

(2007) 09 PAT CK 0122**Patna High Court****Case No:** Criminal Miscellaneous No. 26301 of 2007

Raghu Nandan Prasad Yadav

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision: Sept. 17, 2007**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 161, 173, 173(2), 173(2)(i)
- Penal Code, 1860 (IPC) - Section 149, 302, 34, 366, 376

Citation: (2008) 1 PLJR 385**Hon'ble Judges:** Ghanshyam Prasad, J**Bench:** Single Bench**Advocate:** Kanhaiya Prasad Singh, Ashutosh Kumar and Atal Bihari, for the Appellant;
Gopesh Kumar For the State, for the Respondent**Final Decision:** Dismissed**Judgement**

@JUDGMENTTAG-ORDER

Ghanshyam Prasad, J.

This application u/s 482 of the Code of Criminal Procedure has been filed to quash the order dated 2.6.2005 passed by the Chief Judicial Magistrate, Saharsa in Sour Bazaar P.S. Case No. 113/2004 as well as revisional order dated 4.5.2007 passed by the Fast Track Court No. IV, Saharsa in Criminal Revision No. 238/2005 whereby the learned Additional Sessions Judge (Fast Track Court No. IV) has confirmed the order of the Chief Judicial Magistrate taking cognizance under Sections 366 and 376/34 of the Indian Penal Code. Heard learned counsel for the petitioner as well as the State.

2. It appears from the record that on the basis of Fardbeyan lodged by one Rajo Yadav, the police registered the aforesaid Sour Bazar P.S. Case No. 113/ 2004 against one Prabhat Kumar and three unknown persons. The police after investigation submitted charge-sheet against the named accused and kept the investigation pending against some other persons. Later on, the police submitted

final form against this petitioner and Tarni Yadav. However, the learned Chief Judicial Magistrate, vide order dated 2.6.2005 after going through the case diary differed from the opinion of the police and took cognizance against both of them including the petitioner. The said order has also been confirmed by the learned Fast Track Court, Saharsa.

3. The main submission of learned counsel for the petitioner is that since the case is exclusively triable by the court of session and the police after investigation did not submit charge-sheet against the petitioner, the Magistrate had no power to take cognizance and issue process against the petitioner. Such person can be summoned only u/s 319 of the Code of Criminal Procedure, when in course of trial some materials are brought on record showing his complicity in the crime. For that the reliance has been placed upon a decision of the Apex Court reported in 2000 ECC 816= (2004) 13 SCC 11 (Kishori Singh and Ors. vs. State of Bihar and Anr.)

4. The main question involved in this case is as to whether the Magistrate can take cognizance and issue process even against the person against whom the police has submitted final report u/s 173(2) of the Code of Criminal Procedure. It is needless to say that the Apex Court in the aforesaid Kishori Singh's case has answered this question in negative particularly in a case exclusively triable by the court of session. In paragraphs 8, 9 and 10 it has been held as follows:--

8. The questions involved in this appeal are now squarely answered by the two recent decisions of this Court in the case of Raj Kishore Prasad vs. State of Bihar and a three Judge Bench judgment of this Court in the case of Ranjit Singh vs. State of Punjab. In the later case Their Lordships have considered the earlier two Judge Bench decision of this Court in Raj Kishore Prasad case.

9. After going through the provisions of the Code of Criminal Procedure and the aforesaid two judgments and on examining the order dated 10.6.1997 passed by the Magistrate, we have no hesitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in F.I.R, as accused persons, but not charge-sheeted in the charge-sheet that was filed by the police u/s 173(2) Cr.P.C.

10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers u/s 319 Cr.P.C. when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the learned session Judge to the High Court and the High Court on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge sheet as has been explained in later three Judge Bench decision. Neither of the contingencies has arises in the case in hand.

5. In order to appreciate the decision of Apex Court it would be appropriate to examine the issue involved and answer given in the aforesaid decision upon which the decision of Kishori Singh is based.

6. The decision of Raj Kishore Prasad Vs. State of Bihar and another, and the decision of Ranjit Singh Vs. State of Punjab. The decision in the case of Raj Kishore Prasad (supra) is of two Judge Bench decision. The issue involved in that very decision is mentioned in paragraph 2 of the judgment which is as follows:--

Can a Magistrate undertaking commitment u/s 209 Cr. P.C. of a case triable by a Court of Session, associate another person as accused, in exercise of power u/s 319 of the Code of Criminal Procedure, or under any other provision, is the significant question which crops up for consideration in this appeal.

