PATNA HIGH COURT

Pancham Singh

Vs

State (Patna)

Criminal Revn. Nos. 1398 and 1399 of 1965

(Ramratna Singh and K.K. Dutta, JJ.)

09.12.1966

ORDER

K.K. Dutta, JJ.

1. These two applications in revision are by the same person and have been heard together. They have been referred by a learned Single Judge of this Court to a Division Bench, as some important questions of law arise therein.

2. The petitioner was a writer constable or an assistant sub-inspector of police attached to Gopalpur police-station within the district of Bhagalpur in October 1964. Two first informations were lodged against him on the 17th October 1964, through two written reports, one by Bothri Prasad Thakur and the other by Harihar Dass. On the basis of the two first information reports, two cases were instituted at the police station under section 161 of the Penal Code and section 5(2) of the Prevention of Corruption Act, allegations against him being those of bribery and criminal misconduct. Under the orders of the Deputy Superintendent of Police, Naugachia, the investigation in both the cases was taken up by an Inspector of Police. Copies of the first information reports were received by the Sub Divisional Magistrate. On the same day, the petitioner appeared before the learned Magistrate through a lawyer and prayed for judicial enquiry in both the cases. On the 30th November 1964, the Magistrate, under the provisions of rule 50 of the Bihar and Orissa Police-Manual, 1930, passed an order suspending the investigation by the police in both the cases and directing Mr. T. K. Mishra, a Deputy Magistrate, to hold an enquiry on the spot after giving intimation to the petitioner, the investigating officer concerned and the Superintendent of Police. The enquiring Magistrate was also directed to submit his report by the 12th January 1965; but, in the meantime, the police submitted charge-sheets in both the cases against the petitioner on the 18th December, 1964. Thereafter, the petitioner made a petition on the 6th January 1965, before the Sub-Divisional Magistrate requesting him not to take cognizance on the basis of the charge-sheets. In absence of the records which had been sent to the District Magistrate in connection with some matter, no order was passed by the Sub-divisional Magistrate on this petition. The records were received back by him on the 9th February, 1965, and the learned Magistrate considered the petition dated the 30th January 1965, which had been filed by the sub-inspector of police, Sadar Court, Bhagalpur,

praying for transfer of both the cases for trial, as charge-sheets had already been filed, and also stating that the judicial enquiry ordered in the case was unnecessary. The learned Magistrate fixed the 16th February 1965 for hearing the parties on this petition, on which date he did hear the Senior District Prosecutor and the lawyer for the petitioner. The learned Magistrate, by his orders dated the 17th February 1965, directed the Public Prosecutor to give his opinion in the matter by the 23rd February, 1965; but, on that date, as the opinion was not received, he adjourned the case for orders to the 8th, March 1965. In the meantime, on the 6th March 1965, the Court sub-inspector requested the Sub-divisional Magistrate to keep the judicial enquiry pending till the matter was decided by the Sessions Judge. This matter was put up for hearing on the 22nd March 1965 and the matter was adjourned to the 6th April 1965. On the 27th March 1965, two applications in revision were filed on behalf of the State before the Sessions Judge, Bhagalpur, who admitted both the applications and stayed further proceedings in the Court below. The applications were finally heard by the Second Additional Sessions Judge of Bhagalpur, who dismissed the same by an order dated the 7th September 1965, but, being aggrieved by certain observations made by the learned Judge. In that order, the petitioner has come up in revision to this Court.

3. The learned Judge held that the order of the Subdivisional Magistrate suspending the police investigation and directing a judicial enquiry was illegal and without jurisdiction. In regard to the plea taken on behalf of the petitioner that the investigation by the Inspector of Police was illegal, in view of the provisions of section 5-A of the Prevention of Corruption Act, he observed that this question would be decided only by the Special Judge at the time of trial and that, in both the cases, which were triable by the Special Judge, the Subdivisional Magistrate should have passed on the charge-sheets to him. He however, rejected the applications in revision filed on behalf of the State, in view of the observations made in paragraph 10 of his order which reads as follows :

