

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1543 of 2012

Damodar Mohanty ***Petitioner***
versus-
State of Orissa and another ***Opposite Parties***

CORAM: JUSTICE S. PUJAHARI

Order
No.

ORDER
25.04.2022

04.

1. This matter is taken up through hybrid mode.
2. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order of cognizance dated 28th March, 2005 passed by the learned J.M.F.C., Kendrapara in G.R. Case No.26 of 2005.
3. Heard the learned counsel for the Petitioner and the learned counsel for the State-Opposite Party No.1. No one appears on behalf of the Opposite Party No.2-Informant.
4. The grievance of the Petitioner in this case is that though he was not charge sheeted by the police, but the learned Magistrate while taking cognizance of the offences under Sections 341, 294 and 506 of the I.P.C. has arrayed him as an accused. Since the Petitioner was not charge sheeted by the police, before the trial or enquiry, the court has no jurisdiction to array him as an accused. It is only when during trial or enquiry evidence comes out incriminating to him, the court can array an accused left out in the police report.

5. However, learned counsel for the State has defended the order of the trial court and submitted that it is well within the jurisdiction of the learned Magistrate while taking cognizance of certain offences, to proceed against the left out accused also while ascertaining about the person involved in the offence.

6. In the case of ***Abhinandan Jha and others v. Dinesh Mishra, reported in AIR 1968 SC 117***, the Apex Court at paragraph-17 have held as follows:-

“17. We have to approach the question, arising for consideration in this case, in the light of the circumstances pointed out above. We have already referred to the scheme of Chapter XIV, as well as the observations of this Court in Rishbud and Inder Singh's Case AIR SC 196 that the formation of the opinion as to whether or not there is a case to place the accused on trial before a Magistrate, is 'left to the officer in-charge of the police station. There is no express power, so far as we can see, which gives jurisdiction to pass an order of the nature under attack nor can any such powers be implied. There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, under Section 190(1)(c) of the Code. That provision in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly or through bona fide error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence, not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, under Section 190(1)(c), on the ground that, after having due regard to the final report and the

police records placed before him, he has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the Officer in-charge of the police station and that opinion determines whether the report is to be under Section 170, being a 'charge-sheet', or under section 169, 'a final report'. It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report either under S. 169, or under section 170, depending upon the nature of the decision. Such a function has been left to the police under the Code."

7. From the law laid down in the case of *Abhinandan Jha and others* (supra), it is apparent that the Magistrate is not bound by the opinion formed by the police in the police report with regard to the commission of the offence and also though not dealt with specifically, with regard to proceeding against the accused persons against whom police though collected the evidence, but had not sent up for trial. The Apex Court also in the case of *Rajinder Prasad v. Bashir*, reported in (2001) 8 SCC 522 have held as follows:-

"A Magistrate has jurisdiction to take cognizance of offences against such persons also who have not been

arrested by the police as accused persons, if it appears from the evidence collected by the police that they were prima facie guilty of the offence alleged to have been committed. Section 209 refers back to Section 190, as it is evident from the words “instituted on a police report” used in Section 190(1)(b) of the Code. The cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police some other persons were also involved, it is his duty to proceed against those persons as well.”

8. In view of the aforesaid law laid down by the Apex Court, the contention of the learned counsel for the Petitioner that when a person is not sent up for trial, a court has no jurisdiction to add him as an accused at the time of taking cognizance and proceeding against the accused persons not charge sheeted to be accused even if the material is there and it is only during the enquiry or trial he/she can be added as accused under Section 319 of Cr.P.C., is devoid of substance.

9. Accordingly, the Criminal Misc. Case stands dismissed.

(S. Pujahari)
Judge

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