

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 17.02.2021
CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

Crl. OP No.20825 of 2020
and Crl MP No. 8890 of 2020

Dhanapal

... Petitioner/Complainant

vs.

1. State rep. by

The Inspector of Police,
Sendurai Police Station,
Ariyalur District,
Crime No.187/2016

2. State rep. By

The Inspector of Police,
CBCID, Ariyalur District. ... Respondents 1
& 2/Complainants

3. Kumarasamy

4. Govindamsamy

5. Panneerselvam

6. Prabhakaran

7. Malarkodi

8. Bhanumathi

3 to 8

... Respondents 3 to 8/Accused

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the Final Report filed by the first respondent herein and direct the first respondent to hand over the Investigation to the second respondent to conduct the re-investigation in C.C.No.30 of 2019, on the file of Judicial Magistrate, Sendurai, and filed a Final Report as expeditiously as possible.

For Petitioner : Mr.R.Gokulakrishan

For Respondent : Mr.M.Mohamed Riyaz,

Addl. Public Prosecutor, for RR1 & 2

ORDER

This petition has been filed by the Defacto complainant challenging the Final Report filed by the respondent Police and for a direction to order further investigation by some other agency in Crime No.187 of 2016.

2. The petitioner is said to have been attacked with deadly weapons and based on the statement recorded from the petitioner, while he was admitted in the hospital, an FIR came to be registered in Crime No.187 of 2016 for offences under Section 147, 148, 324, 506(ii) of IPC. There were totally six accused persons in this case. On the completion of the investigation, the Final Report was filed only as against two accused persons and the names of the other accused persons were dropped.

3. The grievance of the petitioner is that when the Final Report was filed by dropping the names of four accused persons, it was mandatory to issue notice to the petitioner to enable him to file a Protest Petition. However, no such notice was issued to the petitioner and the Court below has mechanically taken cognizance of the Final Report in CC No.30 of 2019 as against two accused persons. Aggrieved by the same, the present petition has been filed before this Court.

4. When the matter came up for hearing on 05.01.2021, this Court passed the following order:

"The learned Additional Public Prosecutor takes notice for respondents 1 and 2.

2. Notice to the respondents 3 to 8 returnable by 05.02.2021. Private notice is also permitted.

3. The main grievance that has been expressed by the petitioner is that the final report was filed by the first respondent by dropping the names of A3 to A6 inspite of specific overt act attributed against them. The further grievance of the petitioner is that the Court below ought to have issued notice to the petitioner who is the defacto complainant before taking cognizance of the final report since the names A3 to A6 was dropped. The learned counsel to substantiate his submission, relied upon the judgment of this Court in C.Ve.Shanmugam Vs. The Deputy Superintendent of Police, Tindivanam Sub-Division, Rosanai Police Station, Tindivanam, Villupuram District reported in (2010) 2 MLJ CrI. 833.

4. A prima facie case has been made out. There shall be an order of interim stay of all further proceedings in C.C.No.30 of 2019, on the file of the learned Judicial Magistrate, Sendurai.

5. The learned Judicial Magistrate, Sendurai is directed to send a report to this Court by explaining as to whether any notice was issued to the petitioner while taking cognizance of the final report filed by the first respondent Police by dropping the names of A3 to A6. The report shall reach this Court by the next date of hearing.

6. Post this case on 05.02.2021 under the caption "'for orders'".

5. Pursuant to the above order, a report was received from the Judicial Magistrate, Sendurai, dated 23.01.2021. For proper appreciation the entire Report is extracted hereunder:

"I humbly submit that the Sub-Inspector of Police, Sendurai Police Station has filed a Final Report against the A1 Kumarasamy S/o.Velayutham, A2 Govinthasamy S/o.Kumarasamy and dropping the names of A3 Pannerselvam S/o.Kumarasamy, A4 Prabakaran S/o.Kumarasamy, A5 Malarkodi W/o. Kumarasamy, A6 Banumathi W/o.Kumarasamy, before the Judicial Magistrate Court No.II, Ariyalur on 27.02.2017 and taken on file in C.C.36/2017 on the file of Judicial Magistrate Court No.II, Ariyalur on 14.03.2017 and issue summons to the accused A1 and A2 on 24.04.2017. Judicial Magistrate Court No.II, Ariyalur has not issued any notice to the Defacto complainant regarding dropping the names of A3 to A6 in the Final Report. On 01.08.2017 A1 alone appeared before the Judicial Magistrate Court No.II, Ariyalur and summons not served to A2.

