Raghubans Dubey

Vs

State of Bihar

Criminal Appeal No. 189 of 1964

(M. Hidayatullah, C. A. Vaidialingam, S. M. Sikri JJ)

19.01.1967

JUDGMENT

SIKRI, J. –

This appeal by special leave is directed against the judgment of the High Court to Judicature of Patna dismissing Criminal Revision No. 896 of 1961 filed by the appellant Raghubans Dubey. The relevant facts for appreciating the points raised before us are as follows :-

The appellant was one of the 15 persons mentioned as assailants in the First Information Report dated July 29, 1959, lodged by one Raja Ram Sah. The police investigated the case and during the investigation the appellant set up an alibi. The police accepted the alibi and did not include his name as an accused in the final report under section 173 of the Code of Criminal Procedure. His name was, however, mentioned in column No. 2 of the Charge Sheet under the heading "not sent up". On April 5, 1961, the Sub-divisional Magistrate passed the following order :

> "C.S. No. 12 dated 23-3-61 u/s. 149/302/201 I.P.C. received against the accused noted in col. 3 and 4 of C.S.
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> Cog. taken u/s. 149/302/201 I.P.C. and case transferred to Shri L. P. Singh, Magt...... class for enquiry under Chapter XVIII Cr.P.C. Accused not sent up for trial is discharged."

On transfer, Shri L. P. Singh, Magistrate, took up the hearing of the case on May 2, 1961. In the meantime a petition had been filed on April 11, 1961, praying that the appellant be summoned by the Magistrate. On May 2, 1961, Jagannath Sao, P.W. 1, was examined and in his examination-in-chief he implicated the appellant as one of the persons who were present in the mob which is alleged to have killed Rupan Singh. On the same day Mahesh Sao, P.W. 2, also implicated the appellant in his examination-in-chief. It appears that the counsel for Raja Ram Sah, the person who lodged the F.I.R., requested the Magistrate to summon the appellant as well for trial, as prayed for in the petition dated April 11, 1961. The Magistrate, after hearing the Assistant District Prosecutor as well as the counsel for the informant and the accused, passed the following order :-

> "Raghubans is named in F.I.R. and as submitted by A.D.P. 5 witnesses have named him before police and P.W. 1 examined before me has also named him. So in my opinion it is proper to add Raghubans Dubey also in this enquiry as accused. At this stage one petition has been filed by lawyer of accused that cross-examination of P.W.s. be allowed to be done after appearance of Raghubans. This contention is quite

> reasonable otherwise cross-examination will have to be done again after appearance of Raghubans and so prayer of defence is allowed. Examined P.W. 2 also in chief. He has also named Raghubans to be a member of the mob of these accused at the time of occurrence. So issue non-bailable W/A against Raghubans Dubey according to address given by P.W. Mahesh Sah today as the allegation against Raghubans appears to be very serious one. Send the process by special peon returnable by 3-6-1961. Other accused will re-attend."

The appellant challenged this order before the Sessions Judge. It was urged before him that the Magistrate had no jurisdiction to summon the appellant because the Sub-divisional Magistrate had already dismissed a protest petition on merits. The Sessions Judge rejected the argument and held that it was open to the Magistrate to summon any person against whom he found sufficient evidence in the case.

The appellant then filed a criminal revision before the High Court. Before the High Court it was urged, first, that the petition dated April 11, 1961, was a petition of complaint and, therefore, summoning the appellant on the basis of a petition of complaint would result in a separate complaint case and he could not be tried along with the other accused under section 207A of the Code of Criminal Procedure. Secondly, it was urged that the order of the Magistrate was irregular as he had summoned the appellant on the same grounds on which the Sub-divisional Magistrate had discharged him. On the first point the High Court held that the order of the Magistrate did not result in a separate complaint case against the appellant as "the present case was instituted when the sub-divisional Magistrate took cognizance of an offence reported by the Police, and therefore, the case shall be deemed to have been instituted on the police report." The High Court further observed that "it is, therefore, clear from the language of section 190 of the Code that the Magistrate takes cognizance of an offence made out in the police report or in the petition of complaint and there is nothing like taking cognizance of the offenders at that stage. It has to be decided on the materials on record as to who actually the offenders may be only after cognizance of the offence has been taken. On the facts of the instant case, therefore, cognizance of the offence has been taken on a police report, and the order of the transferee Magistrate summoning Raghubans Dubey does not amount to taking cognizance of an offence." On the second point the High Court held that the Magistrate did not summon the appellant only on those grounds which were before the Sub-divisional Magistrate as the materials before the two Magistrate were not identical. The Sub-divisional Magistrate had acted on the Police report alone but the Magistrate took into consideration the evidence of the two prosecution witnesses examined in court as well.

