'Commencement Of Probe Into Non-Cognizable Offences Without Magistrate's Order Renders Entire Investigation Faulty': Kerala High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
BECHU KURIAN THOMAS, J.
Crl. M.C. No.3267 of 2014; 6 December, 2022
HANEEFA *versus* **STATE OF KERALA**

Petitioners / Accused No.1 to 3: by Advs. K.B. Arunkumar, Ranjit Babu; Respondent / State: M.K. Pushpalatha, Public Prosecutor

O R D E R

Petitioners are alleged to have conducted a parallel telephone exchange, and on getting information, Crime No.340 of 2005 of Ponnani Police Station was registered against them. After investigation, a final report was filed, which was taken cognizance as C.C. No.9 of 2012 on the files of the Judicial First Class Magistrate's Court, Ponnani.

2. The bone of contention raised by the petitioners in this proceeding under section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C') is that the offences for which the crime was registered initially were all non-cognizable offences and by virtue of section 154(2) of Cr.P.C, the police could not have commenced the investigation, without an order of the Magistrate. The investigation being illegal from the inception, the final report and the cognizance taken by the Magistrate were all without authority of law.

3. Though the detailed facts of the case are not relevant for disposing of this petition, a reference to the basic allegations are appropriate and are as follows: On 24.08.2005, an FIR was registered alleging that the accused had, after obtaining a Reliance telephone connection, shifted the telephone to another place along with seven other telephone connections taken in the name of different persons at different places, and conducted a parallel telephone exchange, thereby causing loss to the telephone department. The petitioners were thus alleged to have committed the offences punishable under section 4 and section 20 of the Indian Telegraph Act, 1885 and section 3 and section 6 of the Indian Wireless Telegraphy Act, 1933.

4. Both offences alleged in the FIR are non-cognizable offences. However, without getting any orders from the Magistrate, the police registered the F.I.R. and commenced an investigation. Thereafter, a final report was filed on 31.07.2009, including the offence under section 420 of the Indian Penal Code, 1860 (‘IPC’ for short) also, along with the earlier referred offences. Thus, when the final report was filed, apart from the non-cognizable offences, a cognizable offence was also added.

5. On the basis of the contentions raised by the learned counsel for the petitioners, the following issues arise for consideration.

(i) Whether an investigation into non-cognizable offences can be commenced without an order of a Magistrate?

(ii) Can cognizance be taken when the final report pursuant to an investigation into a non-cognizable offence commenced without orders from the Magistrate reveals a cognizable offence also?

(iii) Is the final report in the present case liable to be quashed?

6. I have heard Sri.K.B.Arunkumar, learned counsel for the petitioners and Smt.M.K.Pushpalatha, learned Public Prosecutor for the first respondent.

Issue No.(i) Whether an investigation into non-cognizable offences can be commenced without an order of a Magistrate?

7. Section 155 of the Cr.P.C, which falls under Chapter XII dealing with information to the police and their powers to investigate, reads as follows:

"S.155. Information as to non- cognizable cases and investigation of such cases.*-(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a noncognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.*
(2) No police officer shall investigate a non-cognizable case without theorder of a Magistrate having power to try such case or commit the case for trial.
(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.
(4) Where a case relates to two or more offences of which at least one iscognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

8. The statute through S.155(2) Cr.P.C stipulates that when information relates to a case indicative of non-cognizable offences, the police officer is interdicted from commencing the investigation without an order from the Magistrate. The statute also mandates that such orders must be obtained from the Magistrate having the power to try the case or commit such a case for trial. The terms 'non-cognizable offence' and 'non-cognizable case' are defined in Section 2(l) of Cr.P.C as an offence and as a case in which a police officer has no authority to arrest without a warrant.