> "The point however is whether it is necessary to refer these cases to the Hon'ble Court. In my opinion, these petitions are premature. As, I have already pointed out, the learned Sub-divisional Magistrate did not finally dispose of the petition, dated 9-3-65: filed by the sub-Inspector of Saddar Court. His order, dated 17-2-1965 shows that he wanted opinion of the Public Prosecutor in that matter. I have gone through the subsequent orders passed by the Subdivisional Magistrate also and I have seen that he has not finally disposed of that petition. It is true that he did not recall the Magisterial enquiry. Nor did he send the cases to the Special Judge, but I find that it was not specifically pointed out to him that the cases were exclusively triable by the Special Judge, and that he cannot even take cognizance in these cases because under the law even the cognizance has got to be taken by the Special Judge. I have explained the legal position, and hope, he will no more persist in continuing the Magisterial enquiry and he will send the records to the Special Judge. At present, I consider it unnecessary to refer these cases to the Hon'ble Court. If, however, the learned Subdivisional Magistrate persists in continuing with the Magisterial enquiry and refuses to send the records to the Special Judge, the State may come up in revision again and then the case will be referred to the High Court".

Mr. Jyoti Narayan, who appeared for the petitioner in this Court, challenged some of the observations of the learned Judge. He first of all, urged that the finding that the order of the Sub-divisional Magistrate suspending the police investigation and directing a Magisterial enquiry was illegal was not justified. His attack is against the view taken by the learned Additional Sessions

Judge on the interpretation of section 159 of the Code of Criminal Procedure.

4. Section 156 of the Code authorizes an officer in charge of a police station to investigate any cognizable offence. Section 157 lays down the duties of the officer in charge of a police station. Sub-section (1) provides that, if a cognizable offence is suspected from information received or from other sources, a report of the same shall be sent to a Magistrate empowered to take cognizance of such offence upon a police report, and the officer in charge of the police-station shall proceed in person, or shall depute a subordinate police officer to proceed, to the spot to take up investigation in the case. According to proviso (a) to this sub-section, if the case is not of a serious nature the officer in charge of the police station need not proceed in person or depute a subordinate officer to make an investigation on the spot. Proviso (b) lays down that, if it appears to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case. Subsection (2) of section 157 requires, in cases covered by the said two provisos, the officer in charge of the police station to state in the said report his reasons for not fully complying with the requirements of sub-section (1), and, in cases mentioned in proviso (b), he shall forthwith notify the first informant the fact that he would not investigate the case or cause it to be investigated. Section 159 enacts :

> "Such Magistrate, on receiving such report, 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 in this Code."

It was conceded that the words 'such report' used in section 159 refer to the reports mentioned in section 157. This is also manifest from a reading of this section. The question is whether the provisions of section 159 are attracted, or not, in a case where the police officer has already taken up investigation under sub-section (1) of section 157 and has not declined to investigate. Mr. Jyoti Narayan submitted that these provisions of Section 159 of the Code are attracted even where the police officer has, of his own accord, taken up investigation and, therefore, the Sub-divisional Magistrate is competent to order a Magisterial enquiry in such a case under the second part of the said section 159. He could not cite any authority in support of his contention; nor is his contention supported by a plain reading of section 159 with section 157. It will be noticed that, under section 159, the Sub-divisional Magistrate may adopt one of the two courses; (i) he can either direct an investigation by the police or (ii) if he thinks fit, he can himself proceed to hold a preliminary enquiry or depute a subordinate Magistrate to proceed to hold an enquiry. It is manifest that no direction for investigation by the police can be given by a Magistrate under section 159 in a case where the police have already taken up investigation of its own accord, that is, in a case not covered by proviso (a) or proviso (b) to sub-section (1) of Section 157. The second part of Section 159, as indicated above, provides an alternative procedure to that laid down in the first part of the section; and it is obvious that the Sub-divisional Magistrate can take recourse to the alternative procedure contained in the second part only in those cases in which investigation has not been taken up by the police, that is, in cases covered by provisos (a) and (b) to sub-section (1) of section 157. The contention that the Sub-Divisional Magistrate may under section 159, suspend a police investigation which has already been commenced and direct a Magisterial enquiry will go against the provisions of the Code of Criminal Procedure, according to which the functions of the police in matters of investigation are completely independent of

those of the Magistrates. In *Emperor v. Khawaja Nazir Ahmad*[1], their Lordships of the Judicial Committee defined, according to the provisions of the Code, the functions of the police vis-a-vis those of the Magistrates and the observations of the Judicial Committee were approved by their Lordships of the Supreme Court in *State of West Bengal v. S. N. Basak*[2], The observations of their Lordships of the Judicial Committee are reproduced below :-

> "In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the Police. Just as it is essential that every one accused of crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty, of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function always of course subject to the right of the Court to intervene in an appropriate case when moved under section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that section 561-A, has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act."

