SUPREME COURT OF INDIA

Sanjay Bansal

Vs.

Jawaharlal Vats

Crl.A.No.1453 of 2007

(Dr. Arijit Pasayat and Lokeshwar Singh Panta JJ.)

22.10.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Allahabad High Court in Criminal Misc. Writ Petition No.13182 of 2006 which was filed under Article 226 of the Constitution of India, 1950 (in short the Constitution). In the writ petition, the writ petitioner, i.e. respondent No.1, had prayed for a direction to the investigating agency to proceed with fair and proper investigation in case No.147 of 2006 under Section 307 of the Indian Penal Code, 1860 (in short the IPC) registered at Police Station Nauchandi, district Meerut. The writ petitioner alleged that his son had sustained fire arm injuries at the hands of some unknown miscreants on 30.3.2006 at 10.00 a.m. and in regard to it a case was registered. Initially, Sri R.P. Singh, Station Officer, Nauchandi had recorded the statement of the informant and the injured-Dhananjay who had categorically stated that the present appellants had caused fire arm injuries on him. Subsequently, the investigation was undertaken by one Chet Singh, SI who submitted the final report excluding the afore-named accused i.e. the present appellants in the offence. The final report was on the basis of alibi claimed by the accused persons. The High Court was of the view that from the beginning the writ petitioner was apprehending that there would be no fair and proper investigation into the case as the accused persons are influential persons. The High Court was of the view that whether any alibi can be accepted is for the trial court to decide. Accordingly, the High Court inter alia gave the following directions:

In above view of the matter the petitioner is directed to approach the learned Magistrate concerned within 10 days and file protest petition and the learned Magistrate concerned taking into account the statement of the injured and the injury report press a proper and appropriate order in accordance with law within a week thereafter and till then the final report No.32 of 2006 shall not be given effect to and in case the final report has already been accepted the same shall be treated to have been rejected.

This Court is anxious to know the order passed by the learned Magistrate, list this writ petition

before us on 20th April, 2007 for the report of the learned Magistrate concerned.

3. In support of the appeal, learned counsel for the appellants submitted that the directions given by the High Court are not sustainable in law. The course to be adopted when the final report is submitted has been indicated by this Court in several cases. In this case what the High Court indirectly directed was rejection of the final report as would be evident from the fact that the High Court expressed its anxiety to know the order passed by the Magistrate and kept the writ petition pending for report of the concerned learned Magistrate. It was submitted that in view of the clear indication of view made by the High Court, the trial court was bound to be influenced. In fact the order by the High Court was passed on 16.3.2007. This Court directed interim stay of the High Courts order by order dated 20th April, 2007. Before the said order could be passed, the trial court in fact had rejected the final report by order dated 16th April, 2007. In the said order, the learned Magistrate categorically referred to the order passed by the High Court. Therefore, there was no independent application of mind.

4. In response, learned counsel for respondent No.1 has submitted that the Magistrate has decided the matter uninfluenced by any observation of the High Court and he exercised the jurisdiction de hors the High Courts order.

5. There is no provision in the Code of Criminal Procedure, 1973 (in short the Code) to file a protest petition by the informant who lodged the first information report. But this has been the practice. Absence of a provision in the Code relating to filing of a protest petition has been considered. This Court in Bhagwant Singh v. Commissioner of Police and Another (AIR 1985 SC 1285), stressed on the desirability of intimation being given to the informant when a report made under Section 173 (2) is under consideration. The Court held as follows:

....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 Section 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 submission to persuade the Magistrate to take cognizance of 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 Section 173 decides not to take cognizance of the offence and to drop the proceeding 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...

6. Therefore, there is no shadow of doubt that the informant is entitled to a notice and an opportunity to be heard at the time of consideration of the report. This Court further held that the position is different so far as an injured person or a relative of the deceased, who is not an informant, is concerned. They are not entitled to any notice. This Court felt that the question relating to issue of notice and grant of opportunity as afore-described was of general importance and directed that copies of the judgment be sent to the High Courts in all the States so that the High Courts in their turn may circulate the same among the Magistrates within their respective jurisdictions.

7. In Abhinandan Jha and Another v. Dinesh Mishra (AIR 1968 SC 117), this Court while considering the provisions of Sections 156(3), 169, 178 and 190 of the Code held that there is no

power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial. The functions of the Magistrate and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding formation of the opinion by the police which is the final stage in the investigation has been provided for in Section 190(1)(c).

8. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Sarat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)]. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singhs case (supra) that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

9. We may add here that the expressions charge-sheet or final report are not used in the Code, but it is understood in Police Manuals of several States containing the Rules and the Regulations to be a

report by the police filed under Section 170 of the Code, described as a charge-sheet. In case of reports sent under Section 169, i.e., where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, though there is nothing in Section 173 specifically providing for such a notice.

10. As decided by this Court in Bhagwant Singhs case (supra), the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows:- ....the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report...

11. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in Bhagwant Singhs case (supra) the right is conferred on the informant and none else.

12. The aforesaid position was highlighted by this Court in Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (2004 (7) SCC 768).

13. The High Court could not have directed the writ petitioner to lodge the protest petition. It was for the informant to do so if he intended to do so. The High Court further could not have kept the matter pending and indicated its anxiety to know the order passed by the learned Magistrate. As rightly contended by learned counsel for the appellants it is clearly indicative of the fact that the High Court wanted the rejection of the final report though it was not specifically spelt out.

14. In the circumstances, we set aside the order passed by the High Court and the consequential order dated 16.4.2007 passed by the Magistrate. The protest petition, if filed, shall be considered by the learned Magistrate in accordance with law uninfluenced by any observation made by the High Court. We make it clear that we have not expressed any opinion on the merits of the case. The writ petition filed before the High Court shall be treated to have been disposed of and not pending.

15. The appeal is accordingly disposed of.