Tula Ram and Others

Vs

Kishore Singh

Criminal Appeal No. 6 of 1976

(P. S. Kailasam JJ)

05.10.1977

JUDGMENT

FAZAL ALI, J. –

1. Whether or not a Magistrate after receiving a complaint and after directing investigation under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) and on receipt of the final report from the police can issue notice to the complainant, record his statement and the statements of other witnesses and then issue processes under Section 204 of the Code is the question of law that falls for consideration in this appeal.

2. This is an appeal by certificate granted by the High Court under Article 134(1)(c) of the Constitution. The answer to the proposition mentioned above would naturally depend on the true and proper interpretation of the scope and ambit of Sections 156(3), 190, 200, 202 and 204 of the Code.

3. Before embarking on this enquiry it may also be necessary to consider the legal import and significance of the term "taking cognizance" as used in Sections 190, 200 and 202 of the Code. Before however considering the various aspects of the matter it may be necessary to summarise the facts which have led to the enquiry in the appeal before us.

4. A criminal case was registered by the Police Officer, Police Station, Guru Har Sahai on the basis of F.I.R. filed by Avinash Chandra against Mohd. Sadiq and others for having caused the murder of one Balbir Singh. This case was committed to the Court of Session by the Committing Magistrate. A cross-complaint appears to have been filed before in the Court of Judicial Magistrate, First Class, Ferozepore on December 30, 1974 by Kishore Singh the brother of the accused (sic deceased) Balbir Singh containing a counter version of the occurrence mentioned in the case registered by the police. On receipt of the complaint the Magistrate ordered the police to investigate the case under Section 156(3) of the Code by his order dated January 1, 1975. The police submitted a final report on March 8, 1975 indicating that no case was made out against the accused. The Court after considering the report on April 2, 1975 ordered that notice may be issued to the complainant to appear before him. Consequently, the complainant appeared along with his witnesses before the Magistrate and his statement was recorded on May 22, 1975. On May 23, 1975, i.e. the next day the Magistrate issued process against the accused by directing a non-bailable warrant against the accused and summoned them under Sections 304/34, 149 and 148 of the Code. The accused appellants moved the High Court for quashing the order of the Magistrate on the ground that the Magistrate having once ordered investigation under Section 156(3) of the Code was not competent to revive the complaint and issue process against the accused. The High Court held that no case for

quashing the order of the Magistrate was made out inasmuch as the Magistrate had issued process against the accused after taking due cognizance of the case and applying his mind and recording the statement of the complainant. Thereafter the appellants prayed for a certificate for leave to appeal to this Court which was granted.

5. We may mention at the outset that we are not at all concerned with the merits of the case and the learned Counsel Mr. D. Mukherjee appearing for the appellants has argued only a pure point of law before us. He has contended that the Magistrate after having referring the matter for investigation to the police was not at all in law entitled to revive the complaint when the report was in favour of the accursed. The Magistrate could at the most order re-investigation but could not have acted on the complaint which merged in the investigation by the police and lost its complete identity.

6. Mr. Harbans Singh, Counsel for the respondent however submitted that the Magistrate had directed investigation under Section 156(3) of the Code obviously before taking cognizance and after receiving the report he was not debarred from taking cognizance and proceeding with the complaint filed by Kishore Singh in accordance with law.

7. The question as to what is meant by taking cognizance is no longer res integra as it has been decided by several decisions of this Court. As far back as 1951 this Court in the case of R.R. Chari v. State of Uttar Pradesh [1951 SCR 312 : AIR 1951 SC 207.] observed as follows :

> Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence.

While considering the question in greater detail this Court endorsed the observations of Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee [AIR 1950 Cal 437] which was to the following effect :

> It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition indicated in the subsequent provisions of this Chapter - proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.

8. Section 190 of the Code runs thus :

> Subject to the provisions of this Chapter, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf under sub-section (2) 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 police report of such facts;
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> (c) upon information received from any person other that a police officer, or upon his

> own knowledge, that such offence has been committed.

