CALCUTTA HIGH COURT

Saifar

Vs.

State of W.B

Criminal Revn. No. 1072 of 1959

(S.K. Sen and K.C. Sen, JJ.)

22.11.1960

JUDGMENT

S.K. Sen, J.

1. This revisional application was filed by the petitioners Saifar Sheikh and five others for quashing the proceedings against them pending in the Court of Sri R.N. Sarkar, Magistrate, First Class, Suri. The facts are briefly as follows:

2. On 26th December 1958 one Sheikh Khoda Newaj lodged a first information report at Nanoor P.S. against 17 persons including the six petitioners, alleging that in the early morning of that day, a bullock belonging to one Sonaullah had damaged gram plants belonging to one Mokshed Sk., that the bullock had been seized by Haijan Sk. and Ajad for impounding; that Sonaullah asked for the release of the bullock and there was a quarrel, whereupon fifteen or sixteen persons including the six petitioners assaulted Haijan Sk. and Ajad and rescued the bullock. The police after investigation submitted charge-sheet against eight accused persons under Section 147, 324 and 325 of the Indian Penal Code. On the 1st of May 1959, when the Magistrate was to peruse police papers for considering whether a charge or charges should be framed against the persons sent up the informant filed a petition stating that there was a prima facie case against the six petitioners and that the police wrongfully refused to send them up. The learned Magistrate then perused the police papers and heard both sides and he decided that there was prima facie evidence against the six petitioners also; and so by an order dated 15th July 1959 he summoned these six petitioners under section 147 of the Indian Penal Code. It is against that order that the petitioners have come up.

3. Mr. Ajit Kumar Dutt appearing for the petitioners has urged that the learned Magistrate had no jurisdiction to summon the petitioners who had not been sent up by the police along with the charge-sheet.

4. The learned Magistrate in the course of his order dated 15th July 1959 observed that when a Magistrate takes cognizance under section 190 (1) (b) of the Criminal Procedure Code 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 can issue process against other persons who appear to him on the basis of the report and other materials placed before him to be concerned in the commission of the offence. In the particular case, after perusing the statements under section 161 of the Criminal Procedure Code, the learned Magistrate observed that more than one witness having named the six persons as concerned in the unlawful assembly which assaulted the men on the side of the informant and rescued the bullock, prima facie there was a good case under section 147 of the Indian Penal Code against the six petitioners; and so he summoned them. The view taken by the learned Magistrate finds support in the observations made in the case *Mehrab v. Emperor*[1], which is a Full Bench case of the Judicial Commissioners, Sind. Though the case comes from Sind, the learned Judges of the Full Bench made a lucid exposition of the relevant law and the case has been quoted as a leading case in B.B. Mitra's Commentary on the Criminal Procedure Code. It was observed in that case as follows:-

> "Under section 190 of the Criminal Procedure Code, a Magistrate takes cognizance of an offence and not of the offender..... The fact that the Police in a report submitted under section 173 of the Criminal Procedure Code have not mentioned all the parties concerned in the offence which has been sent up for enquiry, does not debar a Magistrate from taking action against persona other than those mentioned in the Police report. Once a Magistrate has taken cognizance of a case and proceeds to deal with the evidence brought before him, it is his duty to see that justice is done with regard to any other person that may be suspected of being concerned in the offence. His action against such persons would fall under section 190, clause (b) and not clause (c) of the Code."

5. Mr. Dutt has sought to distinguish the case by pointing out that in the case which the Full Bench of the Judicial Commissioners of Sind were considering, the evidence had been recorded by the Magistrate and on the basis of that evidence the Magistrate considered that there was a good prima facie case against certain other persons not sent up with the charge-sheet and the learned Magistrate summoned those persons. Mr. Dutt has urged that when the Magistrate has recorded evidence in Court, he can for the purpose of doing complete justice between the parties summon any other person who appears to be concerned in the offence. In this connection Mr. Dutt has referred to Edgley, J.'s decision in *Hafizar Rahaman v. Aminal Hoque*[2], where it was held in connection with a transferee Magistrate that such a Magistrate could issue process against any other person not summoned by the Magistrate who took cognizance of the case, if on the evidence before him the transferee Magistrate was satisfies that such other person was concerned in the offence. Mr. Dutt has urged that the Magistrate, whether the original Magistrate who takes cognizance of the offence or a transferee Magistrate, gets jurisdiction to summon other accused not originally summoned or not sent up by the police with the charge-sheet, only after the evidence had been recorded in Court; and that by merely looking at the police papers the Magistrate cannot summon persons not sent up with the charge-sheet.