9. Section 155(2) of Cr.P.C prohibits not only an investigation but even the commencement of an investigation by the police without orders from the Magistrate concerned in cases where only noncognizable offences are alleged. The legislative intent of categorising offences into cognizable and non-cognizable with a fetter placed on the police officer from commencing an investigation into a noncognizable offence without orders from the Magistrate has a purpose. The emphatic negative language employed in the section indicates that the legislative mandate cannot be disobeyed or ignored.

10. The requirement of an order of the Magistrate to commencean investigation into a non-cognizable offence is a fundamental requirement. It goes to the root of the jurisdiction of the investigating officer to commence the investigation. When there is an inherent lack of jurisdiction, it is not a mere irregularity but is an illegality. The situation would have been different if, amongst various non-cognizable offences, there was atleast one cognizable offence. If one of the offences for which the FIR is registered is a cognizable offence, then in view of section 154(4) Cr.P.C, the police can investigate without an order from the Magistrate.

11. However, under section 190 of the Cr.P.C, a Magistrate isentitled to take cognizance of an offence in three situations; (a) upon receiving a complaint of facts constituting an offence, (b) upon a police report of such facts or (c) upon information received from any person other than a police officer or upon his own knowledge. Section 2(d) defines the term 'complaint' as an allegation made orally or in writing to a Magistrate enabling him to take action under the Cr.P.C that some person has committed an offence. Though the definition specifically excludes a police report, the explanation to the definition states that a report made by a police officer in a case which discloses after investigation the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer shall be deemed to be the complainant. The word 'police report' is defined in section 2(r) as a report forwarded by a police officer to a Magistrate under section 173(2). This leads to the question whether a final report pursuant to an investigation conducted into a non-cognizable without an order of the Magistrate can be treated as a complaint as defined in S.2(d) of Cr.P.C.

12. In this context, the decisions in **H.N Rishbud v. State of Delhi** (AIR 1955 SC 196), **Kunhumuhammed v. State of Kerala** (1981 KLT 50), **Keshav Lal Thakur v. State of Bihar** [(1996) 11 SCC 557] and **Mehaboob v. State** (2011 (2) KHC 261) are apposite.

13. **H.N Rishbud's** case (supra) related to the earlier Code. In **Kunjumuhammed's** case (supra), this Court held that the report of a police officer following an investigation contrary to S.155(2) could be treated as a complaint under S.190(1)(a) read with S.2(6) of the Code only if, at the commencement of the investigation the police officer is led to believe that the case involved a cognizable offence and investigation establishes only the commission of a non-cognizable offence. This Court went on to hold further that if at the commencement of the investigation, it is apparent that the case involved only the commission of a non-cognizable offence, then the report followed by investigation cannot be treated as a complaint under S.2(h), or S.190(1)(a) of the Cr.P.C.

14. In the decision in **Keshav Lal Thakur v. State of Bihar** [(1996) 11 SCC 557] it was held that *"On the own showing of the police, the offence under Section 31 of the Act is non-cognizable and therefore the police could not have registered a case for such an offence under Section 154 CrPC. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) CrPC but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the Explanation to Section 2(d) CrPC, which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that relates to a case where the police initiates investigation into a cognizable offence -unlike the present one -- but ultimately finds that only a noncognizable offence has been made out." (emphasis supplied)*

15. Relying upon the above decisions, this Court, in **Mehaboob's** case (supra), held that in non-cognizable offences, registering an FIR, conducting the investigation, filing a final report, and taking cognizance without obtaining an order from the Magistrate are all illegal. In view of the principles laid down in **Keshav Lal Thakur's** case (supra) and **Mehaboob's** case (supra), it is clear that when only non-cognizable offences are alleged initially, investigation cannot be commenced without orders from the Magistrate.

Issue No. (ii) Can cognizance be taken when the final report pursuant to an investigation into a non-cognizable offence commenced without orders from the Magistrate reveals a cognizable offence also?

16. Section 156 of the Cr.P.C, deals with the police officer's power to investigate cognizable cases and section 190 deals with cognizance of offences by Magistrates. When a cognizable offence is understood to have been committed, a police officer is entitled to investigate without an order of the Magistrate.

