

BOMBAY HIGH COURT

State

Vs.

Murlidhar Govardhan

Criminal Ref. No. 199 of 1958; Criminal Revn. Appln. Nos. 1247, 1248, 1250, 1253 and 1254
of 1958

(Shah and Naik, JJ.)

02.09.1959

JUDGMENT

Shah, J.

1. This reference raises a question of some importance about the jurisdiction of a Magistrate to direct an investigation officer to submit a charge-sheet when that Officer in the investigation of a cognizable offence has not filed a charge sheet and has in submitting his report under Section 173 of the Code of Criminal Procedure requested that Summary 'A,' 'B' or 'C' be issued.

2. We may briefly set out the facts which give rise to this reference. Police Constable Murlidhar Govardhan Patel, attached to the Thana Prohibition Department, was found drunk in the house of one Gunyabai. Investigation was commenced in respect of this incident and a final report was submitted by the Investigating Officer to the Judicial Magistrate, F. C. Thana, requesting that 'A' summary be issued. The reasons in support of the request were :

1. That the accused was not found in personal possession of illicit liquor.
2. That there was also no evidence to show if he was found drunk in a public place.
3. That the main witnesses in the case were interested against the prosecution and they may turn hostile because they were themselves prosecuted for an offence under Prohibition Act.
4. That there was no evidence to connect the accused with the liquor bottles that were found in the house of Gunyabai.

The Judicial Magistrate, First Class, Thana, observed that the facts of the case did not warrant the assumption made by the Investigating Officer in asking for 'A' summary and directed that a charge sheet be sent up against the constable without making 'the witnesses as hostile even before

they were given a fair opportunity to come before the Court and depose on oath.'

3. Against this order a revision application was preferred by the State to the Court of Session at Thana. The learned Sessions Judge has made a reference to this Court recommending that the order of the trial Magistrate be set aside, and in the alternative, "'C' Summary be granted on the report made by the Investigating Officer.

4. The Government Pleader appearing in support of the reference contends that a Magistrate has no power to call for a charge-sheet from a Police Officer who after investigating a cognizable case has submitted a report that a summary 'A, B or C' be issued. It is urged that the opinion of the investigating Officer investigating a cognizable offence that the evidence does not warrant the submission of a charge-sheet against the person accused of an offence is binding on the Magistrate and the latter is incompetent to call upon the Officer to submit a charge-sheet when the Investigating Officer asks for Summary. The learned Government Pleader has in support of his submission invited our attention to a number of decisions, but he has fairly conceded that some of these decisions contain mere dicta which were strictly not necessary for the decision of these cases. Before we refer to these authorities, we may examine the scheme of the Code relating to the investigation of offences. Chapter XIV of the Code falls in Part V which deals with the information to the Police and their powers to investigate. A Police Officer is empowered to investigate into any cognizable offence without the order of a Magistrate. In respect of a non-cognizable offence, the Police Officer has no power without an order from a Magistrate to commence investigation. Where a Police Officer has received information about, or has reason to suspect the commission of a cognizable offence, he must forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a Police report and to proceed in person, or depute one of his subordinate officers to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender (S. 157). A Magistrate receiving a report from Police Officer relating to the Commission of a cognizable offence, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate Subordinate to him to proceed, to hold a preliminary inquiry into or otherwise to dispose of, the case in manner provided by the Code (S. 159). Power is also conferred upon certain Magistrates to record statements of confessions in the course of the investigation under Chapter XIV. (S. 164). When a search is made by the Investigating Officer, the record of the search must be sent to the nearest Magistrate empowered to take cognizance of the offence. (S. 165). If an investigation cannot be completed within twenty-four hours, the Investigating Officer must send the accused forthwith to the nearest Judicial Magistrate together with a copy of the entries in the diary relating to the case and power is conferred upon the Magistrate whether or not he has jurisdiction to try the case to authorize the detention of the accused in such custody as the Magistrate thinks fit (S. 167). If the investigating Officer, upon investigation comes to the conclusion that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, if such person is in custody, to release him on his executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a

Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial (S. 169). If it appears to the investigating Officer that there is sufficient evidence or reasonable ground, the Officer is bound to forward the accused in custody to a Magistrate empowered to take cognizance of the offence upon a Police Report and to try the accused or commit him for trial (S. 170). An investigating officer must maintain a diary of his proceedings, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation and a Criminal Court in the Course of a case under inquiry or trial in such Court, has the power to call for the police diaries for the purpose of aiding it during such inquiry or trial (S. 172). It is also prescribed that every investigation shall be completed without unnecessary delay, and as soon as it is completed, the Investigation Officer shall forward to a Magistrate empowered to take cognizance of the offence on a Police Report, a report setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case (S. 173).

5. From this resume of the relevant provisions of the Code, it is evident that at every stage of investigation by a Police Officer in a Cognizable, offence, the Magistrate has the opportunity of supervising the investigation. The legislature has imposed a duty upon the Police Officer to give intimation to the Magistrate about the information received by him and to produce the accused within 24 hours after the commission of the offence, if the accused is arrested; if a search is made a report is required forthwith to be submitted to the Magistrate; and after the investigation is completed, the police officer is bound to submit a report to the Magistrate of his investigation. If during the course of the investigation by the Police, in a cognizable case, a Magistrate has power to supervise the investigation, we are unable to accept the submission of the learned Government Pleader that the opinion formed by a Police Officer in the course of the investigation as to the complicity of a person charged with the commission of the offence, is conclusive and cannot be called in question by the Magistrate to whom a report is submitted under Section 173. The legislature has not used the expression 'charge-sheet' anywhere in the Code. By Section 173, a final report is required to be made by a Police Officer making an investigation in a cognizable offence or when so directed in a non-cognizable offence. By such a report, the investigation officer may report that action be taken against the accused for the offence alleged to have been committed and such a report is a charge-sheet or that the papers be ordered to be filed because the evidence does not warrant the initiation of a Judicial proceeding against the accused. The Bombay Police Manual classifies the orders which may be requested by the Investigating Officer when he is of the opinion that no judicial proceeding need be initiated, as Summaries 'A,' 'B' and 'C.' A request for 'A' summary is to be made when the Police Officer investigating the case is of the view that the offence is true but undetected and where there is no clue whatever about the culprits or property or where the accused is known but there is no evidence to justify his being sent up for trial. Request for 'B' Summary is to be made when the complaint is maliciously false and for 'C' Summary when the complaint is neither true nor false, that is, due to mistake of facts or being of a civil nature.

6. An order passed by a Magistrate on a report under Section 173(1) of the Criminal procedure Code requesting that a Summary 'A, B or C' be issued is in its very nature a judicial order and not an administrative order. When a report is submitted to a Magistrate under Section 173 of the Code of Criminal Procedure by a Police Officer praying that a Summary of the nature described in R. 203 of the Bombay Police Manual, may be issued the Magistrate must act judicially and pass such order on the report as the circumstances may warrant. The Magistrate is not bound to issue the Summary which is asked for nor is he at all bound to issue a Summary. In *Boywalla v. Sorab Rustomji Engineer*¹, Beaumont C. J. observed :

'When, in the case of a man who has been arrested and released on bail the police-officer reports that there appears to be no case, and invites the Magistrate to discharge the man, the Magistrate is not bound to act upon the police view. He can undoubtedly say : 'I will have a further inquiry in this matter. I think the police are wrong in suggesting that the accused should be discharged.'

Again it was held in the *State v. Shankar Bhaurao*². that a Magistrate who is invited to give 'B' summary may on the evidence issue 'A' Summary. These authorities abundantly establish that a Magistrate dealing with a report of a Police Officer is not bound by the opinion formed by that Officer, and is not bound to issue a summary merely because it is asked for, and that the Magistrate is bound to deal with the report judicially.

