Supreme Court of India
Dharam Pal & Ors vs State Of Haryana & Anr on 18 July, 2013
Author: K . Altamas
Bench: Altamas Kabir, Surinder Singh Nijjar, Ranjan Gogoi, M.Y. Eqbal, Vikramajit Sen

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 148 of 2003

1

2 DHARAM PAL & ORS. APPELLANTS

VS.

2 STATE OF HARYANA & ANR.
RESPONDENTS

WITH

CRIMINAL APPEAL NOS. 865 of 2004, 1334 of 2005 and 537 of 2006

J U D G M E N T

ALTAMAS KABIR, CJI.

1. This matter was initially directed to be heard by a Bench of Three- Judges in view of the conflict of opinion in the decisions of two Two-Judge Benches, in the cases of Kishori Singh and Others Vs. State of Bihar and Others [(2004) 13 SCC 11]; Rajender Prasad Vs. Bashir and Others [(2001) 8 SCC 522] and SWIL Limited Vs. State of Delhi and Others [(2001) 6 SCC 670]. When the matter was taken up for consideration by the Three-Judge Bench on 1st September, 2004, it was brought to the notice of the court that two other decisions had a direct bearing on the question sought to be determined. The first is the case of Kishun Singh Vs. State of Bihar [(1993) 2 SCC 16], and the other is a decision of a Three-Judge Bench in the case of Ranjit Singh Vs. State of Punjab [(1998) 7 SCC 149]. Ranjit Singhs case disapproved the observations made in Kishun Singhs case, which was to the effect that the Session Court has power under Section 193 of the Code of Criminal Procedure, 1973,

hereinafter referred to as the Code, to take cognizance of an offence and summon other persons whose complicity in the commission of the trial could prima facie be gathered from the materials available on record. According to the decision in Kishun Singhs case (supra), the Session Court has such power under Section 193 of the Code. On the other hand, in Ranjit Singhs case (supra), it was held that from the stage of committal till the Session Court reached the stage indicated in Section 230 of the Code, that Court could deal only with the accused referred to in Section 209 of the Code and there is no intermediary stage till then enabling the Session Court to add any other person to the array of the accused.

2. The Three-Judge Bench took note of the fact that the effect of such a conclusion is that the accused named in column 2 of the charge-sheet and not put up for trial could not be tried by exercise of power by the Session Judge under Section 193 read with Section 228 of the Code. In other words, even when the Session Court applied its mind at the time of framing of charge and came to the conclusion from the materials available on record that, in fact, an offence is made out against even those who are shown in column 2, it has no power to proceed against them and has to wait till the stage under Section 319 of the Code is reached to include such persons as accused in the trial if from the evidence adduced, their complicity was also established. The further effect as noted by the Three-Judge Bench was that in less serious offences triable by the Magistrate, he would have the power to proceed against those mentioned in column 2, in case he disagreed with the police report, but in regard to serious offences triable by the Court of Session, the Court could have to wait till the stage of Section 319 of the Code was reached. The Three-Judge Bench disagreed with the views expressed in Ranjit Singhs case, but since the contrary view expressed in Ranjit Singhs case had been taken by a Three-Judge Bench, the Three-Judge Bench hearing this matter, by its order dated 20th January, 2005, directed the matter to be placed before the Chief Justice for placing the same before a larger Bench.

3. In view of the above, the matter has been placed before the Constitution Bench for consideration.

4. The questions which require the consideration of the Constitution Bench are as follows:

> i) Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?
>
> ii) If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?
>
> iii) Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?

iv) Can the Session Judge issue summons under Section 193 Cr.P.C. as a Court of original jurisdiction?

v) Upon the case being committed to the Court of Session, could the Session Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?

vi) Was Ranjit Singh's case (supra), which set aside the decision in Kishun Singh's case(supra), rightly decided or not?

5. The facts which led to the order of the learned Magistrate, which was subsequently challenged in Revision before the Session Judge and the High Court are that except for one Nafe Singh, who was shown as an accused, the Appellants Dharam Pal and others were included in column 2 of the police report, despite the fact that they too had been named as accused in the First Information Report. After going through the police report, the learned Judicial Magistrate First Class, Hansi, summoned the Appellant and three others, who were not included as accused in the charge-sheet for the purpose of facing trial along with Nafe Singh. The learned Magistrate purported to act in exercise of his powers under Section 190 of the Code, but without taking recourse to the other provisions indicated in Sections 200 and 202 of the Code, before proceeding to issue summons under Section 204 of the Code.