I humbly submitted that the above C.C.No.36/2017 is transferred to this new constituted District-Munsif-cum Judicial Magistrate Court, Sendurai and new number assigned as in C.C.No.30 of 2019 on 12.06.2019 by this Court and Issue Notice to the A1, A2 on 06.07.2019. This Court has not issued any notice regarding dropping of the names of A3 to A6. On 21.10.2019 A1, A2 appeared before this Court and copies furnished and posted for charge framing on 22.10.2019. On 22.10.2019 charge U/s.324, 506 (ii)-IPC framed against the accused and issue

summons to the LW1 to LW6 and adjourned to 11.12.2019. A1, A2 appeared on 11.12.2019 and 08.01.2020 and 29.01.2020. On 29.01.2020 LW1 witness summon served LW1 called absent. Issue witness warrant against LW1 and also issue summons to LW2 to LW6 adjourned to 04.03.2020. On 04.03.2020 A1, A2 present. LW1 present witness warrant against LW1 recalled and examined as PW1 Ex.P1 marked. Accused side 309 Cr.P.C. Petition filed and adjourned to 11.03.2020 and also issue summons to LW2 to LW6. On 11.03.2020 both accused absent. On 11.03.2020 adjourned to 18.03.2020. On 18.03.2020 A1 present. A2 absent. 317 Cr.P.C. Petition filed and allowed and issue summons to LW2 to LW6 adjourned to 16.04.2020. On 16.04.2020 to 28.10.2020 due to COVID-19 accused absent. On 28.10.2010 A1 present. A2 absent no representation for A2 issue NBW against A2 and adjourned 31.12.2020. On 31.12.2020 A1 present. NBW pending against A2 adjourned to 16.03.2021.

This is for your honours kind submission."

6. Heard Mr. R.Gokulakrishnan, learned counsel appearing for the petitioner and Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the respondents 1 & 2.

7. It is clear from the Report submitted by the Judicial Magistrate, Senthurai, that initially the Final Report was filed before the Judicial Magistrate No.II, Ariyalur on 14.03.2017 only as against two accused persons and admittedly no notice was issued to the petitioner regarding the dropping of the names of A3 to A6 in the Final Report.

8. This Court had an occasion to consider a similar issue in the Criminal Original Petition in CrI. OP. No.1856 of 2015, D.Subramanian v. The Inspector of Police (Crime), Ambur Taluk Police Station, Vellore District, and an order was passed on 22.07.2019. The relevant portions in the order are extracted hereunder:

"18. It is relevant to rely upon the Judgement of this Court in [C.Ve.Shanmugam S/o.Venugopal Vs. The Deputy Superintendent of Police, Tindivanam Sub-division, Rosanai Police Station, Tindivanam, Villupuram District and others] in 2010 2 MLJ CrI 833, in this regard. The relevant portions are extracted hereunder :-

15. At the outset, I have to state that in the Code of Criminal Procedure, there is no provision impelling the learned Magistrate to issue notice to the de facto complainant before accepting the final

report of the police where either some of the accused against whom allegations were made in the FIR have been omitted or the entire report is a negative report. The Hon'ble Supreme Court, however, considering the said lacuna in the Code, in Bhagawant Singh's case cited supra (AIR 1985 SC 1285) has held that such a notice is absolutely necessary. In para 4 of the judgement, the Hon'ble Supreme Court has laid down as follows:-

"4. 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 S.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 C.Ve. Shanmugam vs The Deputy Superintendent Of ... on 21 January, 2010 Indian Kanoon - <http://indiankanoon.org/doc/699824/> 5 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 S.173 decides not to take cognizance of the offence and to drop the proceedings 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 S.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."

