
(2021) 03 J&K CK 0069

Jammu And Kashmir High Court

Case No: Criminal Revision No. 34 Of 2017, IA No. 01 Of 2017

Basharat Hussain And
Another

APPELLANT

Vs

State Of J&K And
Others

RESPONDENT

Date of Decision: March 24, 2021

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 156, 164A, 173, 173(8), 190, 200, 202, 204, 311, 319, 363

Hon'ble Judges: Javed Iqbal Wani, J

Bench: Single Bench

Advocate: Navyug Sethi, Bhanu Jasrotia

Final Decision: Allowed

Judgement

1. In the instant petition challenge is thrown to order dated 15.12.2016, passed by the Court of Judicial Magistrate First Class, Kotranka (for brevity

Ãçâ, -Ã¼JMICâ€Ÿ) in case titled as Ãçâ, -ËœState of J&K vs. Shamsheer HussainÃçâ, -â,,ç.

It is being stated that upon presentation of Challan before the Court in case FIR No. 56/2013, Police Station, Darhal trial against shamsheer Hussain

was commenced, charge under Section 363 Cr.P.C framed against him, inasmuch as, evidence of various witnesses was also recorded.

It is stated that none of the witness deposed regarding rape of respondent No. 3 by the petitioners or even by Shamsheer Hussain.

It is being stated that the trial court after almost about three years of the trial of the case passed the impugned order dated 15.12.2016 banking upon

the statement of the respondent No. 3 and ordered returning of Challan along with relevant material to respondent No. 2- Sr. Superintendent of Police,

Rajouri for further investigation in the light of the statement of prosecutrix as well as her statement recorded under Section 164-A Cr.P.C and directed

submission of compliance report on or before 23.03.2017.

The petitioners challenges the impugned order dated 15.12.2016, inter alia amongst other on the grounds that the same is against law and facts of the

case. It is being urged that learned Magistrate merely on the basis of the statement of respondent No. 3 directed further investigation in the case,

ignoring the other evidence on record which did not remotely corroborate the allegation of rape of respondent No. 3. It is being urged that respondent

No. 3 levelled the allegations of rape against the petitioners and Shamsheer Hussain falsely without alleging the same at the time of registration of

FIR. The said allegation is stated to have been alleged after 23 days of registration of FIR which allegation, however, got demolished by the statement

of Naseem Akhter recorded under Section 164-A Cr.P.C, corroborated with the statement of her brother-in-law, namely, Miran Baksh.

The trial court is stated to have committed serious illegality while directing further investigation in the matter on the grounds that allegation of rape

levelled by respondent No. 3 against the petitioners is highly improbable and misconceived, in presence of the medical reports which is stated to have

been overlooked by the trial court while passing the impugned order.

6. It is being further alleged in the grounds that the impugned order has been passed without any jurisdiction and competence in light of the law laid

down by Honâ€™ble Supreme Court reported in 2017 SCC Online SC 86, Amrutbhai Shambhulubhai Patel vs. Smanbhai Kantibhai Patel, wherein it is

stated to have been held that once cognizance is taken by the Magistrate and the accused person appears pursuant thereto, the Magistrate would be

bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant.

Heard learned counsel for the parties and perused the record.

7. Learned counsel for the petitioners reiterated the contentions raised and grounds urged in the petition, whereas the counsel for the respondents

resisted and controverted the same and sought dismissal of the petition defending the impugned order under challenge.

8. In the light of the case set up by the petitioners in the instant petition the moot point that begs consideration of this Court is that whether a

Magistrate has power to direct further investigation in a case, after submission of police report under Section 173 Cr.P.C. The law is no more res

integra and stands settled by long line of decisions of the Hon'ble Supreme Court on the subject.

9. A Reference to the judgments of the Hon'ble Apex Court reported in 2019(5) SCC 542, Bikash Ranjan Rout vs. State, Th. Secretary (Home)

Government of NCT of Delhi, New Delhi and 2018 (14) SCC 298, Athul Rao vs. State of Karnataka and another would also be appropriate and

advantageous, wherein in Athul Rao's case (supra) at para 8 following is noticed.

