

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.152 OF 2021

1. Ab. Razzak Ab. Sattar,
Aged about 48 years,
Occu: Agriculturist.
2. Ab. Rajique Ab. Razzak,
Aged about 24 years,
Occu: Service.

Both petitioners are residents of
Village Deulghat, Tq. & Dist.
Buldhana, Police Station, Buldhana
Gramin.

..... **PETITIONERS**

...VERSUS...

1. The State of Maharashtra, through
its Police Station Officer,
Police Station Buldhana Gramin.
2. Jubairkha Fakrullahkha,
Aged about 33 years,
Occu: Labour, R/o Deulghat,
Tq. & Dist. Buldhana, Police Station,
Buldhana Gramin.

..... **RESPONDENTS**

Mr. Tejas Deshpande, Advocate for Petitioners.
Mrs. K.R. Deshpande, APP for Respondent 1/State.
Mr. A.J. Thakkar, Advocate for Respondent 2.

CORAM: **ROHIT B. DEO, J.**
DATE: **25th JUNE, 2021.**

ORAL JUDGMENT:

Heard.

2. Rule.

3. With consent, the petition is finally heard.

4. Jubairkha Fakrullahkha – respondent 2 lodged report with Buldhana Police Station (Rural) on the basis of which Crime 32/2011 for offences punishable under Sections 143, 147, 395, 506, 324 and Section 135 of the Bombay Police Act was registered.

5. The informant alleged that his brother Junaidkha was assaulted and the petitioners are named in the report as the assailants.

6. Culmination of investigation resulted in submission of final report under Section 173 of the Criminal Procedure Code, 1973 (Code). The final report, which was submitted invoked Sections 307, 506 read with Section 34 of the Indian Penal Code (IPC). However, the petitioners were not arraigned as accused on the premise that the investigation ruled out their involvement and culpability in the crime. Respondent 2 filed protest petition contending that the petitioners are involved in the commission of

the crime and that they be summoned by rejecting the final report to the extent the petitioners are exonerated.

7. The learned Chief Judicial Magistrate, Buldhana allowed the protest petition and rejected the final report and issued process against the petitioners under Sections 307, 506 read with Section 34 of IPC.

8. The petitioners approached the Revisional Court. The revision came to be dismissed by the Sessions Judge, Buldhana vide judgment dated 25.06.2019. Aggrieved, the petitioners are invoking writ jurisdiction.

9. The thrust of the submissions canvassed by the learned counsel for the petitioners Mr. Tejas Deshpande is that the power to add accused is available only with the Sessions Judge, and such power can be exercised only by the learned Sessions Judge, if the offence is triable exclusively by the Sessions Court. Mr. Tejas Deshpande would submit, that the learned Magistrate who took cognizance of the offence had no option but to commit the case to the Sessions Court, which then, could have considered the prayer for summoning of the petitioners.

10. The other submission canvassed by Mr. Tejas Deshpande is, that assuming *arguendo*, that the learned Magistrate did have the power to summon additional accused who are not charge-sheeted, the protest petition will have to be treated as a complaint, and the Magistrate would be obligated to follow the procedure under Section 200 of the Code. In sum and substance, Mr. Tejas Deshpande would argue that such cognizance would be the cognizance envisaged under Section 190 (1)(a) and not 190 (1)(b). The learned counsel for the respondent 2 Mr. Thakkar would submit that the controversy is not *res integra* and is conclusively put to rest by the Constitution Bench decision of the Supreme Court in *Dharam Pal and others v. State of Haryana and another* (2014) 3 SCC 306, Mr. Thakkar would submit that it is authoritatively pronounced that the Magistrate, even in a case exclusively triable by the Sessions Court, is empowered to disagree with the police report and issue process and summon the accused, if satisfied that a case has been made out to proceed against the persons who are not charge-sheeted.

11. The observations in *Dharam Pal* on which reliance is placed by Mr. Thakkar reads thus:

33. *As far as the first question is concerned, we*

are unable to accept the submissions made by Mr. Chahar and Mr. Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate had no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr. Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Session Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event, the Session Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.

34. The view expressed in Kishun Singh's case, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the Final Report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Session Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Session Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

12. Mr. Tejas Deshpande fairly does not joint issues with Mr. Thakkar on the understanding of the ratio in *Dharam Pal v. State of Haryana and another*.

13. Adverting to the second submission of Mr. Tejas Deshpande, in my considered view, in case of disagreement with the police report and summoning the accused, the learned Magistrate nonetheless takes cognizance upon a police report. The Magistrate may not agree with the inference drawn by the police on the basis of the material collected and may decide to issue process. However, to suggest that the Magistrate is not taking cognizance upon a police report, is contrary to the statutory scheme. The facts which are unearthed in the police report is the

basis of cognizance. While on the basis of the same material or facts the police may have taken a view that a person need not be charge-sheeted, it is open for the Magistrate to disagree with the inference of the police and issue process on the basis of same facts and material. In such a case, the cognizance taken would clearly be as envisaged in Section 190 (1)(b).

14. Both the learned counsel have fairly invited my attention to the decision in *Vishnu Kumar Tiwari v. State of Uttar Pradesh through Secretary Home, Civil Secretariat, Lucknow and another* (2019) 8 SCC 27 and in particular to paragraphs 17 and 18 which read thus:

17. This Court in the course of its judgment in H.S. Bains (supra), held as follows: (SCC pp. 634-35, para 6)

“6. It is seen from the provisions to which we have referred in the preceding paras that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the

case himself or direct an investigation to be made by a police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straight away issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 of the Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156 (3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section

173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

18. *Thus, when he proceeds to take action by way of cognizance by disagreeing with the conclusions arrived at in the police report, he would be taking cognizance on the basis of the police report and not on the complaint. And, therefore, the question of examining the complainant or his witnesses under Section 200 of the Code would not arise. This was the view clearly enunciated.*

15. In view of the Supreme Court enunciation in *Vishnu Kumar Tiwari v. State of Uttar Pradesh* and another, it was not necessary for the learned Magistrate to follow the procedure under Section 200 of the Code, and no fault can be found with the order impugned even on the anvil of the second submission canvassed.

16. No case for interference in writ jurisdiction is made out, the petition is dismissed.

JUDGE

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