It seems to us that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Court prescribes several modes in which a complaint can be disposed of after taking cognizance. In the first place, cognizance can be taken on the basis of three circumstances : (1) upon receiving a complaint of facts which constitute such offence; (2) upon a police report of such facts; and (c) upon information received from any person other than the police officer or upon his own knowledge, that an offence has been committed. These are the three grounds on the basis of which a Magistrate can take cognizance and decide to act accordingly. It would further appear that this Court in the case of Narayandas Bhagwandas Madhavdas v. The State of West Bengal [(1960) 1 SCR 93, 106 : AIR 1959 SC 1118 : 1959 Cri LJ 1368.] observed the mode in which a Magistrate could take cognizance of an offence and observed as follows :

> It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202.

9. It is now well settled by the decision of this Court in Abhinandan Jha v. Dinesh Mishra [(1967) 3 SCR 668 : AIR 1968 SC 117 : 1968 Cri LJ 97] that while a Magistrate can order the police to investigate the complaint he has no power to compel the police to submit a charge-sheet on a final report being submitted by the police. In such cases a Magistrate can either order re-investigation or dispose of the complaint according to law.

10. Analysing the scheme of the Code on the subject in question it would appear that Section 156(3) which runs thus :

> Any Magistrate empowered under Section 190 may order such an investigation as above mentioned.

appears in Chapter 12 which deals with information to the police and the powers of the police to investigate a crime. This section is therefore placed in a Chapter different from Chapter 14 which deals with initiation of proceedings against an accused person. It is, therefore, clear that Section 190 and 156(3) are mutually exclusive and work in totally different spheres. In other words, the position is that even if a Magistrate receives a complaint under Section 190 he can act under Section 156(3) provided that he does not take cognizance. The position, therefore, is that while Chapter 14 deals with post cognizance stage Chapter 12 so far as the Magistrate is concerned deals with pre-cognizance stage, that is to say once a Magistrate starts acting under Section 190 and the provisions following he cannot resort to Section 156(3). Mr. Mukherjee vehemently contended before us that in view of this essential distinction once the Magistrate chooses to act under Section 156(3) of the Code it was not open to him to revive the complaint, take cognizance and issue process against the accused. Counsel argued that the Magistrate in such a case has two alternatives and two alternatives

only - either he could direct re-investigation if he was not satisfied with the final report of the police or he could straightway issue process to the accused under Section 204. In the instant case the Magistrate has done neither but has chosen to proceed under Section 190(1)(a) and Section 200 of the Code and thereafter issued process against the accused under Section 204. Attractive though the argument appears to be we are however unable to accept the same. In the first place, the argument is based on a fallacy that when a Magistrate orders investigation under Section 156(3) the complaint disappears and goes out of existence. The provisions of Section 202 of the present Code debar a Magistrate from directing investigation on a complaint where the offence charged is triable exclusively by the Court of Session. On the allegations of the complainant the offence complained of was clearly triable exclusively by the Court of Session and therefore it is obvious that the Magistrate was completely debarred from directing the complaint filed before him to be investigated by the police under Section 202 of the Code. But the Magistrate's powers under Section 156(3) of the Code to order investigation by the police have not been touched for affected by Section 202 because these powers are exercised even before cognizance is taken. In other words, Section 202 would apply only to cases where the Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency. But there may be circumstances as in the present case where the Magistrate before taking cognizance of the case himself chooses to order a pure and simple investigation under Section 156(3) of the Code. The question is, having done so, is he debarred from proceeding with the complaint according to the provisions of Sections 190, 200 and 204 of the Code after receipt of the final report by the police ? We see absolutely no bar to such a course being adopted by the Magistrate. In the instant case, there is nothing to show that the Magistrate had taken cognizance of the complaint. Even though the complaint was filed by (sic before) the Magistrate, he did not pass any order indicating that he had applied his judicial mind to the facts of the case for the purpose of proceeding with the complaint. What he had done was to keep the complaint aside and order investigation even before deciding to take cognizance on the basis of the complaint. After the final report was received the Magistrate decided to take cognizance of the case on the basis of the complaint and accordingly issued notice to the complainant. Thus, it was on April 2, 1975 that the Magistrate decided for the first time to take cognizance of the complaint and directed the complainant to appear. Once cognizance was taken by the Magistrate under Section 190 of the Code it was open to him to choose any of the following alternatives :

(1) Postpone the issue of process and enquire into the case himself; or

(2) direct an investigation to be made by the police officer; or

(3) any other person.