“8. The question as to whether, after framing of charges and taking cognizance, it is open to the Magistrate to direct further investigation either suo

motu or on an application filed by the complainant/informant is no more res integra. In a recent decision of this Court (to which one of us, Justice

Dipak Misra was party) in the case of Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel and others MANU/SC/0104/2017: (2017) 4

SCC 77, after analysing earlier decisions on the point, it has been held that neither the Magistrate suo motu nor on an application filed by the

complainant/informant can direct further investigation. Further investigation in a given case may be ordered only on the request of the investigating

agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial,

the life purpose of the adjudication in hand. It will be apposite to advert to the dictum in Paragraphs 48 to 51 of the said decision which read thus:-

“48. As adverted to hereinabove, whereas Section 311 of the Code empowers a Court at any stage of any inquiry, trial or other proceeding, to

summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person

already examined, if construed to be essential to be just decision of the case, Section 319 authorizes a Court to proceed against any person, who

though not made an accused appears, in course of the inquiry or trial, to have committed the same and can be tried together. These two provisions of

the Code explicitly accoutre a Court to summon a material witness or examine a person present at any stage of any inquiry, trial or other proceeding, if

it considers it to be essential to the just decision of the case and even proceed against any person, though not an accused in such enquiry or trial, if it

appears from the evidence available that he had committed an offence and that he can be tried together with the other accused persons.

49. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of

explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further

investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available

therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered

appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct

further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further

investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

50. The unamended and the amended sub-Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the

latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relating

thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The

recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the

empowerment of the investigating agency alone.

51. In contradistinction, Sections 156, 190, 200, 202 and 204 of the Cr.P.C. clearly outline the powers of the Magistrate and the courses open for him

to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. Though the Magistrate has the power to direct

investigation under Section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken

and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on

the request or prayer of the complainant/informant. The direction for investigation by the Magistrate under Section 202, while dealing with a complaint,

though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered

or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under Section 173(8) of the Code. If the power of

the Magistrate, in such a scheme envisaged by the Code of Criminal Procedure to order further investigation even after the cognizance is taken,

accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by

this Court and also the relevant layout of the Code of Criminal Procedure adumbrated hereinabove. Additionally had it been the intention of the

legislature to invest such a power, in our estimate, Section 173(8) of the Code of Criminal Procedure would have been worded accordingly to

accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the

Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in Bhagwant

Singh (supra), the Magistrate, in both the contingencies, namely; when he takes cognizance of the offence or discharges the accused, would be

committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his permission to conduct further

investigation, he suo motu cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant. Not only

such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is

taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it

would even otherwise render the provisions of Sections 311 and 319 of Code of Criminal Procedure, whereunder any witness can be summoned by a

Court and a person can be issued notice to stand trial at any stage, in a way redundant. Axiomatically, thus the impugned decision annulling the

direction of the learned Magistrate for further investigation is unexceptional and does not merit any interference. Even otherwise on facts, having

regard to the progression of the developments in the trial, and more particularly, the delay on the part of the informant in making the request for further

investigation, it was otherwise not entertainable as has been rightly held by the High Court. $\hat{\phi} \hat{\alpha}, \hat{\alpha} \hat{\epsilon} \langle$

10. Indisputably, what emerges from the perusal of the record is that trial court has framed charges and taken cognizance, as a consequence of which

the case has been set down for trial and prosecution leading witnesses in the matter.

11. Perusal of the record further reveals that prayer for further investigation had not been sought by the respondent No. 3 or else by the investigating

agency on the ground of deduction of material evidence.

Therefore, there was no reason for the trial court to direct further investigation in the matter. Accordingly, in the light of the settled legal position laid

down by the Honâ€™ble Supreme Court in Athul Rao's case (supra) and what has been noticed hereinabove, the impugned order dated 15.12.2016 is

liable to be set aside and is, accordingly, quashed.

The Trial court shall proceed in the matter without construing any opinion in this order about the guilt or otherwise of the accused facing the trial.