6. The order of the learned Magistrate was questioned by way of Revision before the Additional Session Judge, Hisar, in Criminal Revision No. 27 of 2000, who upheld the order of the learned Magistrate and dismissed the Revision. The order of the learned Session Judge was, thereafter, challenged before the High Court, which also upheld the views expressed by the learned Magistrate as well as the Session Judge, and dismissed the Appellants application under Section 482 of the Code for quashing the order dated 25th March, 2002, passed by the Additional Session Judge, Hisar, affirming the order dated 21st July, 2000, of the Judicial Magistrate First Class, Hansi, passed on an application filed under Section 190 of the Code for summoning the Appellants in connection with FIR No. 272 dated 13th October, 1999, registered under Sections 307 and 323 read with Section 34 of the Indian Penal Code, with Narnaund Police Station.

7. Appearing for the Appellants in Criminal Appeal No. 148 of 2003, filed by Dharam Pal and Others, Mr. Brijender Chahar, learned Senior Advocate, submitted that the learned Session Judge and the High Court erred in holding that the Committing Magistrate was competent to entertain a protest petition in order to summon the Appellants who had not been shown as accused in the charge-sheet. Mr. Chahar contended that in fact the Magistrate under the garb of a protest petition had usurped the powers of the Session Judge under Section 319 of the Code in a case triable exclusively by the Court of Session. Mr. Chahar urged that once a police report was filed before a Magistrate, which disclosed that an offence had been committed, which was exclusively triable by Court of Session, the Magistrate had no other function but to commit the same to the Court of Session, even if on looking into the police report, he was convinced that the others mentioned in column 2 of the police report were also required to be sent up for trial. Mr. Chahar submitted that

the Magistrate had exceeded his jurisdiction and both the Session Judge and the High Court had misconstrued the provisions of Sections 190, 193 and 209 of the Code, in upholding the order of the learned Magistrate. In this regard, Mr. Chahar brought into focus the provisions of the 1898 Code of Criminal Procedure and the corresponding provisions in the present Code, which replaced the 1898 Code. Learned counsel pointed out that in Section 207A of the 1898 Code, the Magistrate was mandatorily required to hold a mini-trial before committing the case to the Court of Session, whereas under Section 190 of the Code of 1973, the Magistrate, having jurisdiction, may 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 report, or upon his own knowledge, that such offence has been committed.

8. Mr. Chahar submitted that the difference in the two provisions was intentional and had been made in order to shorten the proceedings before the Magistrate. Learned counsel submitted that, in terms of the old Code, two stages of trial were contemplated which were eliminated by the amended provisions of the Code of 1973. In such circumstances, the view expressed in Ranjit Singhs case appeared to be correct as against the decision in Kishun Singhs case, wherein it was held that the Session Court had power under Section 193 of the Code to take cognizance of the offence and summon other persons, whose complicity in the commission of the offence could prima facie be gathered from the materials available on record.

9. The submissions made in the above Appeal were also reiterated in Criminal Appeal No. 865 of 2004, filed by Naushad Ali, as the point involved in the said appeal is more or less the same as in the appeal filed by Dharam Pal and others.

10. Mr. Amarendra Sharan, learned Senior Advocate, appearing for the Appellant in Criminal Appeal No. 1334 of 2005, took an additional ground that the order of the learned Magistrate, as upheld by the superior Courts, was in violation of the provisions of Article 21 of the Constitution, inasmuch as, the learned Magistrate issued summons to those included in column 2, without following the procedure indicated in Sections 190, 200, 202 and thereafter 204 of the Code. Mr. Sharan submitted that when the Magistrate decided to take cognizance on the basis of the protest petition filed in regard to the charge-sheet filed by the investigating authorities, he ought to have taken recourse to the provisions relating to taking cognizance on the basis of a complaint within the meaning of Section 190(1)(a) of the aforesaid Code. Not having done so, the order directing summons to issue against the Appellants was in violation of the provisions of Article 21 of the Constitution and was, therefore, liable to be set aside.

11. Appearing for the Appellants in Criminal Appeal No. 148 of 2003 and Criminal M.P. No. 12963 of 2013, Mr. Siddhartha Dave, learned Advocate, submitted that in order to appreciate the order of the Magistrate issuing summons in a Session triable case, it would be necessary to go back to the source

of power of the Magistrate in issuing summons to the Appellants under Section 204 of the Code. Mr. Dave urged that the source of power of the Magistrate to issue such summons could only be traced back to Section 190(1)(b) of the Code, which provides as follows:

> 190.Cognizance of offences by Magistrates.-
>
> (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may 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.
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

12. Mr. Dave submitted that it is only upon receipt of a police report and the objection thereto that the Magistrate may issue summons to the Appellants under Section 204 of the Code, without taking any further recourse to the other provisions relating to cognizance of offences on a complaint petition. Mr. Dave submitted that after taking cognizance upon a police report under Section 190(1)(b), the next stage would be issuance of summons under Section 204 of the Code and there are no intervening stages in the matter. Accordingly, the only course available to the Committing Magistrate, on receipt of a police report under Section 173(3) of the Code, in a Session triable case, would be to commit the case to the Court of Session, which could, thereafter, take recourse to Section 319 of the Code, since it did not have any other power to summon any other person named in column 2 of the charge-sheet, without receiving fresh evidence against them. Mr. Dave submitted that the cognizance referred to in Section 193 of the Code would be not of the offence in respect of which cognizance had already been taken by the Magistrate, but cognizance of the commitment of the case to the Court of Session for trial.