In view of the aforesaid observations of the Privy Council, which were approved by the Supreme Court, the Sub-divisional Magistrate was not competent to stop or suspend the police investigation in the instant cases, after the same had been taken up. This question, with reference to section 159 of the Code, came up directly for
decision before the Lahore High Court in *The Crown v. Mohammad Sadiq Niaz*[3], Relying on the aforesaid decision of the Privy Council, it was held by a Bench of the Lahore High Court that section 159 does not empower a Magistrate to stop or suspend police investigation and order Magisterial enquiry, where investigation of a cognizable offence by the police was already proceeding. It may be mentioned, however, that their Lordships were not required to decide whether a Magistrate could hold a judicial enquiry into a case which was being investigated by the police without stopping or suspending the police investigation; but, as already indicated, we are of the opinion that the Magistrate cannot adopt the alternative procedure for holding a

Magisterial enquiry under the second part of section 159 even without stopping or suspending the police investigation, because police investigation as well as Magisterial enquiry are not contemplated simultaneously under section 159, read with S. 157. If, however, after the submission of the final form under Section 173 of the Code, the Magistrate has some doubt in deciding whether he should take cognizance under clause (b) of sub-section (1) of Section 190 of the Code or not, he, in order to remove his doubt, may himself proceed to hold an enquiry or get an enquiry held by any other subordinate Magistrate. It is, of course, true that, in a case where a protest petition is filed by the first informant before the Magistrate while the police investigation is on, the Magistrate is competent to get an enquiry made by a subordinate Magistrate or any other person to ascertain the truth or otherwise of the allegations contained in the protest petition, in order to decide whether a prima facie case has been made out by the allegations contained in the protest petition; but such an enquiry is legal, because a protest petition is a petition of complaint and an enquiry in such a case is permissible under section 202 of the Code. In the instant cases, however, this question does not arise. Then, Mr. Jyoti Narayan relied on the provision in rule 50 contained in the Bihar and Orissa Police Manual, 1930, in respect of enquiry into serious misconduct on the part of a police officer. This rule deals with three classes of allegations in respect of such misconduct. Class B deals with the allegation contained in a complaint made before a Magistrate under Chapter XIV of the Code. Sub-rule (d) of rule 50 reads as follows :

> "When the complainant lodges information of a cognizable offence of the above description at a police-station, the officer-in-charge shall proceed to investigate the charge, and shall send a copy of the first information by the quickest available means to the Superintendent and to the District or Sub-divisional Magistrate. If on receipt of the first information the Magistrate desires to hold an enquiry under section 159, Criminal Procedure Code he shall inform the Superintendent or the Sub-divisional Police officer, as the case may be, who shall either himself attend, if required, or depute a subordinate police-officer, not below the rank of inspector, to attend and assist at the enquiry. The enquiry shall be made with the least possible delay, and the accused police-officer shall be informed of the time and place through the Superintendent.

When a magisterial enquiry is held into any case of police misconduct, it shall be
made with the least possible delay, and the magistrate shall utilise all evidence that may have been collected before his arrival by the investigating police-officer, whose separate enquiry will thereupon be suspended." This rule does support the contention of Mr. Joyti Narayan that a Magisterial enquiry may be ordered and the police investigation suspended in a case where a police officer is involved. But there is nothing to indicate that this rule was framed in pursuance of any power contained in the Code of Criminal Procedure. Rather, the preface to the Manual shows that the rules therein were framed under sections 7 and 12 of the Police Act, 1861. Section 7 of the Police Act, however, deals with appointment, dismissal etc. of an inferior police officer. Section 12 empowers the Inspector-General of Police to make, from time to time, subject to the approval of the State Government, such orders and rules as he shall deem expedient relative to the organisation, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessaries to be furnished to them;

the collecting and communicating by them of intelligence and information, and all such other orders and rules relative to the police-force as the Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties. It is obvious, therefore, that neither section 7 nor section 12 of the Police Act affects or modifies the provisions contained in the Code of Criminal Procedure in respect of police investigation. Section 46 of the Police Act also empowers the State Government to make rules consistent with the Act in respect of certain matters to regulate the procedure to be followed by police officers; but those matters also do not affect the provisions of the Code of Criminal Procedure regarding police investigation. Moreover, the rules contained in the Manual were framed long before the decision of the Privy Council when the authorities were not clear about functions of the police vis-a-vis those of the Magistrates in connection with investigation.