7. The learned Government Pleader contends that jurisdiction with which the Magistrate is invested to deal with and dispose of the report judicially, does not import the power to order that a charge-sheet be lodged against the accused. The sole argument urged in support of this contention is that there is no such power conferred by the Code upon a Magistrate. In our view, absence of a provision expressly conferring such a power is not decisive. Upon a report of the facts which constitute an offence, by a Police Officer, a Magistrate has jurisdiction to take cognizance. The report may be one in the form of a charge-sheet, or one inviting the Magistrate to issue a summary. After taking cognizance the Magistrate may in exercise of the powers under Section 204 issue process, if in his view that course is warranted. Even though there is no express provision in that behalf, the Magistrate if he is satisfied that process may not issue, "he may discharge the accused. The learned Government Pleader concedes - and in our judgment he is right in so doing - that if a Magistrate, on a report made under Section 173, that a summary be issued, decides to take cognizance of the offence in exercise of the powers under Section 190 (1)(b) the Police Officer will be bound to assist the Magistrate in the inquiry and the trial by making available the witnesses. If a Police Officer is bound to, assist the Magistrate in trying the case when the latter takes cognizance in exercise of power under Section 190(1)(b), we fail to appreciate why the Police Officer is not bound to submit a charge-sheet in a cognizable case when the filing of such a charge-sheet is ordered by the Magistrate. Normally, a Magistrate to whom a report is submitted will give the fullest consideration to the opinion of a Police Officer

who has collected the evidence in the course of an investigation, and he may not lightly call for a charge-sheet when the Police Officer has on the opinion formed by him chosen not to file one. But the Magistrate has in a proper case the power to demand that a charge-sheet be filed and in our judgment, there is nothing in the scheme of the Code which justifies the view that the Magistrate who has power to supervise the investigation has no power to correct the opinion of the Police Officer, though he has, as is conceded, power to ignore the police Officer's opinion. We would require some strong indication in the Code which may justify the view which the learned Government Pleader is asking us to adopt but none such is to be found in the Code.

¹43 Bom LR 529 : (AIR 1941 Bom 294)

²61 Bom LR 591 : (AIR 1959 Bom 437)

8. We may now briefly refer in chronological sequence to the authorities to which our attention was invited. In *Shukadeva Sahay v. Hamid Miyan*³, it was assumed that a Magistrate has power to call upon the investigating officer to submit a charge-sheet; and that such an order was a judicial order. In *Venkata Subba Rao v. Narahari Setty Anjanayulu*⁴, it was observed that :

'The Police must be allowed to form their own opinion of a case when submitting their report and a Magistrate cannot ask them to change their opinion merely because he does not agree with them'.

It appears that in that case Counsel for the accused and Counsel for the Prosecution, conceded that the order directing the Police who had put in a 'referred charge-sheet,' to submit a charge-sheet was not a legal order. The decision, given without any reasons and on a concession made at the Bar, is of little assistance.

9. The next case to which our attention was invited is *Raghunath Puri v. Emperor*⁵, In that case Mr. Justice Mohammad Noor observed that :

'An order calling for a charge-sheet on a report under Section 202, when the police drew up a first information report is an order under Section 204 and in practice is an order for issue of process'. The learned Judge also observed that :

'When such a report received by the Magistrate empowered under Section 190(b) he takes cognisance of the offence under that section. Even if the accused is not sent up, i. e. not a charge-sheet but a final report is sent, the Magistrate when he applies his mind to that report may take cognisance of the offence and if he wants to place the accused on trial he can issue his process. This case does not support the view that a charge-sheet cannot be demanded by a Magistrate when considering the report under Section 173. In fact, it is assumed that a charge-sheet may be ordered to be filed by a Magistrate, when a final report under Section 173, Cri. Pro. Code is submitted to him. In *Abdul Rahim v. Abdul Mukhtadin*⁶, a Division Bench of the Assam High Court held that :

'There is no provision of law by which a Magistrate is empowered to direct the police to send up a charge-sheet against an accused person whom an information has been lodged. A Magistrate is empowered to take cognisance of the case in accordance with Section

190, Code of Criminal Procedure.'