7. The above question has been answered in paragraph 16 of the judgment. The relevant portion is as follows:

Thus, we come to hold that the power u/s 209 Cr.P.C. to summon a new offender was not vested with a Magistrate on the plain reading of its text as well as proceedings before him not being an "inquiry" and material before him not being "evidence". When such power was not so vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Session itself awaiting the case on commitment, merely on the specious ground that the Court of Session can, in any event, summon the accused to stand trial, alongwith the accused meant to be committed for trial before it. Presently, it is plain that the stage for employment of Section 319 Cr.P.C. has not arrived. The order of the Court of Session of requiring the Magistrate to arrest and logically commit the appellant alongwith the accused proposed to be committed to stand trial before it, is patently illegal and beyond jurisdiction. Since the Magistrate has no such power to add a person as accused u/s 319 Cr.P.C. when handling a matter u/s 209 Cr.P.C. The Court of Session, in purported exercise of revisional powers cannot obligate it to do so. The question posed at the outset is answered accordingly in this light. When the case comes after commitment to the Court of Session and evidence is recorded, it may then in exercise of its powers u/s 319 Cr.P.C. on the basis of the evidence recorded by it, if circumstances warranting, proceed against the appellant, summon him for the purpose, to stand trial alongwith the accused committed, providing him the necessary safeguards envisaged under sub-section (4) of Section 319. Such course is all the more necessary in the instant case when expressions on merit have extensively been made in the orders of the Magistrate, the Court of Session and that of the High Court. Any other course would cause serious prejudice to the appellant. We order accordingly.

8. The question framed in Ranjit Singh's case (supra) is also different from the question involved in the present case. In paragraph 2 of the judgment the issue raised has been mentioned which is as follows:

Whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence?

9. The issue has been answered by the Apex Court in paragraphs 19 and 24 of the judgment which are as follows:

19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.

24. For the foregoing reasons, we find it difficult to support the observations in Kishun Singh case that powers of the Sessions Court u/s 193 of the Code to take cognizance of the offence would include the summoning the person or persons whose complicity in the commission of the trial can *prima facie* be gathered from the materials available on record.

10. From the discussions of the aforesaid two decisions upon which the decision of Kishori Singh is based it is quite clear that the issue involved in this case or in case of Kishori Singh was not directly an issue or answered in either of two decisions. In the case of Raj Kishori Prasad (supra) the main issue was as to whether the Magistrate undertaking commitment u/s 209 Cr.P.C. associate another person as accused in exercise of power u/s 319 of the Code of Criminal Procedure. In other decision the issue was as to whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. However, it appears that on the principle what was decided in the aforesaid two decisions, the Apex Court in the case of Kishori Singh (supra) held that the Magistrate cannot issue process against those who have not been charge-sheeted by the police in a case exclusively triable by the Court of Session.

11. However, later on in two other cases, the Apex Court took contrary view which have been reported in [M/s. SWIL Ltd. Vs. State of Delhi and Another](#), and [Rajinder Prasad Vs. Bashir and Others](#). In both the cases the case was exclusively triable by the Court of Session. In the case of Rajinder Prasad (supra) reliance has also been placed on the case of SWIL Ltd. vs. State of Delhi and Ors. (supra). In paragraphs 10 and 11 it has been held as follows:---

10. From the facts of the case, it appears that while passing the order which was challenged before the High Court, the Magistrate had taken recourse to Chapter XIV (Sections 190 to 199) of the Code. Section 190 of the Code empowers the Magistrate to take cognizance of any offence;

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

11. Under this section, a Magistrate has jurisdiction to take cognizance of offences against such persons also who have not been arrested by the police as accused persons, if it appears from the evidence collected by the police that they were *prima facie* guilty of the offence alleged to have been committed. Section 209 of the Code prescribes that when in a case instituted on a police report or otherwise, the accused appears or is "brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit, after compliance with the provisions of Section 207 or Section 209, as the case may be, the case to the Court of Session and subject to the provisions of the Code, pass appropriate orders. This section refers back to Section 190, as is evident from the words "instituted on a police report" used in Section 190(1)(b) of the Code. While dealing with the scope of Section 190, this Court in *Raghubans Dubey vs. State of Bihar* held that the cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence a Magistrate can find out who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police some other persons were also involved, it is his duty to proceed against those persons as well.