The learned counsel for the appellant, Mr. Danial Latifi, raises two points before us; first that the discharge of the appellant by the order dated April 5, 1961, by the Sub-divisional Magistrate was final, and secondly, that the proper procedure to be observed on the facts of this case was not under section 207A but under the subsequent sections in Chapter XVIII of the Criminal Procedure Code. We see no force in these points.

Regarding the first point Mr. Latifi urges that judicial refusal to summon amounts to discharge. There is no force in this contention because there cannot be any question of discharge when the appellant was not sent up upon the charge-sheet submitted by the police.

Coming to the second point the learned counsel for the appellant contends that no proceedings was instituted against the appellant on a police report within the meaning of section 207A of the Code because the appellant's name was not included in the charge-sheet. He says that although

congnizance might have been taken of an offence under section 190(1)(b) no proceeding as such was instituted against the appellant at this stage; the proceeding was instituted when a non-bailable warrant was issued against the appellant and this proceeding was instituted not on the basis of a police report but on the basis of evidence taken before the Magistrate, and, therefore, he says, it is a proceeding falling within section 207(b).

> Section 190(1) and 207 of the Code read as follows :
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> "190(1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence -
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> (a) upon receiving a complaint of facts which constitute such offence;
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> (b) upon a report in writing of such facts made by any police officer;
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> (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed."
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> "207. In every inquiry before a Magistrate where the case is triable exclusively by a court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate shall -
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> (a) in any proceeding instituted on a police report, follow the procedure specified in section 207A; and
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> (b) in any other proceeding, follow the procedure specified in the other provisions of this Chapter."

It seems to us that section 207(a) refers back to section 190(1)(b); in other words, the police report mentioned in section 207(a) is the report mentioned in section 190(1)(b), and once cognizance is taken under section 190(1)(b), a proceeding is instituted within section 207(a). Hidayatullah, J., speaking for the Court, while considering the interpretation of section 251-A of the Code of Criminal Procedure in Pravin Chandra Mody v. State of Andhra Pradesh ([1965] 1 S.C.R. 269) observed as follows :

> "In our judgment the meaning which is sought to be given to a 'police report' is not correct. In section 190, a distinction is made between the classes of persons who can start a criminal prosecution. Under the three clauses of section 190(1), to which we have already referred, criminal prosecution can be initiate (i) by a police officer by a report in writing, (ii) upon information received from any person other than a police of officer or upon the Magistrate's own knowledge or suspicion, and (iii) upon receiving a complaint of facts. If the report in this case falls within (i) above, then the procedure under section 251A, Criminal Procedure Code, must be followed. If it falls in (ii) or (iii) then the procedure under section 252, Criminal Procedure Code, must be followed. We are thus concerned to find out whether the report of the police officer in writing in this case can be described as a 'complaint of facts' or as 'information received' from any person other than a police officer.' That it cannot be the latter is obvious enough because the information is from a police officer. The term 'complaint' in this connection has been defined by the Code of Criminal

Procedure and it 'means the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer.' [see section 4(1)(h)].

It, therefore, follows that section 252, Criminal Procedure Code, can only apply to those cases which are instituted otherwise than on a police report, that is to say, upon complaints which are not reports of a police officer or upon information received from persons other than a police officer."

Similarly section 207(b) can only apply if the case was instituted otherwise than on a police report. On the facts of this case it is quite clear that the case does not fall within section 190(1)(a) or section 190(1)(c) because the Sub-divisional Magistrate had taken cognizance of the offence on April 5, 1961. But, says Mr. Latifi, that though it is true that cognizance was taken on April 5, 1961, the cognizance was taken of the offence as far as the other accused were concerned and not as far as the appellant was concerned, as a matter of fact the appellant had been rightly or wrongly discharged. In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court Pravin Chandra Mody v. State of Andhra Pradesh ([1965] 1 S.C.R. 269) the term "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under section 190(1)(a) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails, in our view, under section 190(1)(b).

Mr. Sachthey, the learned counsel for the respondent brought to our notice some decisions which have taken the same view. The Calcutta High Court in Saifar v. State of West Bengal, (*) following the Full Bench decision of the Judicial Commissioners, Sind, in Mehrab v. Emperor (*), held that when a Magistrate takes cognizance under section 190(1)(b) on a police report he takes cognizance of the offence and not merely of the particular persons named in the charge-sheet, and therefore, the Magistrate is entitled to summon additional accused against whom he considers that there was good evidence, after perusal of the statements recorded by the police under section 161 and the other documents referred to in section 173 even without examination of witnesses in court.

The Punjab High Court in Fatta v. The State (A.I.R. 1964 Pun. 351) and the Allahabad High Court in Ali Ullah v. The State ([1963] 1 Cr.L.J. 66) also expressed a similar view.

In the result the appeal fails and is dismissed.

Appeal dismissed.

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