In the view of the Court there is no provision of law by which a Magistrate is empowered to direct the Police to send up a charge-sheet against an accused person against whom an information has been lodged, and that the Magistrate is only empowered to take cognisance of cases in accordance with Section 190 Criminal Procedure Code. As we have already stated the absence of an express provision of this nature is not decisive of the competence of the Magistrate to call for a charge-sheet.

10. The next case to which our attention was invited is *Rama Shankar v. State of U. P.*⁷. In that case the Allahabad High Court took the view that :

³ ILR 7 Pat 561 : (AIR 1928 Pat 585)

⁵ AIR 1932 Pat 72

⁷ AIR 1956 All 525

⁴ AIR 1932 Mad 673

⁶ ILR (1952) 4 Ass 273: (AIR 1953 Ass 112),

'An investigating Officer is required by Section 173 of the Code to submit a charge-sheet, but this does not render his act of submitting a charge-sheet a judicial act. A court has no judicial control over investigations and over the manner or the circumstances, in which an investigating officer makes his report under Section 173, and an investigating officer's act is wholly administrative and there is nothing to prevent his submitting another report in supersession of an earlier one.'

11. This case is not an authority for the proposition that a Magistrate who is asked to issue a summary may not call for a charge-sheet. The observations relating to the absence of judicial control over the investigation by a Police Officer were made in support of the view that even when a report has been made and accepted, another report may be made by the Police in the same investigation. In *Akshoy Kumar v. Jogesh Chandra*⁸. it was observed by the Calcutta High Court that :

'When a petition of complaint is filed before a Magistrate, he has two alternative courses open to him and can follow either of them at his option. He may examine the complainant on oath and proceed under Chapter 16 or he may simply direct investigation by the Police under Section 156(3) and proceed under Chapter 14.' It was further observed that :

'When the Police finds the case to be false and reports accordingly, the Magistrate has nothing further to do in the chain of that proceeding. He is in seisin of nothing and neither the Police, nor anybody else is complaining before him and he could not entertain a petition filed by the complainant.' This case again has no bearing on the question under examination; and even the observations relied upon do not support the contention of the Government Pleader.

12. In a recent judgment of the Orissa High Court in *Hrushikesh v. Krushna Chandra*⁹, it was observed that there is nothing illegal if a Magistrate revises his opinion and calls for a charge-sheet from the police even if the final report of the Police is once accepted by him. Narasimham C. J. observed that the consistent view of the Patna High Court was that the Magistrate has the

power to call for a charge-sheet after the final report has been accepted by him.

13. In our view, the power to call for a charge-sheet from the investigating officer who has asked for a summary after investigating a cognizable case is vested in the Magistrate because the Magistrate is required by law to deal with the report made to him judicially and also because the Magistrate has supervisory control over the investigation by a Police Officer in the course of the investigation of an offence. With respect, we are unable to agree with the view of the Assam and the Madras High Courts that a Magistrate cannot order an investigating officer in a cognizable offence to submit a charge-sheet.

14. We may however observe that a Magistrate may not, even though he has the power, lightly pass an order that a charge-sheet be filed. It is only after a careful consideration of the materials placed by a police Officer in his report if a Magistrate is satisfied that there are sufficiently compelling grounds which require him to disagree with the opinion of the

⁸ AIR 1956 Cal 76

⁹ AIR 1958 Ori 104

Police Officer and to reject the prayer for a summary asked for that he will be justified in calling for a charge-sheet.

15. On the view taken by us, there will be no order on the Reference made by the learned Sessions Judge.

16. Rule in Revision Applications Nos. 1247, 1248, 1250, 1253 and 1254 all of 1958, in which the identical question arises will be discharged.

Rule discharged.