Jamuna Singh and Others

Vs

Bhadai Sah

Criminal Appeal No. 56 of 1960

(CJI B. P. Sinha, M. Hidayatullah, J. C. Shah, K. Subha Rao, P. B. Gajendragadkar, K. N. Wnchoo JJ)

04.10.1963

JUDGMENT

DAS GUPTA J. –

These seven appellants were tried by the Assistant Sessions Judge, Saran, on charges under s. 395 of the Indian Penal Code and also under s. 323 of the Indian Penal Code but were acquitted by him of both the charges.

The prosecution case was that on November 15, 1956 when Bhadai Sah, a businessman belonging to Teotith, within police station, Baikunthpur, was passing along the village road on his way to purchase Patua, the seven appellants armed with lathis surrounded him and demanded that he should hand over the monies he had with him. Bhadai had Rs. 250 with him but he refused to part with them. Kesho Singh one of the appellants tried to take away forcibly the currency notes from his pocket but Bhadai caught hold of his arm and raised an alarm. On this all the appellants assaulted him with their lathis and as he fell injured Kesho Singh took away the money from his pocket. Bhadai thereupon filed a petition of complaint in the Court of the Sub-Divisional Magistrate, Gopalgunj, on November 22, 1956. The Magistrate after examining him on solemn affirmation made an order asking the Sub-Inspector of Police, Baikunthpur, to institute a case and report by December 12, 1956. Ultimately, a charge-sheet was submitted by the Police and the accused persons were committed to the Court of Sessions. The Sessions trial ended, as already stated, in the acquittal of all the appellants.

Against the order of acquittal, Bhadai Sah filed an appeal under s. 417(3) of the Code of Criminal Procedure in the High Court of Judicature at Patna. On the following day two learned Judges of the High Court made the order : "The appeal will be heard". The appeal then came up for hearing before two other two other learned Judges of the Court who being of opinion that the learned Sessions Judge had rejected the prosecution evidence "on unsound standards without any real effort to assess the credibility of the evidence" and that the prosecution case was fully established by the evidence, set aside the order of acquittal and convicted the appellants under s. 395 of the Indian Penal Code and sentenced them to two years' rigorous imprisonment.

Against this order of the High Court the present appeal has been filed by special leave of this Court.

The main contention urged in support of the appeal is that in this case no appeal lay to the High Court against an order of acquittal under s. 417(3) of the Code of Criminal Procedure. This provision in s. 417 was introduced in the Code by the Amending Act XXVI of 1955, giving a

complainant a right of appeal against acquittal where a case is instituted upon a complaint. Before this new legislation, only the State Government had the right to appeal against an order of acquittal. The result of the new provision in sub-s. 3 is that if an order of acquittal is passed by any court other than a High Court in a case instituted upon a complaint, the High Court on an application made to it by the complaint in this behalf may grant special leave to appeal from the order of acquittal and on such leave being granted the complainant may present such an appeal to the High Court. It is to be noticed that this right is limited only to cases instituted upon a complaint. On behalf of the appellants it is argued that the case against them was not instituted on any complaint but was instituted on a police report.

The Code does not contain any definition of the words "institution of a case". It is clear however and indeed not disputed, that a case can be said to be instituted in a court only when the court taken cognizance of the offence alleged therein. Section 190(1) of the Code of Criminal Procedure contains the provision for cognizance of offences by Magistrates. It provides for three ways in which such cognizance can be taken. The first is on receiving a complaint of facts which constitute such offence; the second is on a report in writing of such facts - that is, facts constituting the offence - made by any police officer; the third is upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed. Section 193 provides for cognizance of offences being taken by courts of sessions on commitment to it by a Magistrate duly empowered in that behalf. Section 194 provides for cognizance being taken by the High Court of offences upon a commitment made to it in the manner provided in the Code.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's court on a police report.

To decide whether the case in which the appellants were first acquitted and thereafter convicted was instituted on a complaint or not, it is necessary to find out whether the Sub-Divisional Magistrate, Gopalgunj, in whose Court the case was instituted, took cognizance of the offences in question on the complaint of Bhadai Sah filed in his Court on November 22, 1956 or on the report of the Sub-Inspector of Police dated the 13th December, 1956. It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under s. 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. It was so held by this Court in R. R. Chari v. State of U.P. ([1951] S.C.R. 312.) and again in Gopal Das v. State of Assam (A.I.R. (1961) S.C. 986.).