5. In view of the foregoing discussion, we agree with the learned Additional Sessions Judge that the orders of the Sub-divisional Magistrate in the instant cases suspending the police investigation and ordering a Magisterial enquiry were illegal and without jurisdiction.

6. The second contention of Mr. Jyoti Narayan was that the police was not competent to submit any charge-sheet against the petitioner in the absence of the previous sanction required by section 6 of the Prevention of Corruption Act. This section lays down that no Court shall take cognizance of an offence punishable under section 161 or section 164, or section 165 of the Indian Penal Code or sub-section (2) of section 5 of the Prevention of Corruption Act alleged to have been committed by a public servant, except with the previous sanction of authorities mentioned in clauses (a), (b) and (c), as the case may be of sub-section (1) of that section. The bar contained in this section is to the taking of cognizance of an offence by a Court and not to the institution of a police case or the submission of a final form by the police under section 173 of the Code. Therefore, this contention of Mr. Joyti Narain must fail.

7. Mr. Jyoti Narain also attacked the observations of the learned Additional Sessions Judge that the Sub-divisional Magistrate could not take cognizance of the offences in the instant cases, as the Special Judge is alone competent to do so. The powers of Special Judges and their functions were enacted for the first time by the Criminal Law Amendment Act, 1952. Under Section 6 of this Act, the State Government is empowered to appoint Special Judges to try offences under certain sections as specified in clauses (a) and (b) of sub-section (1) of that section. Section 161 of the Penal Code and Section 5(2) of the Prevention of Corruption Act are specifically mentioned in clause (a). Under sub-section (1) of Section 7, notwithstanding anything contained in the Code of Criminal Procedure or any other law, the offences mentioned in sub-section (1) of section 6 are triable by Special Judges only. Section 8 deals with the procedure and power of Special Judges, and sub-section (1) of that section lays down that a Special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates. This may be compared with section 193 (1) of the Code of Criminal Procedure, which reads thus :

> "Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

We may notice, therefore, that in a case triable by a Special Judge, no commitment enquiry is necessary. It may be mentioned here that, according to sub-section (3) of Section 8 of the Criminal Law Amendment Act, the Court of a Special Judge shall be deemed to be a Court of session trying cases without a jury or without the aid of assessors. There is no provision in the Criminal Law Amendment Act to support the view that, in a case triable by a special Judge, a Magistrate is not competent to take cognizance of an offence in accordance with section 190 of the Code of Criminal Procedure. Of course, section 10 of the Criminal Law Amendment Act lays down that all cases triable by a Special Judge under Section 7 of the Act, which immediately before the commencement of the Act, were pending before any Magistrate for trial, shall, on such commencement, be forwarded for trial to the Special Judge having jurisdiction over such cases, but this does not indicate that a Magistrate should not take cognizance under section 190 of the Code in respect of offences of which cognizance may be taken by a Special Judge. Section 173 of the Code of Criminal Procedure requires the investigating officer to submit his report in the final form to a Magistrate empowered to take cognizance of the offence on a police report; No amendment was made in this section, providing that the investigating officer should submit a report to a Special Judge instead of Magistrate. Section 190 empowers some classes of Magistrates to take cognizance of certain offences upon a report made by any police officer under section 173. This section was also not amended so as to indicate that the Magistrates mentioned in this section cannot take cognizance of any offence triable by a Special Judge upon a police report. It may be recalled that sub-section (3) of section 8 of the Criminal Law Amendment Act lays down that the powers of a Special Judge shall be deemed to be those of a Court of Session, and, in view of this provision, section 193 (1) of the Code would apply even to a case triable by a Special Judge and a commitment enquiry would be necessary. But this contingency was obviated by a provision in sub-section (1) of section 8 of the Criminal Law Amendment Act that the Special Judge may take cognizance of an offence without any commitment proceeding. The provision in sub-section (1) of section 8 of this Act was, however, not meant to restrict the powers of a Magistrate under section 190 of the Code.