6. It is true that under the procedure for the trial of the warrant cases before the amendment of the Criminal Procedure Code in 1955 the Magistrate had to record the evidence before he could decide whether there was a prima facie case against anybody, including also the persons sent up by the police along with the charge sheet. The

[1]26 Cri LJ 181 : (AIR 1924 Sind 71)
[2]44 Cal WN 1114 : (AIR 1941 Cal 185)

Magistrate could not act on the basis of the statements recorded by the police under section 161 of the Criminal Procedure Code. For framing charge against the accused sent up as well as for deciding whether any other additional persons were concerned in the offence, the Magistrate had to act on the evidence which he himself had recorded. But the amendment of the Criminal Procedure Code by the Amending Act of 1955 has introduced a substantial change in the powers of the Magistrate in this connection. Under section 251A of the Criminal Procedure Code the Magistrate after consideration of the documents referred to under section 173 and hearing the prosecution and the defence, has to decide whether a charge has been prima facie established against any of the accused and if he is satisfied on that point, he will frame a charge. Thus, before examination of any witness, by perusing the statements recorded by the police under section 161 of the Criminal Procedure Code and the other documents referred to under section 173 like the first information report and the dying declaration, if any and the medical report, the Magistrate has to decide whether there is a prima facie case against the persons sent up by the police along with the charge-sheet. It is clear that, at the same time, the Magistrate can also decide on the basis of the same materials whether there is a prima facie case against other persons not sent up by the police and if the Magistrate is so satisfied certainly the Magistrate is entitled to summon them and place them on trial along with the other persons sent up by the police. The Magistrate takes cognizance of the offence on the police report or charge-sheet; for as has been repeatedly held in many decided cases, the Magistrate takes cognizance of the offence and not of the offender and having taken cognizance of the offence on the police report, if he summons additional persons not sent up by the police, he is still not taking cognizance under clause (c) of section 190(1) but acting under the cognizance which he has already taken under clause (b). Therefore, the same procedure for the trial remains applicable. The competence of the Magistrate to summon additional persons as accused without examination of witnesses in Court, therefore, follows from the altered procedure under the Amende Criminal Procedure Code. Mr. Dutt has referred to a decision of a Division Bench of this Court in *Kashemali Gomasta v. The State*[3], in support of his contention that a Magistrate has no jurisdiction to summon accused not sent up by the police. But a perusal of that case shows that police submitted a clear final report, that is, did not find any offence established against anybody. In such a case there was no charge-sheet on which the Magistrate could take cognizance under clause (b) of section 190(1) of the Criminal Procedure Code. Therefore merely on a naraji petition and on a perusal of the police papers the Magistrate could not take cognizance. He must treat the naraji petition as a complaint and examine the complainant on oath and only then he would have jurisdiction to summon persons against whom he may consider that there is a prima facie case. The case cited, therefore, does not support the proposition that even when the Magistrate has taken cognizance of a case on a charge-sheet submitted by the police, the Magistrate cannot after examination of the statements recorded under section 161 of the Criminal Procedure Code summon additional accused. Mr. Dutt has also referred to the decision, *Akshoy Kumar Dutta v. Jogesh Chandra Nandy*[4], where also the Magistrate without examination of the complainant on oath on his naraji petition proceeded to take cognizance of a case and the procedure was held to be bad. There also it appears that the investigating officer had submitted a final report stating that the complainant's case was altogether false. In the circumstances, when the complainant filed a naraji petition, the Magistrate was not

[3] Crl. Revn. No.226 of 1960 D/d. 12-9-1960 (Cal)
[4]60 Cal WN 345: (AIR 1956 Cal 76)

entitled to take cognizance without examination of the complainant on oath under section 200 of

the Criminal Procedure Code. This decision also does not help to establish the proposition urged by Mr. Dutt. We must, therefore, hold that the learned Magistrate was right in the view he took, that he was entitled to summon additional accused against whom he considered that there was good evidence, after perusal of the statements recorded by the police under section 161 of the Criminal Procedure Code and the other documents referred to in section 173 of the Criminal Procedure Code.

7. This Rule is, therefore, discharged.

K.C. Sen, J.

8. I agree.

Rule discharged.