In the instant case as the allegations made against the accused made out a case exclusively triable by the Court of Session the Magistrate was clearly debarred from ordering any investigation, but he was not debarred from making any enquiry himself into the truth of the complaint. This is what exactly the Magistrate purported to have done in the instant case. The Magistrate issued notice to the complainant to appear before him, recorded the statement of the complainant and his witnesses and after perusing the same he acted under Section 204 of the Code by issuing process to the accused appellants as he was satisfied that there were sufficient grounds for proceeding against the accused.

11. Mr. Mukherjee however submitted that the moment the Magistrate directed investigation he must be deemed to have taken cognizance, and, therefore, he could not have taken any of the steps excepting summoning the accused straightaway or directing re-investigation. We have already pointed out that Chapter 12 and Chapter 14 subserve two different purposes : One pre-cognizance

action and the other post-cognizance action. That fact was recognised by a recent decision of this Court in the case of Devarpalli Lakshminarayana Reddy v. V. Narayana Reddy [1976 Supp SCR 524 : (1976) 3 SCC 252 : 1976 SCC (Cri) 380] where the Court observed as follows [SCC p. 258, SCC (CRI) p. 386, para 17] :

> The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is competent to switch back to the pre-cognizance stage and avail of Section 156(3).

12. In the case of Gopal Das Sindhi v. State of Assam [AIR 1961 SC 986 : (1961) 2 Cri LJ 39] this Court while approving the observations of Justice Das Gupta in the case referred to above observed as follows :

> It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence.

13. To the same effect is the decision of this Court in Jamuna Singh v. Bhadai Sah [(1964) 5 SCR 37, 41 : AIR 1964 SC 1541 : (1964) 2 Cri LJ 408] :

> 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 offence mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under Section 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence.

14. In these circumstances the inescapable conclusion is that in the present case the Magistrate had not taken cognizance of the case and ordered investigation by the police under Section 156(3) before applying his mind to the complaint. This being the position it was always open to the Magistrate to take cognizance of the complaint and dispose it of according to law, that is to say according to the provisions of Sections 190, 200 and 202. In view of the facts in the present case he was prohibited from directing any investigation but he could take other steps. Even in the case of Abhinandan Jha v. Dinesh Mishra (supra) this Court while holding that the Magistrate has supervisory power over the police and it was not open to him to direct the police to file a charge-sheet observes that the Court was not powerless to dispose of the complaint according to law. In this connection, this Court observed as follows : We are not inclined to agree with the further view that from these considerations alone it can be said that when the police submit a report that no case has been made out for sending up an accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. But, we may make it clear that this is not to say that the Magistrate is absolutely

powerless, because, as will be indicated later, it is open to him to take cognizance of an offence and proceed, according to law.

15. In these circumstances we are satisfied that the action taken by the Magistrate was fully supportable in law and he did not commit any error in recording the statement of the complainant and the witnesses and thereafter issuing process against the appellants. The High Court has discussed the points involved thread-bare and has also cited a number of decisions and we entirely agree with the view taken by the High Court. Thus on a careful consideration of the facts and circumstances of the case the following legal propositions emerge :

> 1. That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance state, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.
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> 2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives :
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> (a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.
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> (b) The Magistrate can postpone the issue of process and direct an enquiry by himself.
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> (c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.
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> 3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.
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> 4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above.

16. The present case is clearly covered by proposition No. 4 formulated above.

17. For these reasons, we find no merit in this appeal which is accordingly dismissed.

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