17. However, in the decisions in **Biju V.G. (Dr.) v. State of Kerala and Another** (2020 (5) KHC 685), this Court had held that courts must be cautious about the attempts to use the device of incorporating a cognizable offence at the final stage to circumvent the mandate of section 155(2) Cr.P.C., especially when non-cognizable offences alone are alleged before commencing the investigation or registration of the crime. The following observations are apposite in the present context.

"The summary of the above said discussion is that (i) when an investigation was commenced on the allegation of cognizable offence alone or on the allegation of commission of both cognizable and non-cognizable offences, the submission of final report only against a non-cognizable offence after investigation will not stand hit by non-compliance of S.155(2)Cr.P.C., but the court must be more cautious in accepting the final report against non-cognizable offence and has to rule out the

malafides, if any, in including a cognizable offence at its initial stage and the intention, if any, to use it as a device to circumvent the mandate under S.155(2) Cr.P.C., (ii) when non-cognizable offences alone are alleged before commencing investigation or registration of crime, the compliance of the requirement under Section 155 Cr.P.C. cannot be avoided, (iii) when both cognizable and noncognizable offences are alleged, it would fall under S.155(4) Cr.P.C., wherein the compliance of mandate under S.155(2)Cr.P.C. is not required, (iv) the mandate under S.155(2) Cr.P.C. cannot be exercised at the instance of an officer in charge of a police station or the investigating officer."

18. In the instant case, the final report revealed the existence ofa cognizable offence. The realization that a cognizable offence was committed came to the knowledge only after the FIR for noncognizable offences was registered, and investigation commenced thereon. Such an FIR could not have been registered at all in the first instance. The investigating officer can commence investigation without an order from the Magistrate only if the offences for which the crime has been registered reveal a cognizable offence also. Incorporation of a cognizable offence at the time of filing of the final report cannot be utilized as a method or as a device to circumvent the mandate of S.155(2) Cr.P.C. by the officer in charge of the police station or any investigating officer. The principles laid down in **Keshav Lal Thakur's** case (supra) are relevant in this context.

19. Therefore, as observed in **Biju V.G's case,** while taking cognizance, the learned Magistrate ought to be cautious and find out whether the addition of a cognizable offence was to overcome the bar of section 155(2) Cr.P.C. If the addition of the cognizable offence was a device to overcome the statutory interdiction, cognizance cannot be taken.

Issue No. (iii) Is the final report in the present case liable to be quashed?

20. In the instant case, the learned Magistrate had not verified whether the inclusion of a cognizable offence under section 420 was to overcome the restriction under section 155(2) Cr.P.C. It is noticed that the FIR was registered without obtaining orders from the Magistrate and included only non-cognizable offences. Therefore the learned Magistrate could not have taken cognizance.

21. Even otherwise, on a perusal of the final report, it is noticedthat the ingredients of section 420 are not at all made out. No material has been adduced during the investigation to justify the incorporation of the said provision. In fact, in the statement given by the Divisional Engineer of BSNL, it is stated that there is nothing to show that the accused had cheated either the Reliance Company or the telecom department. No other material has been pointed out as adduced to justify the inclusion of section 420 IPC.

22. After considering the entire documents produced, I amsatisfied that the offence under section 420 IPC was incorporated at the time of filing the final report, only to overcome the interdiction in section 155(2) of Cr.P.C. The commencement of investigation without an order of the Magistrate, that too for the offences which are only non-cognizable, has rendered the entire investigation faulty. Further, the ingredients of the offence under section 420 IPC are also not seen made out from the final report. The final report based upon such a faulty investigation is, therefore, an abuse of the process of court.

23. Accordingly, I quash all further proceedings in C.C. No.9 of 2012 on the files of the Judicial First Class Magistrate's Court, Ponnani.

This Crl.M.C. is allowed as above.