13. Mr. Dave submitted that having regard to the provisions of Section 204 of the Code, where some amount of application of mind was required by the learned Magistrate, the necessity of applying his mind by holding an independent inquiry was minimal. It was urged that since the Magistrate had no power to proceed to Section 190 of the Code, the matter has to be committed to the Session Court, without any choice being left to the learned Magistrate to take recourse to any other course of action. In support of his submissions, Mr. Dave referred to the decision of this Court in Rashmi Kumar Vs. Mahesh Kumar Bhada [(1997) 2 SCC 397], wherein the question of the courts powers at the stage of taking cognizance of an offence under Sections 190, 200 and 202 of the Code fell for consideration and it was held that at the stage of taking cognizance of an offence, the court should

consider only the averments made in the complaint as the court is not required to sift or appreciate any evidence at that stage.

14. Mr. Dave also referred to the decision of this Court in Indian Carat Pvt. Ltd. Vs. State of Karnataka and Another [(1989) 2 SCC 132], wherein this Court has held that despite a police report that no case had been made out against an accused, the Magistrate could take cognizance of the offence under Section 190(1)(b), taking into account the statement of witnesses made under police investigation and issue process. Reference was also made to the decision of this Court in Abhinandan Jha Vs. Dinesh Mishra [(1967) 3 SCR 668], in which the same view had been expressed. In the said case, it was held that the Magistrate had no power to direct the police to submit a charge-sheet, when the police, after investigation into a cognizable offence, had submitted a report of the action taken under Section 169 of the 1898 Code that there was no case made out for sending of the accused for trial.

15. Mr. Dave also referred to the decision of this Court in Raj Kishore Prasad Vs. State of Bihar and Another [(1996) 4 SCC 495], in which it was also held that while committing a case under Section 209 of the Code, the Magistrate had no jurisdiction to associate any other person as accused in exercise of powers under Section 319 of the Code or under any other provision. It was further observed that a proceeding under Section 209 of the Code before a Magistrate is not an inquiry and material before him is not evidence. It is only upon committal can the Court of Session exercise jurisdiction under Section 319 of the Code and add a new accused, on the basis of evidence recorded by it. Mr. Dave also urged that in the decision of this Court in SWIL Limited (supra), which was one of the cases brought to the notice of the Referring Court, it was held that a person not mentioned as accused in the charge-sheet could also be summoned by the Magistrate after taking cognizance of the offence, if some material was found against him, having regard to the FIR, his statement recorded by the police and other documents. It was also held that Section 319 of the Code did not operate in such a situation. Mr. Dave submitted that the aforesaid decision had not taken note of the decision in Raj Kishore Prasads case (supra), wherein just the contrary view had been taken and was, therefore, per incuriam. Mr. Dave submitted that the entire exercise undertaken by the Magistrate was contrary to the provisions of law and orders summoning the Appellants as accused in these cases, were, therefore, liable to be quashed.

16. On behalf of the State, it was sought to be urged by Mr. Rajeev Gaur Naseem, learned AAG, that under Section 193 of the Code, the Session Court was entitled to take cognizance and issue summons. Contrary to what had been indicated by the Referring Court, Mr. Gaur urged that the law had been correctly stated in Kishun Singhs case (supra) and the Session Court, after receiving the case for commitment, was entitled under Section 193 of the Code to take cognizance and issue summons to those not named as accused in the charge-sheet.

17. Mr. Gopal Singh, learned Standing Counsel for the State of Bihar, appearing in three of the matters, submitted that the question has been considered in the case of Kishori Singh (supra), in which the view expressed in Ranjit Singhs case (supra) was followed and it was held that under the scheme of the Code, in a case where the offence is triable solely by the Court of Session, when the police files a charge-sheet and arrays some only as accused persons, though many more might have

been named in the FIR, the Magistrate or even the Session Judge would have no jurisdiction to array them as accused persons at a stage prior to Section 319 of the Code, when some evidence or materials were collected during the trial.