8. In this connection, section 337 of the Code is important. Sub-section (1) of this section contains provisions about the Magistrates who may grant pardon and in which circumstances. Under sub-section (2), a person accepting a tender shall be examined as a witness in the Court of 'the Magistrate taking cognizance of the offence", and in the subsequent trial, if any, sub-section (2A) provides that, after the person has been examined under sub-section (2), a Magistrate may commit him for trial to the Court of Session. Then sub-section (2B) lays down that –

> "In every case where the offence is punishable under section 161 or section 165 or Section 165-A of the Indian Penal Code or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been examined under sub-section (2), then, notwithstanding anything contained in sub-section (2A), a Magistrate shall, "without making any further inquiry, send the case for trial" (portion between inverted commas was underlined in the original judgment-Ed.) to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952"

These provisions indicate that a Magistrate. taking cognizance of the offence has the power to

examine such a person under sub-section (2) of section 337 of the Code in respect of offences triable exclusively by the Special Judge. In other words, the Magistrate is not deprived of his power to take cognizance of an offence under section 190 of the Code even where the offence is exclusively triable by a Special Judge. We are, therefore, of the opinion that the power of the Sub-divisional Magistrate to take cognizance of an offence under section 190 of the Code of Criminal Procedure has not been taken away by any provision of the Criminal Law Amendment Act and our view is supported by a Bench decision of the Bombay High Court in *State v. Shankar Bhaurao Khirode*[4], The learned Additional Sessions Judge was, therefore, not right in his view that the Sub-divisional Magistrate had no power to take cognizance of the offence in question and that the Special Judge was alone competent to do so.

9. The next contention of Mr. Jyoti Narayan is that the investigation by the police inspector in the two instant cases was illegal inasmuch it was in contravention of the specific provision of section 5-A of the Prevention of Corruption Act. This section lays down that, so far as the State of Bihar is concerned, notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank of Deputy Superintendent of Police shall investigate any of the offences in respect of which allegations have been made in the instant cases, without, of course, the order of a Magistrate of the first class. In both the cases, however, the investigation was entrusted by the Deputy Superintendent of Police, Naugachia, to the Inspector of Police without the order of any Magistrate. Hence, the investigation by the police in the instant case was illegal. It may be recalled that the learned Judge has observed that this matter would be considered by the Special Judge at the time of the trial. It is true
that the illegalily committed in the course of investigation does not affect the jurisdiction of a Court holding trial, but that question does not arise here inasmuch as the matter is not yet before the Special Judge for trial. The provisions of Section 5-A of the Prevention of Corruption Act have been brought to the notice of the Court even before the cognizance of the offences has been taken. It may be mentioned here that the Sub-Divisional Magistrate has not taken cognizance of the offences as yet. But there has been a contravention of the provisions of section 5-A of this Act inasmuch as the investigation has been done by a police officer below the rank of Deputy Superintendent of Police and, in that view of the matter, it is the duty of this Court to see that it is rectified. We, therefore, direct that a fresh investigation be made in these two cases by a police officer competent to do so in accordance with the provisions of section 5-A of the Prevention of Corruption Act.

10. The last argument of Mr. Jyoti Narayan was that, in spite of certain observations made by the learned Additional Sessions Judge against the order of the Sub-divisional Magistrate, the applications in revision filed by the State were dismissed by him and that, inasmuch as the State has not come up in revision against the order of the Sub-divisional Magistrate, the Magistrate's order dated the 30th November 1964, suspending the police investigation and directing an enquiry by a Magistrate, stands unaffected. But, when the illegality in the order has come to our notice, this Court has ample power to set it right by setting aside the order of the Sub-divisional Magistrate dated the 30th November, 1964.

11. In the result, the order of the Sub-divisional Magistrate dated the 30th November, 1964 in both the cases is set aside, and it is directed that a fresh investigation by a competent police officer should be made in both the cases. Thereafter, appropriate order may be passed by the Sub-divisional Magistrate in accordance with law. Both the applications are, accordingly, allowed

in part.
Order accordingly.

Cases Referred.

[1] AIR 1945 PC 18
[2] AIR 1963 SC 447
[3] AIR 1949 Lah 204
[4] AIR 1959 Bom 437