12. The aforesaid three contrary decisions have been rendered by two Judge bench. As a result, the question in issue was referred to be heard by a three Judge Bench in connection with a case of *Dharmpal and Ors. vs. State of Haryana and Anr.* reported in (2004)13 SCC 9. However, in course of hearing, the parties brought to notice other decisions which have bearing on the question sought to be decided by three Judge Bench i.e. [Kishun Singh and Others Vs. State of Bihar](#), and [Ranjit Singh Vs. State of Punjab](#). Both decisions were rendered on the point of power of Sessions Judge u/s 193 of the Code of Criminal Procedure to add any person as an accused. Both Benches took contrary views. However, the judgment in Ranjit Singh's case (*supra*) was rendered by a three Judge Bench having negative view, the Court referred the matter to the Chief Justice to place the matter before a larger Bench. The matter in issue has not yet been resolved.

13. However, this position does not pose any difficulty to this Court to decide the matter in question. This Court has to follow the law which has already been laid down by the Supreme Court and has not yet been overruled. As said above, the judgment in Ranjit Singh's case (*supra*) has been rendered by a three Judge Bench but the issue decided in that case has no direct bearing in this case. The direct decisions on this point are Kishori Singh's case, SWIL Ltd. and Rajinder Prasad (*supra*). The decision rendered in Kishori Singh's case (*supra*) has not been followed in other two later decisions mentioned above. In the case of Rajinder Singh (*supra*) the Apex Court has placed reliance upon its earlier three Judge Bench decision reported in [Raghubans Dubey Vs. State of Bihar](#), . The case in question in the above

decision was also exclusively triable by the Court of Session as being under Sections 149 and 302 of the Indian Penal Code. The relevant finding in paragraph 9 of the judgment is as follows:

In our opinion once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.

14. In paragraph 10 of the judgment it has further been held as follows:

10. Mr. Sachthey, the learned counsel for the respondent brought to our notice some decisions which have been taken the same view. The Calcutta High Court in Saifar and Others Vs. State of West Bengal, following the Full Bench decision of the Judicial Commissioners, Sind in Mehrab vs. Emperor, AIR 1924 Sind 71, held that when a Magistrate takes cognizance under S. 190(1)(b) 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 is entitled to summon additional accused against whom he considers that there was good evidence, after perusal of the statements recorded by the police under S. 161 and the other documents referred to in S. 173 even without examination of witnesses in Court.

15. Relevant provisions of Criminal Procedure Code, 1973 are similar to Criminal Procedure Code, 1898. The above decisions of the Apex Court has escaped the attention of Kishori Singh's case.

16. The above decision of the Apex Court has been rendered by a Bench consisting of three Judges whereas the decision in the case of Kishori Singh (supra) has been delivered by two Judge Bench. Therefore the law laid down in the case of Raghubans Dubey (supra) is binding upon this Court unless and until contrary view is taken by another larger Bench of the Apex Court.

17. The power of a Magistrate to take cognizance upon the report submitted by the police has recently been examined by the Apex Court in a case reported in Karamchand Thappar and Brother (CS) Limited Vs. Laxmi Narayan Mishra and Others, . In paragraph 11 it has been held as follows:

11. When a report forwarded by the police to the Magistrate u/s 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 u/s 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 again has 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 be made by the police u/s 156(3). The position is, therefore, now well settled that upon receipt of a police report u/s 173(2) a Magistrate is entitled to take cognizance of an offence u/s 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 too the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers u/s 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 u/s 190(1)(a) though it is open to him to act u/s 200 or Section 202 also. (See India Carat (P) Ltd. vs. State of Karnataka).

18. The above decision is based on earlier decision of the Apex Court reported in [India Carat Pvt. Ltd. Vs. State of Karnataka and Another](#) . This decision is also rendered by three Judge Bench. This decision also finds mention in Kishori Singh's case (supra) but neither it has been relied upon nor distinguished. In other words, it has not been considered in the aforesaid Kishori Singh's case. The decision being of a larger Bench rendered earlier in point of time and not yet been overruled has to be given precedence over the case of Kishori Singh. Thus, from the above discussions it appears that the power of Magistrate u/s 190(1) is very wide. He is not bound to accept the opinion of the police mentioned in the report submitted u/s 173(2) of the Code of Criminal Procedure. He can take cognizance and issue process against the person even not charge-sheeted irrespective of nature of accusation, if he finds sufficient materials for the same. In the present case the learned court below has rightly taken cognizance and issued process against the petitioner as there was sufficient materials in the case diary against him. Accordingly, I find no merit in this application. This application is accordingly dismissed.