16. When the said law came to be again considered by the Hon'ble Supreme Court in Union Public Service

Commission v. S.Papaiah 1998(3) Crimes 40 (SC), the same was reaffirmed. There are several such judgements rendered subsequently wherein the Hon'ble Supreme Court has followed the said law laid down in Bhagwant Singh's case [AIR 1985 SC 1285]. Thus, undoubtedly, it is a settled law as of now that before accepting a final report, where some of the accused, whose names find a place in the FIR, have been omitted, the learned Magistrate must issue notice to the de facto complainant. On receipt of such notice, the de facto complainant has got right to file a petition known as 'protest petition'. Only after hearing him, the learned Magistrate has to pass an order either accepting the final report in its entirety or rejecting the same and to proceed to take cognizance of the offence on the basis of the materials on record and the Court can direct further investigation or to treat the protest petition as a complaint in terms of Chapter XV of the Code of Criminal Procedure.

17. In para 16 of the judgement in S.Papaiah's case cited supra, the Hon'ble Supreme Court has held as follows:-

"Thus, for what we have said above we are of the opinion that the learned Magistrate was not justified in accepting the final report of the C.B.I. and closing the case without any notice to the appellant and behind its back. The order of the learned Magistrate dated March 6, 1995 closing the case and of November 4, 1995 dismissing the petition filed by the appellant as well as the order of the learned Sessions Judge dated March 8, 1996 dismissing the revision petition are set aside. The matter is remitted to the learned Metropolitan Magistrate for its disposal in accordance with law.
....."

सत्यमेव जयते

18. Applying the above law laid down in Bhagwant Singh's case cited supra and followed in the other cases cited supra to the present case, it is crystal that the order of the learned Magistrate accepting the final report without notice to the petitioner is absolutely illegal and the same is, therefore, liable to be set aside. Consequentially, the order of committal of the case to the Court of Sessions for trial C.Ve.Shanmugam vs The Deputy Superintendent Of ... on 21 January, 2010 Indian Kanoon - <http://indiankanoon.org/doc/699824/> 6 and all the consequential proceedings before the Court of Sessions

are liable to be set aside.

19. Now, yet another question arises as to whether, in the absence of any specific challenge to the order of the learned Magistrate taking cognizance and the order of committal by filing appropriate petition, in this revision, which questions only the legality and correctness of the order passed by the learned Additional Sessions Judge, this Court can set aside the above orders of the learned Magistrate and the consequential proceedings. In this regard, it needs to be pointed out that though separate petition has not been filed to challenge the above proceedings, nevertheless, a specific ground has been taken before the learned Additional Sessions Judge as well as in this revision that the orders of the learned Magistrate are vitiated for want of notice as laid down in Bhagwant Singh's case."

9. It is clear from the above order that where the names of some of the accused persons are dropped from the Final Report, there is a mandate to issue notice to the Defacto Complainant to enable him to file a Protest Petition as against dropping the names of certain accused persons. Only on consideration of the Protest Petition, the concerned Court must take a decision, as to whether, the Final Report filed by the respondent Police can be sustained or the cognizance has to be taken against all the accused persons. This mandatory procedure has not been followed in the present case. Therefore, the cognizance of the Final Report taken by the Court below stands vitiated and it requires the interference of this Court and accordingly the same is set aside.

10. The petitioner is directed to file a Protest Petition before the learned Judicial Magistrate, Senthurai, on or before 08.03.2021. Immediately on receipt of the Protest Petition, the Court below shall consider the same along with the materials collected by the respondent Police in the course of investigation and take a decision on the Protest Petition in accordance with law. This process shall be completed within a period of 6 weeks from the date of the filing of the Protest Petition by the petitioner.

11. This Criminal Original Petition is allowed with the above directions. Consequently the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

jv
To

1. The Inspector of Police,
Sendurai Police Station,
Ariyalur District,
Crime No.187/2016
2. The Inspector of Police,
CBCID, Ariyalur District.
3. The Judicial Magistrate, Sendurai
4. The Public Prosecutor,
High Court of Madras,
Chennai 600 104.

+1cc to Mr.R.Gopalakrishnan , Advocate SR.No. 9986

A.SK(08.03.2021)

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