18. In the last of several matters heard by this Court, namely, Criminal Appeal No. 1334 of 2005, filed by one Chandrika Prasad Yadav against the State of Bihar, Mr. K.K. Tyagi, learned counsel, appearing for the Respondent No. 2 complainant, contended that the Magistrate had sufficient powers to issue process against those persons who had not been shown as accused, but had been included in column 2 of the charge-sheet, even after cognizance was taken. He referred to various decisions, which had already been referred to by the other counsel.

19. Even in Criminal Appeal No. 865 of 2004, Mr. Shishir Pinaki, learned Advocate appearing for Respondent No. 2 (complainant), urged that the Magistrate has been vested with control over the proceedings under Article 20 of the Constitution and hence it was within his powers to issue summons under Section 204 of the Code, even if he disagreed with the police report filed under Section 173(3) of the Code, without taking recourse to the provisions of Section 202, before proceeding to issue process under Section 204 of the Code.

20. The issue in the Reference being with regard to the powers of the Magistrate to whom a report is submitted by the police authorities under Section 173(3) of the Code, it is necessary for us to examine the scheme of Chapter XIV of the Code, dealing with the conditions requisite for initiation of proceedings.

21. Section 190, which has been extracted hereinbefore, empowers any Magistrate of the First Class or the Second Class specially empowered in this behalf under Sub-section (2) to take cognizance of any offence in three contingencies. In the instant case, we are concerned with the provisions of Section 190(1)(b) since a police report has been submitted by the police, under Section 173(3) of the Code sending up one accused for trial, while including the names of the other accused in column 2 of the report. The facts as revealed from the materials on record and the oral submissions made on behalf of the respective parties indicate that, on receiving such police report, the learned Magistrate did not straight away proceed to commit the case to the Court of Session but, on an objection taken on behalf of the complainant, treated as a protest petition, issued summons to those accused who had been named in column 2 of the charge- sheet, without holding any further inquiry, as contemplated under Sections 190, 200 or even 202 of the Code, but proceeded to issue summons on the basis of the police report only. The learned Magistrate did not accept the Final Report filed by the Investigating Officer against the accused, whose names were included in column 2, as he was convinced that a prima facie case to go to trial had been made out against them as well, and issued summons to them to stand trial with the other accused, Nafe Singh. The questions which have arisen from the procedure adopted by the learned Magistrate in summoning the Appellants to stand trial along with Nafe Singh, have already been set out hereinbefore in paragraph 4 of this judgment.

22. As far as the first question is concerned, we are unable to accept the submissions made by Mr. Chahar and Mr. Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate had no other function, but to commit the case for trial to the Court of

Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr. Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Session Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event, the Session Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.

23. The view expressed in Kishun Singh's case, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the Final Report that may be filed by the police authorities under Section 173(3) of the Code and to proceed against the accused persons dehors the police report, which power the Session Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(3) of the Code, he was helpless in taking recourse to such a course of action while the Session Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

24. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column no.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

25. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Session Court.

26. Questions 4, 5 and 6 are more or less inter-linked. The answer to question 4 must be in the affirmative, namely, that the Session Judge was entitled to issue summons under Section 193 Cr.P.C. upon the case being committed to him by the learned Magistrate. Section 193 of the Code speaks of cognizance of offences by Court of Session and provides as follows :-

> 193. Cognizance of offences by Courts of Session. - 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 case has been committed to it by a Magistrate under this Code. The key words in

> the Section are that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code. The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by Mr. Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said Section.

27. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

28. In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singhs case (supra) that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

29. We are also unable to accept Mr. Daves submission that the Session Court would have no alternative, but to wait till the stage under Section 319 Cr.P.C. was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session.

30. The Reference to the effect as to whether the decision in Ranjit Singhs case (supra) was correct or not in Kishun Singhs case (supra), is answered by holding that the decision in Kishun Singhs case was the correct decision and the learned Session Judge, acting as a Court of original jurisdiction, could issue summons under Section 193 on the basis of the records transmitted to him as a result of the committal order passed by the learned Magistrate.

31. Consequent upon our aforesaid decision, the view taken by the Referring Court is accepted and it is held that the decision in the case of Kishun Singh vs. State of Bihar and not the decision in Ranjit Singh Vs. State of Punjab lays down the law correctly in respect of the powers of the Session Court after committal of the case to it by the learned Magistrate under Section 209 Cr.P.C.

32. The matter is remitted to the Three-Judge Bench to dispose of the pending Criminal Appeals in accordance with the views expressed by us in this judgment.

CJI.

(ALTAMAS KABIR) ...J (SURINDER SINGH NIJJAR) J.

(RANJAN GOGOI) J.

(M.Y. EQBAL) J.

(VIKRAMAJIT SEN) New Delhi Dated: July 18,2013.