In the case before us the Magistrate after receipt of Bhadai Sah's complaint proceeded to examine him under s. 200 of the Code of Criminal Procedure. That section itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath. This examination by the Magistrate under s. 200 of the Code of Criminal procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such examination and recording the substance of it to writing as required by s. 200 the Magistrate could have issued process by once under s. 204 of the

Code of Criminal Procedure or could have dismissed the complaint under s. 203 of the Code of Criminal Procedure. It was also open to him, before taking either of these courses, to take action under s. 202 of the Code of Criminal Procedure. That section empowers the Magistrate to "postpone the issue of process for compelling the attendance of parsons complained against, and either enquire into case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks first, for the purpose of ascertaining the truth or falsehood of the complaint." If and when such investigation of inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under s. 203 of the Code of Criminal Procedure.

We find that in the case before us the Magistrate after completing the examination under s. 200 of the Code of Criminal Procedure and recording the substance of it made the order in these words :-

> "Examined the complaint on s.a. The offence is cognizable one. To S.I. Baikunthpur for instituting a case and report by 12.12.56."

If the learned Magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under s. 202 of the Code of Criminal Procedure. We do not think that the fact that he used the words "for instituting a case" makes any difference. It has to be noticed that the Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under s. 156(3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code of Criminal Procedure. As it is clear here from the very fact that he took action under s. 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words "for instituting a case" in this order of November 22, 1956 he was actually taking action under s. 202 of the Code of Criminal Procedure, that being the only section under which he was in law entitled to Act.

The fact that the Sub-Inspector of Police treated the copy of the petition of complaint as a first information report and submitted "charge-sheet" against the accused persons cannot make any difference. In the view we have taken of the order passed by the Magistrate on November 22, 1956, the report made by the police officer though purporting to be a report under s. 173 of the Code of Criminal Procedure should be treated in law to be a report only under s. 202 of the Code of Criminal Procedure.

Relying on the provisions in s. 190 of the Code that cognizance could be taken by the Magistrate on the report of the police officer the learned counsel for the appellants argued that when the Magistrate made the order on November 22, 1956 his intention was that he would take cognizance only after receipt of the report of the police officer and that cognizance should be held to have been taken only after that report was actually received in the shape of a chargesheet under s. 173 of the Code, after December 13, 1956. The insuperable difficulty in the way of this argument, however, is the fact that the Magistrate had already examined the complainant under s. 200 of the Code of Criminal Procedure. That examination proceeded on the basis that he had taken cognizance and in the face of this action it is not possible to say that cognizance had not already been taken when he made the order "to sub-Inspector, Baikunthpur, for instituting a case and report by 12.12.56."

Cognizance having already been taken by the Magistrate before he made the order there was no scope of cognizance being taken afresh of the same offence after the police officer's report was received. There is thus no escape from the conclusion that the case was instituted on Bhadai Sah's complaint on November 22, 1956, and not on the police report submitted later by the Police Sub-Inspector, Baikunthpur. The contention that the appeal did not lie under s. 417(3) of the Code of Criminal Procedure must therefore be rejected.

The next contention raised on behalf of the appellants is that the High Court was not justified in interfering with the order of acquittal passed by the learned Assistant Sessions Judge. The reasoning on which the learned Assistant Sessions Judge rejected the evidence of the prosecution witnesses and the reasons for which the learned Judges of the High Court were of opinion that there was no real effort by the learned Sessions Judge to assess the credibility of the evidence have been placed before us. It is quite clear that the High Court examined the matter fully and carefully and on a detailed consideration of the evidence came to the conclusion that that assessment of the evidence had resulted in a serious failure of justice. The principles laid down by this Court in a series of cases as regards interference with orders of acquittal have been correctly followed by the High Court. There is nothing, therefore, that would justify us in reassessing the evidence for ourselves. As relevant parts of the evidence were however placed before us, we think it proper to state that on a consideration of such evidence we are satisfied that the decision of the High Court is correct.

As a last resort the learned counsel for the appellants argued that the Magistrate had acted without jurisdiction in asking the police to institute a case and so the proceedings subsequent to that order were all void. As we have already pointed out, the order of the Magistrate asking the police to institute a case and to send a report should properly and reasonably be read as one made under s. 202 of the Code of Criminal Procedure. So, the argument that the learned Magistrate acted without jurisdiction cannot be accepted. At most it might be said that in so far as the learned Magistrate asked the police to institute a case he acted irregularly. There is absolutely no reason, however, to think that that irregularity has resulted in any failure of justice. The order of conviction and sentence passed by the High Court cannot be reversed or altered on account of that irregularity.

In the result, the appeal is dismissed.

Appeal dismissed.

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