposite parties for trial on the ground of their not being present at the place of occurrence but being available at some other place.

The learned Magistrate accepted the report in the first instance without noticing the informant. This order of the court below accepting the final report false without noticing the informant was challenged before this Court and a Bench of this Court vide order dated 15.03.2016 set aside the aforesaid order. The matter was taken up by the Magistrate again after issuing notice



to the informant.

By the order impugned, the court below has refused to proceed against opposite parties no. 2 and 3.

Mr. Mahesh Prasad, learned advocate for the petitioner has made three pronged arguments against the order dated 30.06.2016.

In the first instance, he has submitted that the order refusing to proceed against opposite parties no. 2 and 3 was set aside by a Bench of the High Court without any further direction. It therefore presupposes that the Magistrate was under an obligation to proceed against opposite parties no. 2 and 3 forthwith.

The other objection raised on behalf of the petitioner is that from the perusal of the order impugned, it would appear that the alibi of opposite parties, as discussed in the police papers, was accepted on its face value for not proceeding against them.

The third objection and which has been pressed most vehemently by Mr. Mahesh Prasad, learned



advocate for the petitioner is that the counsel for opposite parties no. 2 and 3 were heard which was not permissible at the stage of taking of cognizance.

Mr. Bakshi S.R.P. Sinha, learned senior advocate while countering the aforesaid submissions raised on behalf of the petitioner/informant, urged that the order is based on the materials on record and if the Magistrate has not found sufficient materials to proceed against the petitioner by relying upon the police report, the order cannot be faulted with on that account.

In a complaint case, while an enquiry is afoot under Section 202 Cr.P.C., an accused can only wait and watch and not respond in any manner before the court.

This is not the situation when final report false is submitted and informant is noticed before accepting such report. In that event, even if the counsel for opposite parties has been heard, this would not contaminate the order of the court below refusing to proceed against opposite parties no. 2 and 3.



The submission on behalf of the petitioner that the plea of alibi is to be tested only at the trial is not an absolute prosecution.

True it is that alibi is one of the weakest defence available with an accused but if the issue has been investigated properly and the police report finds favour with the court assaying such report, such an order cannot be faulted with only on that ground. After all, the plea of alibi, if investigated properly and found to be correct can be relied upon. It need not only be tested at the trial.

The petitioner otherwise has an option for getting opposite parties no. 2 and 3 summoned to face trial under Section 319 Cr.P.C. provided materials come during the trial against them. The order refusing to proceed against opposite parties no. 2 and 3 does not foreclose the chapter forever and it is always open for the prosecution or the informant to prefer an application under Section 319 of the Code of Criminal Procedure, if



so advised.

This Court finds no fault with the order refusing
to proceed against opposite parties.

The petition is dismissed with the observation
indicated above.

(Ashutosh Kumar, J)

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